

PETITION FOR SPECIAL EXCEPTION

TO THE ZONING COMMISSIONER OF BALTIMORE COUNTY:

The undersigned, legal owner(s) of the property situate in Baltimore County and which is described in the description and plat attached hereto and made a part hereof, hereby petition for a Special Exception under the Zoning Law and Zoning Regulations of Baltimore County, to use the herein described property for a wireless transmitting tower and receiving structure 500' in height, including a control house.

Property is to be posted and advertised as prescribed by Zoning Regulations.

I, or we, agree to pay expenses of above Special Exception advertising, posting, etc., upon filing of this petition, and further agree to and are to be bound by the zoning regulations and restrictions of Baltimore County adopted pursuant to the Zoning Law for Baltimore County.

I/We do solemnly declare and affirm, under the penalties of perjury, that I/we are the legal owner(s) of the property which is the subject of this Petition.

Contract Purchaser: (Type or Print Name) Signature Address City and State	Legal Owner(s): (Type or Print Name) Signature Address City and State Name and telephone number of legal owner, contract purchaser or representative to be contacted Name Telephone No.
H. Willie Parks 6311 Windsor Mill Road Baltimore, Maryland 21207 944-3346	Dorothy B. Shaw Arthur R. Shaw, Jr. 6311 Windsor Mill Road Baltimore, Maryland 21207 944-3346
Attorney for Petitioner: Name Address City and State Name Telephone No.	David W. Billingsley 826-9060

ORDERED By The Zoning Commissioner of Baltimore County, this 22nd day of January, 1980, that the subject matter of this petition be advertised, as required by the Zoning Law of Baltimore County, in two newspapers of general circulation throughout Baltimore County, that property be posted, and that the public hearing be had before the Zoning Commissioner of Baltimore County in Room 106, County Office Building in Towson, Baltimore County, on the 1st day of April, 1980, at 1:30 o'clock P.M.

William E. Hammond
Zoning Commissioner of Baltimore County.

**BALTIMORE COUNTY
ZONING PLANS
ADVISORY COMMITTEE**



**PETITION AND SITE PLAN
EVALUATION COMMENTS**

Mr. & Mrs. Arthur R. Shaw, Jr.
6311 Windsor Mill Road
Baltimore, Maryland 21207

cc: Hudkins Associates, Inc.
200 East Joppa Road
Room 101, Shell Building
Towson, Maryland 21204

BALTIMORE COUNTY OFFICE OF PLANNING & ZONING
County Office Building
111 W. Chesapeake Avenue
Towson, Maryland 21204

Your Petition has been received and accepted for filing this 22nd day of January, 1980.

William E. Hammond
WILLIAM E. HAMMOND
Zoning Commissioner

Petitioner: Arthur R. Shaw, Jr., et ux
Petitioner's Attorney: _____
Reviewed by: *Nicholas B. Commodari*
NICHOLAS B. COMMODARI
Chairman, Zoning Plans Advisory Committee

BALTIMORE COUNTY ZONING PLANS ADVISORY COMMITTEE

March 25, 1980

Mr. & Mrs. Arthur R. Shaw, Jr.
6311 Windsor Mill Road
Baltimore, Maryland 21207

RE: Item No. 146
Petitioner - Shaw
Special Exception Petition

Dear Mr. & Mrs. Shaw:

The Zoning Plans Advisory Committee has reviewed the plans submitted with the above referenced petition and has made an on-site field inspection of the property. The following comments are not intended to indicate the appropriateness of the zoning action requested, but to assure that all parties are made aware of plans or problems with regard to the development plans that may have a bearing on this case. The Director of Planning may file a written report with the Zoning Commissioner with recommendations as to the suitability of the requested zoning.

This Special Exception is required as a result of your proposal to construct a wireless transmitting and receiving structure of 500 feet in height and an accompanying control house on the subject property. As shown on the submitted site plan, the location of this structure is greater than 300 feet from any existing single family dwelling which fronts on Granite and Marriottsville Roads.

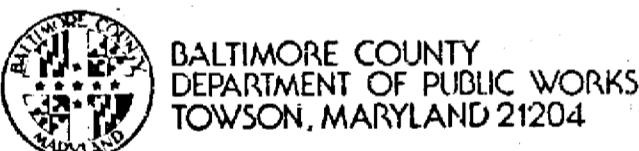
Particular attention should be afforded to the comments of the Bureau of Engineering as well as those of the Department of Permits and Licenses.

Enclosed are all comments submitted to this office from the Committee members at this time. The remaining members felt that no comment was warranted. This petition was accepted for filing on the date of the enclosed certificate and a hearing scheduled accordingly.

Very truly yours,
Nicholas B. Commodari
NICHOLAS B. COMMODARI, Chairman
Zoning Plans Advisory Committee

NBC/sf
Enclosures

cc: Hudkins Associates, Inc.
200 East Joppa Road
Room 101, Shell Building
Towson, Maryland 21204



BALTIMORE COUNTY
DEPARTMENT OF PUBLIC WORKS
TOWSON, MARYLAND 21204

HARRY J. PISTEL, P.E.
DIRECTOR

February 27, 1980

Mr. William E. Hammond
Zoning Commissioner
County Office Building
Towson, Maryland 21204

Re: Item #146 (1979-1980)
Property Owner: Arthur R. & Dorothy B. Shaw
E/S Granite Rd. 330' S. Marriottsville Rd.
Existing Zoning: DR 2
Proposed Zoning: Special Exception for a wireless transmitting and receiving structure 500' in height.
Acres: 14.55 District: 2nd

Dear Mr. Hammond:

The following comments are furnished in regard to the plat submitted to this office for review by the Zoning Advisory Committee in connection with the subject item.

Highways:
Marriottsville Road and Granite Road, existing public roads, are proposed to be improved in the future as 50 and 40-foot closed section roadways on 70 and 60-foot rights-of-way, respectively. Highway rights-of-way, widenings, including any necessary reversible easements for slopes, will be required in connection with any grading or building permit application.

Sediment Control:
Development of this property through stripping, grading and stabilization could result in a sediment pollution problem, damaging private and public holdings downstream of the property. A grading permit is, therefore, necessary for all grading, including the stripping of top soil.

Storm Drains:
Provisions for accommodating storm water or drainage have not been indicated on the submitted plan.

Future drainage and utility easements are required through this property.

Open stream drainage requires a drainage reservation or easement of sufficient width to cover the flood plain of a 100-year design storm.

The Petitioner must provide necessary drainage facilities (temporary or permanent) to prevent creating any nuisances or damages to adjacent properties, especially by the concentration of surface waters. Correction of any problem which may result, due to improper grading or improper installation of drainage facilities, would be the full responsibility of the Petitioner.

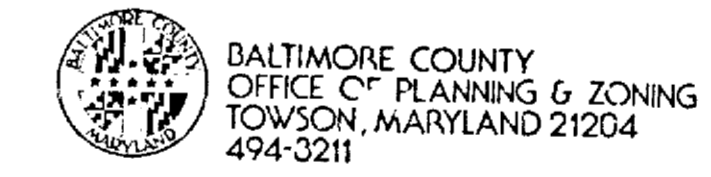
Item #146 (1979-1980)
Property Owner: Arthur R. & Dorothy B. Shaw
Page 2
February 27, 1980

Water and Sanitary Sewer:

Public water supply and sanitary sewerage are not available to serve this property, which is utilizing private onsite water supply and sewage disposal facilities. This property is beyond the Baltimore County Metropolitan District and within the Urban-Rural Designation Line. Baltimore County Water and Sewerage Plans W and S-15B and 16A, respectively, indicate "Planned Service" in 6 to 10 years in this vicinity.

Very truly yours,
Ellsworth N. Diver, P.E.
ELLSWORTH N. DIVER, P.E.
Chief, Bureau of Engineering

END:EAM:PWR:ss
cc: J. Somers
FP-SE Key Sheet
28 & 29 SW 42 Pos. Sheets
NE 7 & 8 K Topo
76 Tax Map



BALTIMORE COUNTY
OFFICE OF PLANNING & ZONING
TOWSON, MARYLAND 21204
494-3211

JOHN D. SEYFFERT
DIRECTOR

February 5, 1980

Mr. William Hammond, Zoning Commissioner
Zoning Advisory Committee
Office of Planning and Zoning
Baltimore County Office Building
Towson, Maryland 21204

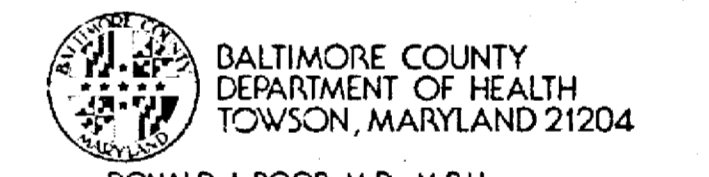
Dear Mr. Hammond:

Comments on Item #146, Zoning Advisory Committee Meeting, January 22, 1980, are as follows:
Property Owner: Arthur R and Dorothy B. Shaw
Location: E/S Granite Road 330' S. Marriottsville Road
Existing Zoning: D.R.2
Proposed Zoning: Special Exception for a wireless transmitting and receiving structure 500' in height.
Acres: 14.55
District: 2nd

This office has reviewed the subject petition and offers the following comments. These comments are not intended to indicate the appropriateness of the zoning in question, but are to assure that all parties are made aware of plans or problems with regard to development plans that may have a bearing on this petition.

This plan has been reviewed and there are no site-planning factors requiring comment.

Very truly yours,
John L. Wimbley
John L. Wimbley
Planner III
Current Planning and Development



BALTIMORE COUNTY
DEPARTMENT OF HEALTH
TOWSON, MARYLAND 21204

DONALD I. ROOP, M.D., M.P.H.
DEPUTY STATE & COUNTY HEALTH OFFICER

February 11, 1980

Mr. William E. Hammond, Zoning Commissioner
Office of Planning and Zoning
County Office Building
Towson, Maryland 21204

Dear Mr. Hammond:

Comments on Item #146, Zoning Advisory Committee Meeting of January 22, 1980, are as follows:

Property Owner: Arthur R. & Dorothy B. Shaw
Location: E/S Granite Rd. 330' S Marriottsville Rd.
Existing Zoning: D.R. 2
Proposed Zoning: Special Exception for a wireless transmitting and receiving structure 500' in height.
Acres: 14.55
District: 2nd

The existing dwelling on the property is served by a well and sewage disposal system, both of which appear to be functioning properly. The proposed wireless transmitting and receiving structure should not pose any health hazards.

Very truly yours,
Jan J. Kujest
Jan J. Kujest, Director
BUREAU OF ENVIRONMENTAL SERVICES

LJP/rth

ARGUMENT

THE DECISION OF THE BOARD OF APPEALS WAS ARBITRARY AND CAPRICIOUS IN THAT IT WAS UNSUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS BASED UPON ERRORS OF LAW

Wireless transmitting and receiving structures are permitted by special exception in R.C. 3 zones pursuant to the provisions of Section 1A02.2.B.3 of the Zoning Regulations. Section 502 of the Zoning Regulations clearly states that all of the uses permitted by special exception "are proper uses of land, but further provides that since "under certain conditions they could be detrimental to the health, safety or general welfare of the public," they are to be permitted only pursuant to special exception. (Emphasis supplied.)

Wireless transmitting and receiving towers are not permitted as a matter of right, except as an accessory use, in any zone. By the same token, however, such towers are permitted by special exception in rural conservation, density residential, business and manufacturing zones. See e.g., Baltimore County Zoning Regulations, Sec. 1A01.2.C.30 (R.I.C. 2 zones); Sec. 1A02.2.B.31 (R.C. 3 zones); Sec. 1A03.3.B.14 (R.C. 4 zones); Sec. 1A04.2.B.21 (R.C. 5 zones); Sec. 1B01.1.C.20 (all D.I.R. zones); Sec. 230.13 (B.L. zones); Sec. 233.4 (B.M. zones); Sec. 236.4 (B.R. zones); Sec. 248.4.a (M.L.R. zones); Sec. 253.2.D (M.L. zones); and Sec. 256.4 (M.H. zones).

The standards for determining whether to grant a special exception are set forth in Sec. 502.1 of the Zoning Regulations and are the same whether the zone involved is a rural conservation or a heavy manufacturing zone. The County Council, in permitting wireless transmitting and receiving towers to be constructed in residential and rural conservation zones, has determined that, as a general matter, there is nothing about such towers which is inconsistent with the welfare of the residents of residential or rural areas. The proper standards for consideration of special exception applications have been considered in numerous cases decided by the Maryland appellate courts.

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Club, Inc., 202 Md. 279, 96 A.2d 261 (1953), in which the Court of Appeals held that the Montgomery County Board of Appeals had incorrectly denied a special exception for a swimming and tennis club in a residential zone.

The concerns of the protestants that the tower would be an eyesore and result in general deterioration of the neighborhood furnish no basis for denial of the special exception. The Court of Appeals has held that a zoning ordinance which has as its sole purpose the achievement of an aesthetically pleasing result is not a permissible use of the police power. Mayor and City Council of Baltimore v. Mano Schwartz, Inc., 268 Md. 79, 299 A.2d 828 (1973).

Generalized concerns about neighborhood deterioration, such as those expressed by the Protestants, have recently been held by the Court of Special Appeals to be an insufficient basis for denying a conditional use permit for outdoor advertising signs under a statute which contains requirements which are quite similar to those which are applicable in the present case. Under that statute, Baltimore City Code, Art. 30, sec. 11.0-5(a), a conditional use is not to be granted "unless the Board finds in each specific case that the establishment, maintenance, or operation of the conditional use will not be detrimental to or endanger the public health, security, general welfare, or morals...."

In Mayor and City Council of Baltimore v. Foster & Kleiser, 46 Md. App. 163, 416 A2d 762 (1980), the Court of Special Appeals reversed a denial of such a permit and stated as follows:

"The City Council, by permitting billboards as a conditional use, has legislatively determined that, as a general rule, they do not menace or endanger the public health, safety, general welfare, or morals within the area of their permitted use. The Board has a limited amount of discretion to deny the use if there is substantial evidence to show that, notwithstanding the underlying legislative conclusion, a particular structure would, in fact, have such an effect. But it may not thwart the legislative will based upon unspecified and unsupported protestations and concerns." 46 Md. App. at 171-172.

In the present case, the Board conceded that the Protestants had failed to provide "sound evidence of harm to the community...." Opinion of the Board, 4. The Board held, however, that the burden was upon the Appellants to prove that there were no potential detrimental effects upon the community which might arise from the requested use. The Board expressed

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There have been at least two reported cases in recent years involving appeals from the decisions of the Baltimore County Board of Appeals in which the Board had denied applications for special exceptions. In Anderson v. Sawyer, 23 Md. App. 612, 329 A. 2d 716 (1974), cert. denied 274 Md. 725 (1/75), there was an application for a special exception for a funeral home in a D.R.5.5 zone. The Board denied the application on the strength of the testimony of protestants to the effect that the funeral home would create traffic congestion, create a "wedge for future commercialization," have a depressing psychological effect on the residents of neighboring properties, and make those properties less valuable. The protestants' testimony concerning reduction in property values, unlike that in the present case, was supported by the testimony of a qualified real estate appraiser. 23 Md. App. at 623. The Court of Special Appeals held, however, that the special exception should have been granted and therefore reversed the action of the Board.

The Court of Special Appeals conceded that funeral homes had inherent deleterious effects on residential areas and could for that reason be prohibited altogether in such cases if the County Council chose to do so. The Court went on, however, to point out that the County Council, by permitting such a use as a special exception, had determined that as a general matter the use was to be permitted. The following language of the Court is as applicable to the present case as it was to Anderson if one merely substitutes the words "radio tower" for "funeral home":

"[I]n the instant case the legislature of Baltimore County has determined that as part of its comprehensive plan funeral homes are to be allowed in residential zones notwithstanding their inherent deleterious effects. By defining a funeral home as an appropriate use by way of special exception, the legislature of Baltimore County has, in essence, declared that such uses, if they satisfy the other specific requirements of the ordinance, do promote the health, safety and general welfare of the community. As part of the comprehensive zoning plan this legislative declaration shares in a presumption of validity and correctness which the courts will honor. (Citations omitted.)

"The presumption that the general welfare is promoted by allowing funeral homes in a residential use district, notwithstanding their inherent depressing effects, cannot be overcome unless there are strong and substantial existing facts or circumstances showing that the particularized proposed use has detrimental effects above and beyond the inherent ones

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concerns about the lack of evidence as to the specific type of base which might be required and as to other specific aspects of the proposal, including the 20 foot antenna at the top of the tower, the equipment building and the connecting waveguide or cable. With the exception of the issue concerning the base, none of these concerns was even addressed at the hearing. Similarly, although the Board found that the Protestants had not produced credible evidence that their property values would in fact be adversely affected by the tower, it chose to disbelieve the expert testimony produced by Appellants and stated as follows: "Lacking any direct factual testimony otherwise, the Board finds it inconceivable that the erection of such a large structure in close proximity to these homes could be anything except a detriment to the general welfare of these homes." Opinion of the Board, 4-5.

The Board, in making the foregoing factual finding in the admitted absence of any persuasive evidence to support it, has done precisely what the appellate courts of this State have repeatedly held is impermissible. In ruling that the applicant for a special exception has the burden of negating the possibility of every conceivable adverse effect of that exception—even in the absence of credible evidence that any adverse effects might in fact occur—the Board has imposed a requirement which is both logically impossible to meet and which is inconsistent with the decisions of the highest court of this State.

There appear to be no reported Maryland cases in which a denial of a special exception or conditional use permit has been affirmed which did not involve at least one of the following two factors—either a statutory requirement that the applicant prove a public need for the use or credible expert testimony that the use would in fact produce substantial adverse effects of a nature beyond that inherently presented by the proposed use in the zone in which it is being proposed. Neither of these factors is present in this case.

The proper allocation of the burden of proof is perhaps nowhere better illustrated than in Eastern Outdoor Advertising Company v. Mayor and City

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ordinarily associated with such uses. Consequently, the bald allegation that a funeral home is inherently psychologically depressing and adversely influences adjoining property values, as well as other evidence which confirms that generally accepted conclusion, is insufficient to overcome the presumption that such a use promotes the general welfare of a local community. Because there were neither facts nor valid reasons to support the conclusion that the grant of the requested special exception would adversely affect adjoining and surrounding properties in any way other than would result from the location of any funeral home in any residential zone, the evidence presented by the protestants was, in effect, no evidence at all." 23 Md. App. at 624-625 (Emphasis supplied.)

The facts in the present case are even stronger than those in Anderson, since the protestants in this case failed to produce any expert testimony to support their assertions as to the adverse effects of the proposed tower. Furthermore, as in Anderson, none of the testimony indicated why any of the adverse effects feared by the protestants would be any worse in the present case than in any other case in which there is an application for a special exception for the same use in any other residential area.

The fact that special exception uses are presumptively permissible was again emphasized by the Court of Special Appeals in Miller v. Kiwanis Club of Loch Raven, Inc., 29 Md. App. 285, 347 A.2d 572 (1975), in which the Court of Special Appeals held that the Board had incorrectly denied an application for a special exception for a swimming club in an R.D.P. zone, and affirmed this Court's reversal of the Board's denial of the special exception.

There have been a number of similar decisions reversing denials of special exceptions in other counties under statutes which are virtually identical to the one in this case.

In Turner v. Hammond, 270 Md. 41, 310 A.2d 543 (1973) the Court of Appeals pointed out that special exception uses are provided for as part of the comprehensive zoning plan and that such a use shares "the presumption that....it is in the interest of the general welfare and, therefore, valid." 270 Md. at 54 (emphasis supplied.) The Court pointed out that such uses are to be permitted "absent any fact or circumstance negating the presumption." Id. (Emphasis supplied.) The Court further stated that while an applicant for a special exception has the burden of adducing testimony to show that the proposed use meets the standards prescribed by

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Council of Baltimore, No. 45, September Term 1980 (Court of Special Appeals, filed September 25, 1980). A copy of the opinion in that case and of the complete testimony before the administrative board in that case is attached hereto as Exhibit A. In the Eastern Outdoor case, which involved the Baltimore City Code provision discussed above, no expert testimony and only minimal lay testimony was presented by the applicant, but the Court of Special Appeals held that "the decision of the Board of Municipal and Zoning Appeals was arbitrary and capricious in that it was unsupported by substantial evidence...."

A substantial amount of testimony at the hearing below centered upon the fact that the height of the proposed tower would be greater than the distance to certain nearby houses and the People's Counsel suggested to the Board that the application should be denied on that basis alone. (It bears repeating that the closest residence to the proposed tower is that owned and occupied by the Appellants and in which they intend to continue living after construction of the tower.)

That the fact that a tower is higher than the distance to nearby residences is not by itself sufficient to mandate denial of a special exception is demonstrated by the case of Levy v. Montgomery County, 248 Md. 346, 236 A.2d 737 (1968), cert. denied, 393 U.S. 877, in which the Montgomery County Board of Appeals granted a special exception to permit the construction of a 1219 foot self-supporting tower and a transmitter building on a less than four-acre lot in a residential subdivision. Although the opinion of the Court of Appeals did not discuss the distance to neighboring residences, the transcript of testimony indicated that the base of the tower was within 300 feet from five different houses and was only 180 feet from the nearest house. Levy v. Montgomery County, supra, Appendix for Appellees, at 104-105. Copies of the relevant pages from the transcripts are attached hereto as Exhibit B. Despite the fact that the protestants in Levy, unlike those in the present case, produced testimony from a qualified real estate appraiser that the tower would cause a decrease in the value of the adjacent properties, the Court of Appeals affirmed the Board's granting of the special exception.

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the zoning ordinance, "he does not have the burden of showing affirmatively that his proposed use accords with the general welfare." 270 Md. at 55. The Court held that the Salisbury Board of Zoning Appeals had improperly denied a special exception for an apartment house in what was essentially a single-family residential zone.

To the same effect is Rockville Fuel and Feed Company v. Board of Appeals, 257 Md. 183, 262 A.2d 199 (1970), in which the Court of Appeals pointed out that the special exception "is a valid zoning mechanism that delegates to an administrative board a limited authority to permit enumerated uses which the legislative body has determined can, prima facie, properly be allowed in a specified use district, absent any fact or circumstance in a particular case which would change this presumptive finding." 257 Md. at 188. (Emphasis supplied.)

In Rockville Fuel, the Gaithersburg Board of Appeals had denied a special exception for a concrete plant in a heavy industrial zone on the basis of a memorandum from the planning commission opposing the special exception, testimony from the owner of a neighboring apartment building that he feared structural damage to his building from vibrations, and testimony from a resident of the area that dust and heavy trucks associated with the operation would adversely affect the area. The Court of Appeals held that none of this was sufficient to overcome the presumption that the use was consistent with the public welfare and that the testimony of the protestants "amounted to unsupported dislike and fear of the project." 257 Md. at 193.

The Court of Appeals held in Rockville Fuel that "there is no need...for the applicant to show affirmatively that the granting of his application would be a benefit to the community at large...." 257 Md. at 191. The applicants in the present case, in producing evidence of the services provided and the need for two-way radio communication have thus gone well beyond the requirements of the statute.

The fact that special exception uses are presumptively permissible and that the applicant need not demonstrate hardship or a necessity for the special exception was also the holding in Montgomery County v. Merlands

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The tower proposed in the present application is only 41% of the height of the Levy tower, but is more than 60% farther from the closest neighboring house.

The Board stated in the present case that one of its reasons for disapproving the application was that soil studies had not been performed, so that it could not be determined with certainty what type of a foundation would be required for the tower. Appellants indicated that the foundation design was subject to approval in conjunction with building permit review and that they would be willing to have the special exception expressly conditioned upon approval of the safety of construction by any County officials or other professional personnel whom the Board desired to name—even if those requirements went beyond the normal ones of the building permit review process.

The Board recognized that, if said samples showed rock, "the Petitioner would design a new and different base to accommodate the requirement, submit same to the County technical staff and presumably erect a safe tower." Opinion of the Board, 5.

The Board stated, however, that "it is not sufficient that the County's technical staff will review the proposal at a later time." Opinion of the Board, 5. The Board cited no authority for this statement, and there appears to be no Maryland case in which a special exception has been denied because of a comparable detail.

The Board's role is to approve or disapprove the proposed use—not to a specific construction details. That authority has been delegated to other County agencies. Although the Board in its opinion indicated that it did not expect "that separate experts should be returned to testify on every design detail," Opinion of the Board, 5, it is imposing precisely such a requirement when it bases its denial of a special exception upon the absence of such testimony.

The presumption that a special exception use is in the public interest—a presumption which has been repeatedly emphasized in such cases as Anderson v. Sawyer, supra; Turner v. Hammond, supra; Rockville Fuel & Feed Company v. Board of Appeals, supra; Montgomery County v. Merlands

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Club, Inc., supra; and Mayor and City Council of Baltimore v. Foster & Lasser, supra; has no significance if a special exception may be denied because the applicant has not produced expert testimony concerning every design detail which could possibly affect the safety of the project.

It is impossible for an applicant for a special exception to anticipate every conceivable detriment which an administrative body may think might be presented by the requested use, let alone to present expert testimony to negate the possibility of each such imaginable problem. To permit a special exception to be denied upon such a basis, in the absence of any persuasive evidence that such a detriment would in fact be present, is essentially to permit the Board of Appeals to exercise an unreviewable discretion.

The impermissibility of an administrative board denying a special exception upon the basis of the mere possibility of an adverse impact upon the public welfare is illustrated by the case of Gowl v. Atlantic Richfield Company, 27 Md. App. 410, 341 A.2d 632 (1975).

The Gowl case involved an application for a special exception to permit above-ground storage of more than 30,000 gallons of petroleum products per 20,000 square feet of lot area. Although the property in question was in a manufacturing zone, it was within 500 feet from a residential district and none of the proposed structures themselves were only 550 feet from a residential district. The Howard County Board of Appeals denied the application, in part because some of the supporting structures for a pipeline to be constructed in connection with the storage facility were to be located within the floodplain. The Board ruled that the presence of such structures in the floodplain "would provide a potential danger to the surrounding properties, as well as menace the general welfare." 27 Md. App. at 413.

The Court of Special Appeals noted, however, that there was expert testimony to the effect that the supporting structures were designed to withstand flood waters of greater strength than any expected in the area. The Court held that the Board had incorrectly denied the special exception. In discussing the Board's finding of a potential danger, the Court quoted

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with approval the following language from the opinion of the trial court, which had also held that the special exception should have been granted:

"The Board's finding...cannot be faulted as an abstract proposition. The...was, however, testimony that the likelihood of such a danger nature present a 'potential' danger but if the possibilities rather than the probabilities of danger are good grounds for denying permits for such uses, it is difficult to see how these uses could be permitted anywhere, regardless of what steps might be taken to minimize the potential dangers accompanying them." 27 Md. App. at 415. (Emphasis supplied.)

Although another portion of the Gowl holding has recently been overruled in the case of Schultz v. Pritts, ___ Md. ___, ___ A.2d ___ (1981), the above portion of the holding was unaffected. Moreover, the Court of Appeals in the Schultz case again reiterated that the special exception "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 the presumption." (Slip opinion, 11) (Emphasis in original).

The Court of Appeals again stated the rule that "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." (Slip Opinion, 11-12)

In the present case, the Board of Appeals conceded that there was no probative evidence of harm or disturbance which would be caused by the proposed use.

CONCLUSION

In the present case, there was substantial evidence that the requested use would not be contrary to the public welfare. In view of the absence of any specific probative evidence to the contrary, the decision of the Board of Appeals should be reversed.

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H. Enslie Parks
H. Enslie Parks
Leland S. Van Koten
Leland S. Van Koten
Wright & Parks
409 Washington Ave.
Suite 1012
Towson, Md. 21204
Attorneys for Appellants

I HEREBY CERTIFY that on this 30th day of October, 1981 I have mailed a copy of the within Memorandum of Law to John W. Hessian, III, Esquire, People's Counsel for Baltimore County, Peter Max Zimmerman, Esquire, Deputy People's Counsel, Room 223, Court House, Towson, Md., 21204, and George W. Liedman, Esquire, The Keyser Bldg., 207 E. Redwood Street, Baltimore, Md., 21202, Attorney for Protestants, and to Arnold Jablon, Esq., 109 Old Padonia Road, Cockeysville, Md. 21030, and to County Board of Appeals of Baltimore County, Room 219, Court House, Towson, Md., 21204.

Leland S. Van Koten
Leland S. Van Koten

BALTIMORE COUNTY
CITY CLERK
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OCT 30 10 30 AM '81

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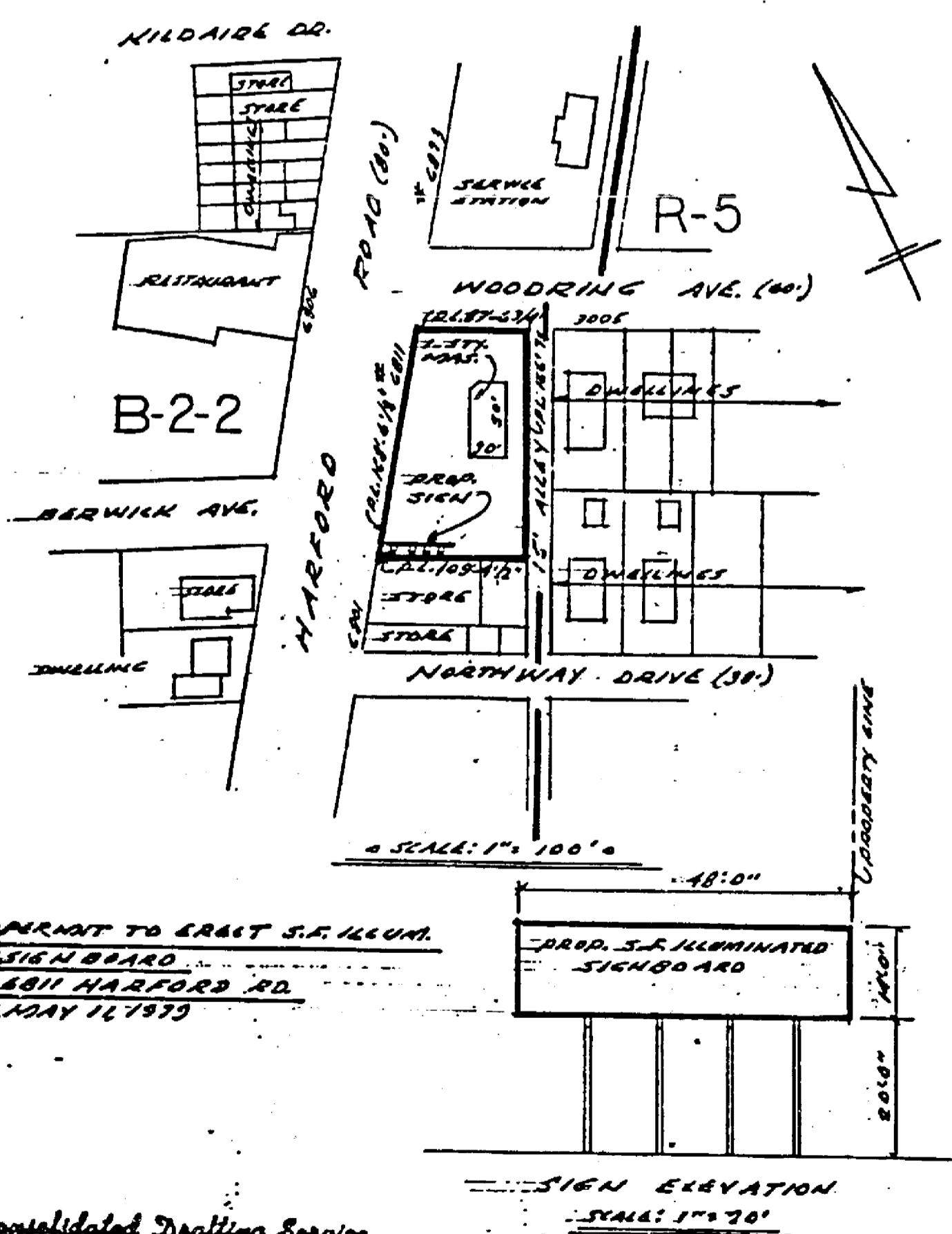
-5-

While the Board in the instant case did have before it a letter from the City Department of Planning in which the Department claimed that Eastern's signboard would be visible from houses facing Woodring Avenue and Northway Drive, examination of the plat that was also before the Board reveals that the Department's very general statement expressing concern about its "proximity to the dwellings to the east" more accurately describes its objection to Eastern's plans to erect the signboard in question, rather than its claim as to visibility. Accordingly, the Board's disapproval of Eastern's application is without merit and is therefore, by law, arbitrary and capricious.

JUDGMENT OF THE BALTIMORE CITY COURT REVERSED. CASE REMANDED TO THAT COURT WITH THE DIRECTION THAT IT REMAND TO THE BOARD WITH INSTRUCTION TO APPROVE THE APPLICATION.

COSTS TO BE PAID BY THE APPELLEE.

3 See appendix.



Consolidated Drafting Services
5210 Catalpha Road
Baltimore, Maryland 21214

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185-57457

TRANSCRIPT OF TESTIMONY

Appeal No. 339-79X

Before the
BOARD OF MUNICIPAL AND ZONING APPEALS
on

July 17, 1979

Philip Heller Sachs, Chairman
R. Dennis Garman
Mrs. Courtney J. McKeldin
John H. Michener
Mrs. Ethel P. Rich
Gilbert V. Rubin, Executive Secretary

APPEARANCE

For the Permit
Eastern Outdoor Advertising Co.
6811 Harford Road

Protesting

Protesting
Working Group
3211 Chesley Lane

E. 9

MR. SACHS: Appeal 339, 6811 Harford Road.
This is an appeal to erect a single illuminated sign board 14 feet by 48 feet. This conditional use requires this Board's approval in a B-2-2 zoning district.

Raise your right hands, please.

(Witnesses sworn.)

MR. SACHS: Who is the applicant, name and address, please.

MR. SMITH: Clarence L. Smith President of Eastern Outdoor Advertising at 7115 Rock Ridge Road, 21207.

MR. SACHS: And who owns the property?

MR. SMITH: The property is owned by Mr. & Mrs. Krasfle, K-r-e-a-f-l-e.

MR. SACHS: And their address is the same?

MR. SMITH: Their address is the same.

They operate a business of producing picture frames and fitting them to pictures.

MR. SACHS: All right. Is this a replacement of any sign or what?

MR. SMITH: This is a new location at the south end of what is now used for a parking area for the business.

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E. 10

MR. RUBIN: All right. We have several letters.

The first one is from the Department of Planning and they state that, "The proposed billboard would be erected on a larger property which is presently occupied by a custom framing company. There is a bank on the west side of Harford Road and a gas station at the northeast corner of the intersection of Harford Road and Woodring Avenue. Across a 15 foot alley to the east, an R-5 district contains well maintained detached homes.

The applicant proposes a 34 foot overall height for the sign board. At such a height, it would be clearly visible from the houses facing Woodring Avenue and Northway Drive to the south.

Because of the height, which is considered to be excessive, and because of the proximity to the dwellings to the east, the Department of Planning recommends disapproval of the application." The fire department indicates they have no objection. There is also a letter from Councilman Michael Curran, Frank Gallegher and Carroll Fitzgerald, all of whom are responding for the Woodring Improvement Association that, in various forms, that they oppose this, that they support

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the opposition and sympathize for what they state.

There is also a letter here from a Joseph -- Joseph Curran. He is an elected official from this district.

MR. TASSI: State Senator.

MR. RUBIN: He states that he is not in favor of the sign because of the neighborhood lights. There is a letter here from Harbell's saying that they support the Woodring Association in their opposition to this appeal. The erection of this sign will have a negative impact. There are many billboard type signs here and in other areas that are offensive and a detrimental factor to the residential neighborhood. We respectfully request the Board to disapprove this appeal.

MR. SACHS: All right. Do you want to tell us something?

MR. TASSI: Well, this property that the custom picture frames occupies at one time was a filling station, then a repair garage then a filling station, then it was abandoned and then Mr. Kreafile came up with this custom picture frame and he done a beautiful job with that property. As a matter of fact, about two years ago he was on television showing what people can do with abandoned, derelict property. It is a

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beautiful set-up. Now he is starting to put automobiles in there and trailers. He has got a trailer sitting there now for a couple of months and cars parked all over it and by putting a sign up, I think it is just going to tear the -- the whole area down.

MR. SACHS: Well --

MR. TASSI: And it is a beautiful place.

MR. SACHS: That's been approved, the storage of cars and buses?

MR. TASSI: It has been approved.

MR. SACHS: This was approved in 1966 to park and store buses. This Board approved that.

MR. TASSI: 1966. Mr. Kreafile hasn't been there that long.

MR. SACHS: John E. Banks applied at that time, so I assumed that continued to the present time.

MR. RUBIN: You said Mr. Kreafile?

MR. TASSI: Kreafile.

MR. RUBIN: Is he parking buses there now?

MR. TASSI: Not buses.

MR. RUBIN: What?

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MR. TASSI: He has got a trailer there, van like, and a couple of cars.

MR. RUBIN: Is it his personal van?

MR. TASSI: He doesn't have seven or eight cars. I can't prove it but, as far as trucks or buses there, I don't think it was Kreafile that had it.

MR. SACHS: No, it was someone named Banks.

MR. TASSI: Banks?

MR. SACHS: I am trying to get the history of the property.

MR. TASSI: It was not nice enough Kreafile took it over.

MR. MICHENER: Are you familiar with the area?

MR. TASSI: I have lived there.

MR. MICHENER: There is a Foster & Kleiser sign across the street.

MR. TASSI: Yes.

MR. MICHENER: Is that the only sign around?

MR. TASSI: There are a few of them. One was further up the street that the Board approved illuminating last week.

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MR. RUBIN: This is a 14 by 48 sign?

MR. SMITH: A 14 by 48 with a 20 foot elevation.

MR. RUBIN: Illuminated?

MR. SMITH: Yes. Shows to traffic going in a southerly direction.

MR. RUBIN: Shows to southbound traffic?

MR. SMITH: Yes.

MR. RUBIN: The area presently is a parking lot?

MR. SMITH: Correct.

MR. SACHS: How late at night will that illumination be on?

MR. SMITH: That illumination, according to National contracts, is a half hour before dusk until midnight, which is customary in the industry.

MR. SACHS: Is that what it is going to be? You say it is customary.

MR. SMITH: Right.

MR. RUBIN: I have a few letters I would like to get on the record. We can take your name and address.

MR. TASSI: Vincent Tassi, 3211 Chesley. I am the President of the Woodring Improvement Association.

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MR. MICHENER: That is several blocks?

MR. TASSI: Yes. The ones that are there, we have no objection to, but there is nothing we can do about it. We don't want any more signs especially in that location. I don't know if you live in that area or are familiar with that area or not.

MR. RUBIN: This sign -- I will show you a photograph that we have showing the picture framing establishment.

Where in reference to this picture would the sign be placed?

MR. SMITH: This would be placed at this end.

MR. SACHS: Identify that.

MR. RUBIN: This is a photograph that the Board took.

MR. SMITH: It doesn't show on the photograph.

MR. RUBIN: Adjoining the subject building is a parking lot and the building would be at the end of the parking area.

Anything else sir?

MR. SMITH: May I make a statement?

MR. SACHS: This gentleman wants to say something.

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MR. SMITH: We feel this way about the area that the Harford Road is a business corridor from North Avenue to the -- to and beyond the county line. As the City planned it, the zoning of the business is incorporated in the business zoning and being in the business zoning we feel that we have justification in placing the board there and it will not create unsightful condition. Secondly, it is very difficult --

MR. SACHS: It is a conditional use which gives this Board the opportunity to approve it or disapprove it. It is not a permitted use.

MR. SMITH: It is very difficult to oppose the planning commission, but as I see it, that board will not be able to be seen from any residential areas. There is a possibility of one house adjacent to the lot that would come into view, but the other properties are so far away and they are more or less in a row or semi-detached area that this board will not be seen from that.

Secondly, if I may, directly across Rock Ridge is a large service station and it has its sign there in the evening and 50 yards to the southwest across Harford Road is the Crown Station which constitutes a very generalized business

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entity in that area.

MR. SACHS: All right.

MR. SMITH: Have you anything to add?

MR. SACHS: Your name and address.

MRS. SMITH: Mrs. Jean Smith, executive vice president of Eastern Outdoor Advertising, 7115 Rock Ridge Road.

MR. SACHS: What do you want to tell us?

MRS. SMITH: I want to tell you, Mr. Tassi has mentioned there are other signs in the area about which he can do nothing about, but I would also like to stress that Eastern Outdoor is a small business and a family owned business and over all these years they have not erected a single sign board along Harford Road or Belair Road or anywhere else in the northeast part of the City, and it only seems fair that, in fact mandatory, if a small business is to compete with a large business, which do get the signs approved, and in fact to survive, that we must have at least one sign in an area here and there. We are not asking, I feel, for very much.

MR. SACHS: Well, as I have said before in the cases today, we have to apply the provisions of the ordinance

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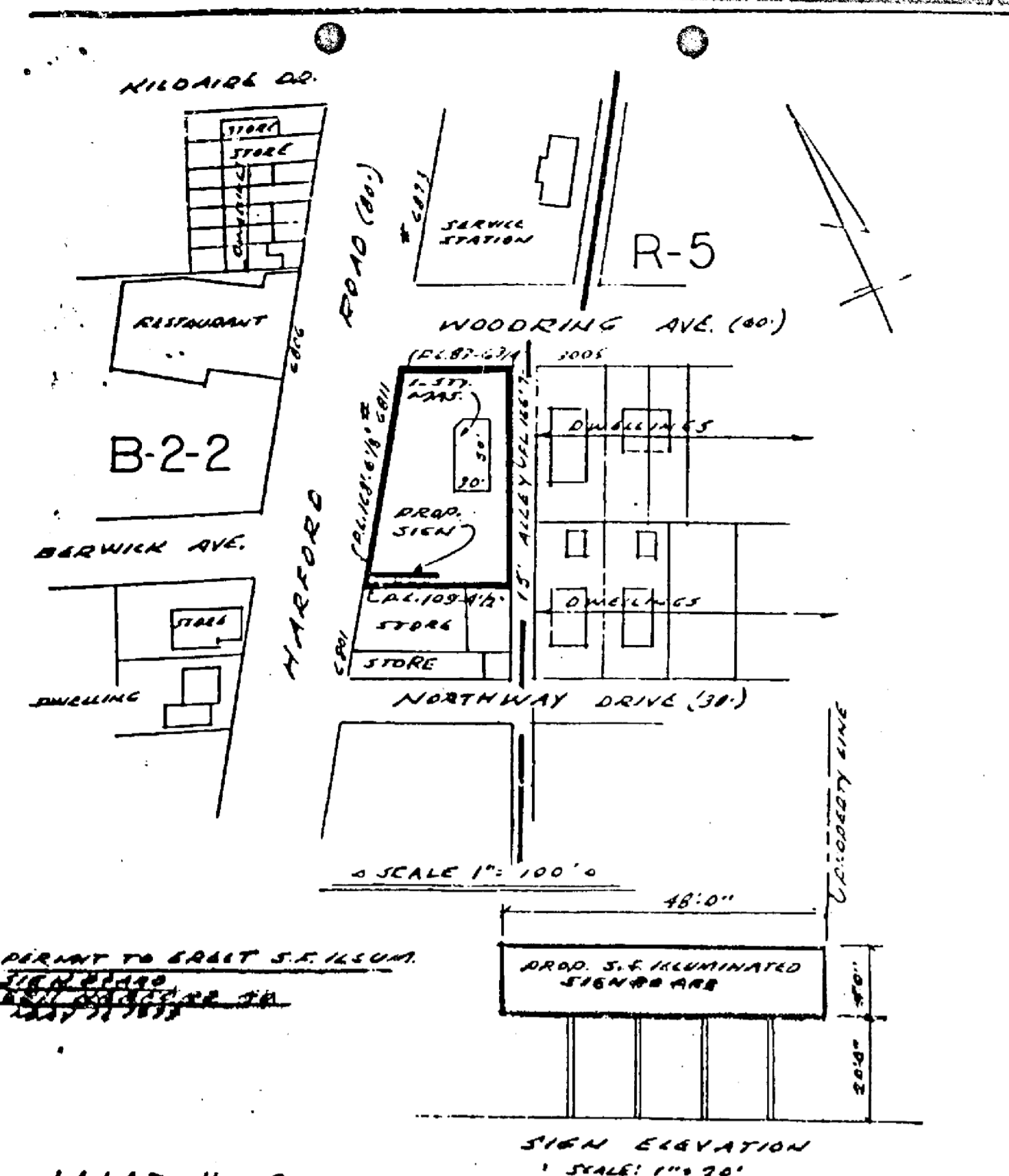
E. 18

and the ordinance isn't written to vapor or not vapor a small or a large business and we try to do that very conscientiously.

All right, you will hear from us in a few days.

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E. 19



Consolidated Drafting Bureau
5210 Catalpha Road
Baltimore, Maryland 21214

COPY

Apx. 104
Proceedings

Mr. Donovan: They are in 20 foot centers. We have evergreen trees at 16 feet high that will be on roughly I would say 10 foot centers.
Mr. Bucher: Mr. Donovan, have you estimated how much landscaping would cost that is proposed?
Mr. Donovan: The only thing I know, the clients have told us they want it done properly. And we, the tree sizes that we are providing is a mature size.
Mr. Bucher: So all those figures you mention are of mature trees?
Mr. Donovan: When we say 16 foot trees, this is what we will write the specifications for.
Mr. Bucher: At the time of planting?
Mr. Donovan: That is right.
Mr. Thomas: How close is the brick wall that you testified to the property line?
Mr. Donovan: Well, it varies from 28 feet to 22 feet, at this point 28.
Mr. Thomas: Do you know the total number of shade trees that will be installed on that property?
Mr. Donovan: No, we have not developed that yet. This is a preliminary plan.
Mr. Thomas: Do you know the total number of evergreens [108] that will be planted?
Mr. Donovan: Not at this particular time.
Mr. Thomas: For the record, would you give me the specific distances for each of these five homes located immediately adjacent to the subject property?
Mr. Donovan: From where to what?
Mr. Thomas: First, from the proposed building, then to the tower, itself, starting with Lot 15, Block 5?
Mr. Donovan: Lot 15, to the nearest structure is 110 feet. To the base of the tower, 220 feet.

Apx. 105
Proceedings

Mr. Thomas: Lot 14, Block 5?
Mr. Donovan: Lot 14, the nearest structure is 95 feet. To the nearest leg of the tower, 180 feet.
Mr. Thomas: Lot 13, Block 5?
Mr. Donovan: The nearest structure, will be 110 feet. To the tower would be 200 feet.
Mr. Thomas: Lot 12, Block 5?
Mr. Donovan: 84 feet and the nearest tower leg, 205 feet.
Mr. Thomas: Let's try that same measurement again coming straight this way.
Mr. Donovan: To this tower leg, this is farther away.
Mr. Linowes: Why don't you try it?
Mr. Thomas: Give me the measurement again, the closest to the area?
[109] Mr. Donovan: 82 feet.
Mr. Thomas: That is Lot 12, Block 5. The fifth house, Lot 26, Block 2?
Mr. Donovan: 160 feet, and to the nearest tower leg, 300 feet.
Mr. Thomas: Directing your attention to the last house, you just mentioned, Lot 26, Block 2 there would be no intervening building between it and the tower?
Mr. Donovan: That is right. As this section shows.
Mr. Thomas: You are in no way suggesting or testifying that this 1,219 foot tower is not going to be clearly visible to each of those residents, are you?
Mr. Donovan: If this thing is planted properly, and there are adequate shade trees around, adequate canopy, I doubt very seriously that the tower, itself, in the immediately adjacent houses, is going to be that visible.
Chairman Sanders: Going to be?
Mr. Donovan: Will not be that visible. In other words, not going to be standing out there in its raw form.

EXHIBIT B

RE: PETITION FOR SPECIAL EXCEPTION : IN THE
for a wireless transmitting tower and receiving structure 500' in height including a control house : CIRCUIT COURT
E/S of Granite Road, 330' S. of Marriottsville Road : FOR
2nd District : BALTIMORE COUNTY
Arthur R. Shaw, Jr., et ux, : AT LAW
Petitioners : Misc. Docket No. 13
Zoning File No. 80-203-X : Folio No. 207
: File No. M-7557

CERTIFIED COPIES OF PROCEEDINGS BEFORE THE
ZONING COMMISSIONER AND THE BOARD
OF APPEALS OF BALTIMORE COUNTY

TO THE HONORABLE, THE JUDGE OF SAID COURT:
And now come William T. Hackett, John V. Murphy and John A. Miller, constituting the County Board of Appeals of Baltimore County, and in answer to the Order for Appeal directed against them in this case, herewith return the record of proceedings had in the above entitled matter, consisting of the following certified copies or original papers on file in the office of the Zoning Department of Baltimore County:
ZONING ENTRIES FROM DOCKET OF ZONING COMMISSIONER OF BALTIMORE COUNTY

- No. 80-203-X
- January 22, 1980 Petition of Arthur R. Shaw, Jr., et ux, for a special exception for a wireless transmitting tower and receiving structure 500' in height including a control house, on property located on the east side of Granite Road, 330' south of Marriottsville Road, 2nd District - filed
 - January 22, 1980 Order of Zoning Commissioner directing advertisement and posting of property - date of hearing set for April 1, 1980, at 1:30 p.m.
 - March 11, " Comments of Baltimore County Director of Planning - filed
 - March 24, " Certificate of posting of property - filed
 - March 20, " Certificate of Publication in newspaper - filed

E. 20

- Arthur R. Shaw, Jr., et ux
Case No. 80-203-X 2.
- March 25, 1980 Comments of Baltimore County Zoning Plans Advisory Committee - filed
 - April 1, 1980 At 1:30 p.m. hearing held on petition by Zoning Commissioner
 - July 3, 1980 Order of Zoning Commissioner denying special exception
 - July 23, 1980 Order of Appeal to County Board of Appeals from Order of Zoning Commissioner
 - April 14, 1981 Hearing on appeal before County Board of Appeals
 - June 16, 1981 Order of County Board of Appeals denying special exception
 - June 23, 1981 Order of Appeal filed in the Circuit Court for Baltimore County by H. Emslie Parks, Esq., Counsel for the Petitioners
 - June 23, 1981 Petition to accompany Order for Appeal filed in the Circuit Court for Baltimore County
 - July 7, 1981 Certificate of Notice sent to all interested parties
 - July 13, 1981 Transcript of testimony filed - 1 volume
- People's Counsel Exhibit No. a - Plat of property
" " " No. b - Series of photos of area - a thru j (plus 1 extra photo - 2 h's)
- Protestant's Exhibit No. 1 - Study by Motorola dated 8/23/78
" " " 2 - Telephone Co. price for lease line
" " " 3 - Work sheet from Tax Assessors office
- Petitioners' Exhibit No. 1 - Lease between U.M.B.C. & Shaw Bus Service, Inc.
" " " 2 - Topo Map
" " " 3 - Plat of proposed use - 4/18/79, revised 2/20/80
" " " 4 - Series of 3 photos-4 a,b,c,-subj. site
" " " 5 - Photos, 1, 2, 3, 4
" " " 6 - Photo of transmission tower - 1 mi. away
" " " 7 - Approval from F.A.A. -for antenna tower- expired 10/17/80

Arthur R. Shaw, Jr., et ux
Case No. 80-203-X 3.

- Petitioners' Exhibit No. 8 - UNARCO-ROHN, foundation-elevation drawing
" " " 9 - UNARCO-ROHN-side elevation
" " " 10 - Photo of Westinghouse Transmission Tower
" " " 11 - Report to Shaw Bus, April 9, 1980, by Mr. McGraw
- July 16, 1981 Record of proceedings filed in the Circuit Court for Baltimore County
- Record of proceedings pursuant to which said Order was entered and said Board acted are permanent records of the Zoning Department of Baltimore County, and your respondents respectively suggest that it would be inconvenient and inappropriate to file the same in this proceeding, but your respondents will produce any and all such rules and regulations whenever directed to do so by this Court.

Respectfully submitted,
June Holmen
June Holmen
County Board of Appeals of Baltimore County

cc: H. Emslie Parks, Esq.
George W. Liebman, Esq.
John W. Hessian, Esq.

Re: PETITION FOR SPECIAL *
EXCEPTION * IN THE CIRCUIT COURT
Arthur R. Shaw, Jr., et ux, * For Baltimore County
Petitioners * At Law
Zoning File No 80-203-X * Misc Docket No: 13
* Folio: 207
* File No: M-7557

Answer to Petition for Appeal

Arnold Jablon, Protestant below and Appellee herein, answers the Petition for Appeal heretofore filed by the Appellant, and for cause prays:
1. That the Appellee admits the allegations made and contained in the first paragraph of said Petition.
2. That the Appellee denies the allegations made and contained in the second through sixth paragraphs of said Petition and states affirmatively that the decision of the County Board of Appeals of Baltimore County herein was proper and justified by the evidence before it and that the decision of the Board should therefore be sustained as being properly and legally made.

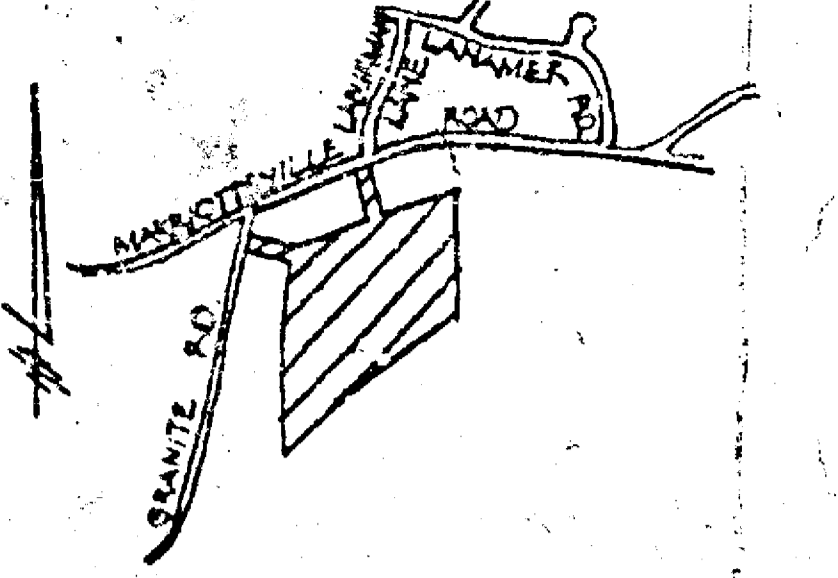
Arnold Jablon
Arnold Jablon
109 Old Padonia Road
Cockeysville, Maryland 21030
561-1930

RECEIVED
BALTIMORE COUNTY
Aug 11 9 34 AM '80
CITY CLERK
BY

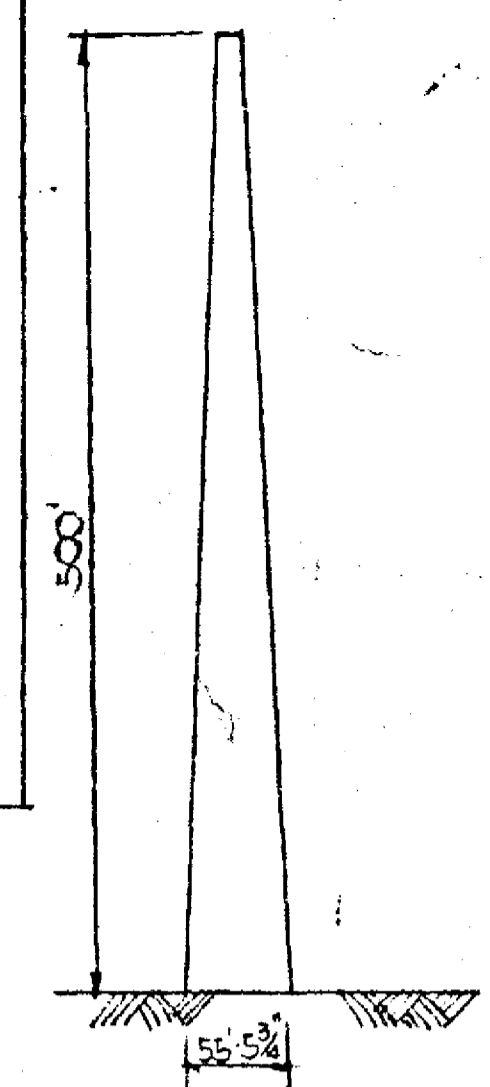
CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on this 4th day of August, 1981, a copy of the foregoing Answer was mailed, postage prepaid, by first class delivery to H. Emslie Parks, Esq., 409 Washington Ave., Towson, Maryland 21204, John W. Hessian, III, Esq., Room 223 Court House, Towson, Maryland 21204, George W. Liebmann, Esq., The Keyser Bldg, 207 E. Redwood St., Baltimore, Maryland 21202.

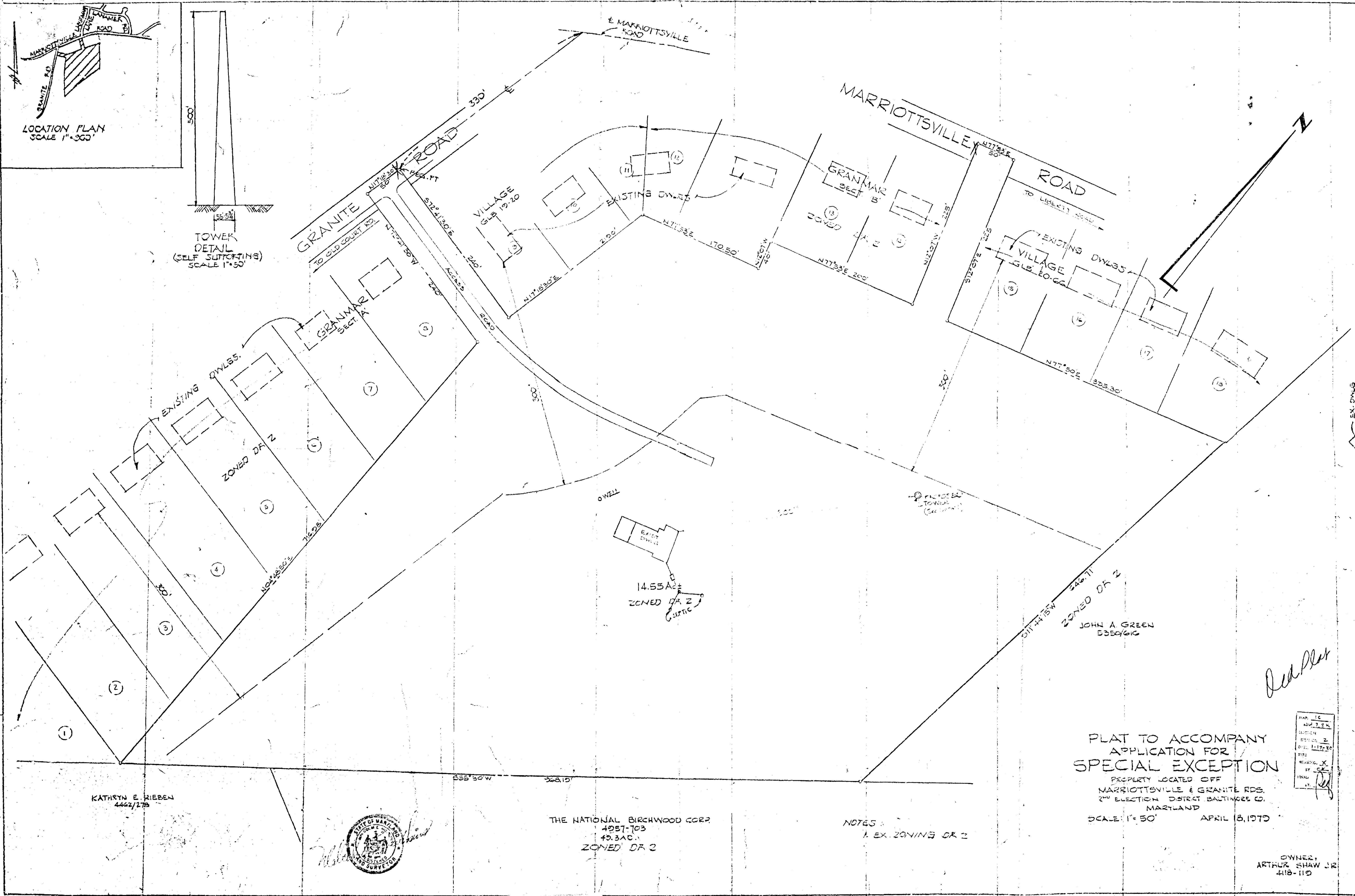
Arnold Jablon
Arnold Jablon



LOCATION PLAN
SCALE 1"=300'



TOWER
DETAIL
(SELF SUPPORTING)
SCALE 1"=50'



KATHRYN E. RIEBEN
4462/275



THE NATIONAL BIRCHWOOD CORP
4057-703
49.3 AC.
ZONED DR 2

NOTES:
1. EX. ZONING DR 2

PLAT TO ACCOMPANY
APPLICATION FOR
SPECIAL EXCEPTION
PROPERTY LOCATED OFF
MARIOTTSVILLE & GRANITE RDS.
2ND ELECTION DISTRICT BALTIMORE CO.
MARYLAND
SCALE 1"=50' APRIL 8, 1979

MAP	16
SECTION	2
DISTRICT	2
DATE	1-17-80
BY	AK
FOR	AK

Red Plot

OWNER:
ARTHUR SHAW JR.
418-110

RE: PETITION FOR SPECIAL EXCEPTION * IN THE
 Arthur R. Shaw, Jr., et ux * CIRCUIT COURT
 Zoning Case No. 80-203-X * FOR
 * BALTIMORE COUNTY
 * At Law
 * Misc. Docket No. 13
 * Folio No. 207
 * File No. M7557

MOTION TO WITHDRAW APPEARANCE

George W. Liebmann, counsel for protestants, hereby moves to withdraw his appearance on behalf of protestants and states as follows:

1. Counsel for protestants has appeared on their behalf for the limited purpose of filing a response to the petition for appeal. Protestants will be represented at the hearing before this court by Arnold Jablon, Esquire, a protestant herein who has entered his appearance herein.
2. George W. Liebmann, counsel for protestants, hereby certifies that at least five days prior to the filing of this motion he sent to Ms. Jane Phipps, William Hughes and Mary Basso, officers of the Village of Kings Park Community Association notice of his intention to file a motion for leave to withdraw appearance and that the community associations concerned have been advised of counsel's intention to withdraw.
3. Withdrawal of the appearance of counsel for protestants will not unduly delay the trial of this case or be prejudicial to any of the parties or otherwise not in the interests of

- a. Create a potential hazard from fire, panic or other dangers;
- b. Tend to overcrowd land and cause undue concentration of population;
- c. Interfere with adequate provisions for schools, parks, water, sewerage, transportation or other public requirements, conveniences, or improvements;
- d. Interfere with adequate light and air."

The discretion vested in this Court in review of a zoning appeal is limited. The reviewing court is generally confined to a determination of whether sufficient evidence has been presented at the zoning hearing to make the issues fairly debatable and may only consider for that purpose evidence which is on the record. Pattev v. Board of County Commissioners, 271 Md. 352, 360 (1974). "Fairly debatable" has been described as "very much akin, if not identical to, the 'clearly erroneous rule'". Largo Civic Association v. Prince George's County, 21 Md.App. 76, 90 (1974). When the evidence presented is fairly debatable, i.e., one may draw one of several rational inferences therefrom, courts should not substitute their judgment for that of the agency. Largo Civic Association v. Prince George's County, ibid. at 90.

The Opinion issues by the County Board of Appeals emphasizes the safety standards to be met by Petitioners, and the effect the tower would have on property values. Reviewing the transcript of the hearing before the County Board of Appeals, this Court does not find that the issues of safety and property values are fairly debatable from the evidence presented.

On the safety issue, the testimony of Mr. Matthew Vlissides,

justice since Mr. Jablon will fully represent the interests of the protestants.
 WHEREFORE, George W. Liebmann, counsel for protestants move for leave to withdraw his appearance on their behalf.

George W. Liebmann
 George W. Liebmann
 The Keyser Building
 207 E. Redwood Street
 Baltimore, Maryland 21202
 752-5887

Certificate of Service

I HEREBY CERTIFY that on this 3rd day of November, 1981 a copy of the foregoing Motion to Withdraw Appearance was mailed to:

H. Emalie Parks, Esquire
 409 Washington Avenue
 Towson, Maryland 21204

Administrative Secretary
 County Board of Appeals
 of Baltimore County
 Room 219 Court House
 Towson, Maryland 21204

George W. Liebmann
 George W. Liebmann

an expert witness in the areas of civil engineering and tower structures, established that the proposed plans and drawings meet the standards of the State of Maryland and the BOCA Code for the construction of a 500' tower. (transcript, p.90) Wind gusts, ice formation, and possible weather conditions had been considered in evaluating the proposal from an engineering standpoint. While some questions remain in the Board's mind as to the safety of the antenna construction and the suitability of the soil for the proposed plan, there is no reason for the Board to assume that these cannot be resolved satisfactorily under the supervision of the appropriate building and permit authorities for Baltimore County.

On the issue of potential property value decrease, the Board may have been skeptical of Mr. Brian McGraw's contention as a real estate appraiser that the proximity of the tower would not adversely affect property values, but no evidence was presented to the contrary. There was no evidence presented before the Board to make this issue fairly debatable. Adjacent property owners expressed their concern over this possibility, but presented no testimony to substantiate their assumptions.

It is therefore ORDERED that the decision of the County Board of Appeals is REVERSED, and that the Special Exception be granted.

Cullen H. Hormes
 CULLEN H. HORMES
 JUDGE

DATE 11/26/81

RECEIVED
 CLERK OF COURT
 BALTIMORE COUNTY
 NOV 26 1981

Re: PETITION FOR SPECIAL EXCEPTION * IN THE
 Arthur R. Shaw, Jr., et ux * CIRCUIT COURT
 Zoning Case No. 80-203-X * FOR
 * BALTIMORE COUNTY
 * At Law
 * Misc. Docket No. 13
 * Folio No. 207
 * File No. M7557

ORDER GRANTING LEAVE TO WITHDRAW

Upon consideration of the motion of George W. Liebmann, counsel for protestants, to withdraw his appearance on behalf of protestants and the certification therein contained and the said motion having been served upon the attorneys for all the parties in this action more than five (5) days ago and not appearing that the withdrawal of the appearance of counsel for protestants will unduly delay the trial of this case, be prejudicial to any of the parties, or otherwise not be in the interests of justice, it is now by the Circuit Court for Baltimore County this day of November, 1981

ORDERED that the appearance of George W. Liebmann on behalf of protestants shall be and hereby is withdrawn.

Judge

DAVED:

CASE No. 7557	PETITION FOR SPECIAL EXCEPTION for a wireless transmitting tower and receiving structure 500' in height including a control house E/S of Granite Road, 330' S. of Marriottsville Road 2nd District Arthur R. Shaw, Jr., et ux Petitioners Mrs. Arthur R. Shaw, Jr.	ADVANCE COSTS
		Petitioner's Atty. 5.00 Clerk 60.00 Sheriff _____ Paid in Advance _____ Receipt No. _____
H. Emalie Parks, Leland S. Van Koten, Wright & Parks	BOARD OF APPEALS OF BALTIMORE COUNTY CHARLES M. SCHEVKER, HOMER SEIDEL, JR., MICHAEL S. DEAN, BARRY SMITH, CHARLES WALTERS, Mr. JAMES PHIPPS, ARNOLD JABLON, President HERWOOD HEIGHTS COMM. ASSO., INC.,	ADDITIONAL COSTS
George W. Liebmann John W. Hessian, III		Deft's Atty. _____ Clerk _____ Sheriff _____

- (1) June 19, 1981 Order of Appeal and Petition fd.
- (2) July 7, 1981 Certificate of Notice fd.
- (3) July 8, 1981 - Appellee (People's Counsel for Balt. County) Answer to Petition for Appeal fd.
- (4) July 15, 1981 - Appellee (Michael Dean, Lawrence Phipps, Jane Phipps, The Village of Kings Park Community Assoc. and Herwood Heights Community Assoc.) Answer to Petition fd.
- (5) July 16, 1981 - Certified Copies of Proceedings before the Zoning Commissioner and the Board of Appeals of Baltimore County fd.
- (6) July 16, 1981 - Notice of Filing of Record fd.
- (7) August 6, 1981 Appellee's Answer to Petition for Appeal fd.
- (8) Nov. 2, 1981 - Appellants' Memo of Law & Exhibits fd.
- (9) Nov. 3, 1981 Hon. Cullen H. Hormes. Hearing had. Opinion, and or Order to be filed.
- (10) Nov. 6, 1981 - Motion of George Liebmann to withdraw app., and Order of Court striking app. of Liebmann as atty for protestants fd. (M75)
- (11) May 6, 1981 - Notice to employ new counsel fd. Copies sent.
- (12) May 26, 1982 - Opinion and Order of Court that the decision of County Board of Appeals is REVERSED, and that the Special Exception be granted fd. (CM)

PETITION FOR SPECIAL EXCEPTION * IN THE
 for a wireless transmitting tower and receiving structure 500' in height including a control house E/S of Granite Road, 330' S. of Marriottsville Road 2nd District
 Arthur R. Shaw, Jr., et ux
 Petitioners
 Zoning File No. 80-203-X * Misc. Docket No. 13
 * Folio 207
 * File No. M-7557

OPINION and ORDER

The Petitioners have appealed to this Court from a denial by the County Board of Appeals of a Special Exception to permit the construction of a wireless transmitting tower and receiving structure on property owned by Petitioners near the intersection of Granite and Marriottsville Roads. The property is zoned R. C. 3, and transmitting and receiving towers are permitted by Special Exception in R. C. 3 zones.

The Petitioners seek to construct a tower to facilitate communication with their bus company, which transports students with health and other problems. The proposed construction site is Petitioner's property in a residential neighborhood.

A transmitting tower is a permitted use in an R. C. 3 zone if it meets the requirements of Section 502.1 of the Baltimore County Zoning Regulations:

"Before any Special Exception shall be granted, it must appear that the use for which the Special Exception is requested will not:

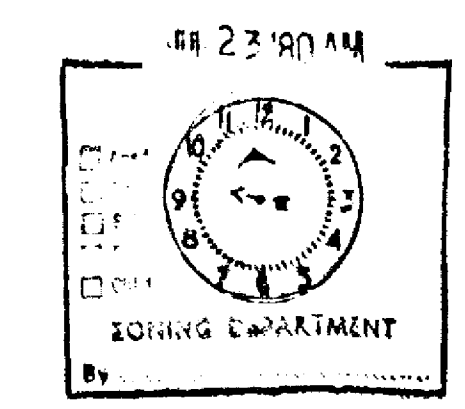
- a. Be detrimental to the health, safety, or general welfare of the locality involved;
- b. Tend to create congestion in roads, streets, or alleys therein;

FILED MAY 26 1982

RE: PETITION FOR SPECIAL EXCEPTION *
 E/S of Granite Road, 330' S. of
 Marriottsville Road - 2nd Election * BEFORE THE
 District * ZONING COMMISSIONER
 Arthur R. Shaw, Jr., et ux * OF
 Petitioners * BALTIMORE COUNTY
 No. 80-203-X (Item No. 406) *

NOTICE OF APPEAL BY ARTHUR R. SHAW, JR. AND DOROTHY B. SHAW

Mr. Commissioner:
 Please enter an appeal by Arthur R. Shaw, Jr. and Dorothy B. Shaw, 6311 Windsor Mill Road, Baltimore, Maryland 21207, to the Board of Appeals of Baltimore County from the order entered in the above matter on July 3, 1980.



H. Emalie Parks
 H. Emalie Parks
Leland S. Van Koten
 Leland S. Van Koten
 WRIGHT & PARKS
 305 W. Chesapeake Ave.
 Towson, Md. 21204
 (301) 821-6350
 Attorneys for Arthur R. Shaw, Jr., and Dorothy B. Shaw

I HEREBY CERTIFY that on this 22 day of July, 1980, I have mailed a copy of the above Notice of Appeal to Mr. Charles M. Schevker, 10101 Marriottsville Rd., Randallstown, Md. 21133, Mr. Homer Seidel, Jr. 10012 Marriottsville Rd., Randallstown, Md. 21133, Mr. Michael S. Dean, 10017 Marriottsville Road, Randallstown, Md. 21133, Mr. Barry Smith, 3615 Granite Road, Randallstown, Md. 21133, John W. Hessian, III, Esquire, People's Counsel, County Courts Bldg., Towson, Md. 21204.

Leland S. Van Koten
 Leland S. Van Koten

RE: PETITION FOR SPECIAL EXCEPTION: BEFORE THE ZONING COMMISSIONER
 N/S of Granite Rd., 330'
 S of Marriottsville Rd., 2nd District
 OF BALTIMORE COUNTY
 Case No. 80-203-X

ARTHUR R. SHAW, JR., et ux,
 Petitioners

APPEARANCE OF COUNSEL

MR. COMMISSIONER:

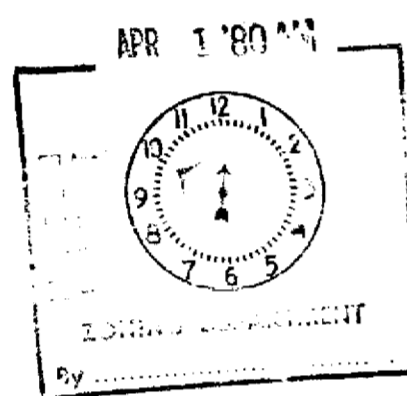
Please enter my appearance in the above captioned case on

behalf of the Petitioners, Arthur R. Shaw, Jr., et ux.

H. Emalie Parks
 H. Emalie Parks
 Suite 402
 305 W. Chesapeake Avenue
 Towson, Maryland 21204
 Telephone: 821-6350

I HEREBY CERTIFY that on this 31st day of March, 1980, a copy of the foregoing Appearance of Counsel was mailed, postage prepaid, to John W. Hessian, III, Esq., People's Counsel for Baltimore County, County Office Building, Towson, Maryland 21204.

H. Emalie Parks
 H. Emalie Parks



80-203-X

CERTIFICATE OF POSTING
 ZONING DEPARTMENT OF BALTIMORE COUNTY
 Towson, Maryland

District: 2nd Date of Posting: MARCH 24, 1980
 Posted for: PETITION FOR SPECIAL EXCEPTION
 Petitioner: ARTHUR R. SHAW, JR., ET UX
 Location of property: E/S GRANITE RD., 330' S. MARIOTTVILLE RD.
 Location of Signs: E/S GRANITE RD. 330' + or - S OF MARIOTTVILLE RD.
@ MARIOTTVILLE RD. OPPOSITE DEAD END OF LABURNUM RD.
 Remarks: ILLUMINATED SIGN
 Posted by: LIAMAS P. ROLAND Date of return: MARCH 28, 1980
 Signature

2-SIGNS

FUNCTION	Wall Map		Original		Duplicate		Tracing		200 Sheet	
	date	by	date	by	date	by	date	by	date	by
Descriptions checked and outline plotted on map										
Petition number added to outline										
Denied										
Granted by ZC, BA, CC, CA										
Reviewed by: <u>MMA</u>										
Revised Plans: Change in outline or description										
Previous case:										

RE: PETITION FOR SPECIAL EXCEPTION : BEFORE THE ZONING COMMISSIONER
 E/S Granite Rd., 330'
 S of Marriottsville Rd., 2nd District : OF BALTIMORE COUNTY
 Case No. 80-203-X
 ARTHUR R. SHAW, JR., et ux,
 Petitioners

ORDER TO ENTER APPEARANCE

Mr. Commissioner:

Pursuant to the authority contained in Section 524, I of the Baltimore County

Charter, I hereby enter my appearance in this proceeding. You are requested to notify me of any hearing date or dates which may be now or hereafter designated therefore, and of the passage of any preliminary or final Order in connection therewith.

Peter Max Zimmerman John W. Hessian, III
 Peter Max Zimmerman John W. Hessian, III
 Deputy People's Counsel People's Counsel for Baltimore County
 County Office Building
 Towson, Maryland 21204
 494-2188

I HEREBY CERTIFY that on this 19th day of March, 1980, a copy of the foregoing

Order was mailed to Mr. and Mrs. Arthur R. Shaw, 6311 Windsor Mill Road, Baltimore, Maryland 21207, Petitioners.

John W. Hessian, III
 John W. Hessian, III

LEGALS

PETITION FOR SPECIAL EXCEPTION
 LOCATION: East side of Granite Road, 330 feet South of Marriottsville Road
 DATE & TIME: Thursday, April 10, 1980 at 1:30 P.M.
 PUBLIC HEARING: Room 106, County Office Building, 111 W. Chesapeake Avenue, Towson, Maryland
 The Zoning Commissioner of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County, will hold a public hearing on the above-captioned Petition for Special Exception for a wireless transmitting tower and receiving structure 500 feet in height including a control house.
 All that parcel of land in the Second District of Baltimore County (2) Beginning for the same at a point in the center of Granite Road, said parcel being 300 feet southerly 300 feet measured along the centerline of said Granite Road from its intersection with the center of Marriottsville Road (1) South 72 degrees 41' North 17 degrees East 240 feet (2) North 17 degrees East 219.0 feet (3) North 77 degrees 53 minutes East 170.50 feet (4) North 12 degrees 07' minutes East 200 feet (5) North 77 degrees 07' minutes East 225 feet (6) North 77 degrees 07' minutes East 395.30 feet (7) South 11 degrees 44' West 80.19 feet (8) North 04 degrees 48 minutes 50 seconds East 716.80 feet (9) North 72 degrees 41' minutes East 240 feet to a point in the center of said Granite Road thence binding thence North 17 degrees 18 minutes 30 seconds East 50 feet to the place of beginning.
 Containing 14.55 acres of land more or less.
 Being the property of Arthur R. Shaw, Jr., et ux, as shown on plat plan filed with the Zoning Department.
 Hearing Date: Thursday, April 10, 1980 at 1:30 P.M.
 Public Hearing: Room 106, County Office Building, 111 W. Chesapeake Avenue, Towson, Maryland
 BY ORDER OF
 WILLIAM E. HAMMOND
 ZONING COMMISSIONER
 OF BALTIMORE COUNTY

CERTIFICATE OF PUBLICATION

A-1233

Pikesville, Md., March 20th 19 80

THIS IS TO CERTIFY, that the annexed advertisement was published in the NORTHWEST STAR, a weekly newspaper published in Pikesville, Baltimore County, Maryland before the 10th day of April 19 80 the first publication appearing on the 20th day of March, 19 80 the second publication appearing on the day of 19 the third publication appearing on the day of 19

THE NORTHWEST STAR

William E. Hammond
 Manager

Cost of Advertisement \$46.00

PETITION FOR SPECIAL EXCEPTION

LOCATION: East side of Granite Road, 330 feet South of Marriottsville Road
 DATE & TIME: Tuesday, April 1, 1980 at 1:30 P.M.
 PUBLIC HEARING: Room 106, County Office Building, 111 W. Chesapeake Avenue, Towson, Maryland
 The Zoning Commissioner of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County, will hold a public hearing on the above-captioned Petition for Special Exception for a wireless transmitting tower and receiving structure 500 feet in height including a control house.
 All that parcel of land in the Second District of Baltimore County (2) Beginning for the same at a point in the center of Granite Road, said parcel being 300 feet southerly 300 feet measured along the centerline of said Granite Road from its intersection with the center of Marriottsville Road (1) South 72 degrees 41' North 17 degrees East 240 feet (2) North 17 degrees East 219.0 feet (3) North 77 degrees 53 minutes East 170.50 feet (4) North 12 degrees 07' minutes East 200 feet (5) North 77 degrees 07' minutes East 225 feet (6) North 77 degrees 07' minutes East 395.30 feet (7) South 11 degrees 44' West 80.19 feet (8) North 04 degrees 48 minutes 50 seconds East 716.80 feet (9) North 72 degrees 41' minutes East 240 feet to a point in the center of said Granite Road thence binding thence North 17 degrees 18 minutes 30 seconds East 50 feet to the place of beginning.
 Containing 14.55 Acres of land, more or less.
 Being the property of Arthur R. Shaw, Jr., et ux, as shown on plat plan filed with the Zoning Department.
 Hearing Date: Tuesday, April 1, 1980 at 1:30 P.M.
 Public Hearing: Room 106, County Office Building, 111 W. Chesapeake Avenue, Towson, Maryland.
 BY ORDER OF
 WILLIAM E. HAMMOND,
 Zoning Commissioner
 of Baltimore County
 Mar. 11.

CERTIFICATE OF PUBLICATION

TOWSON, MD., March 13, 1980

THIS IS TO CERTIFY, that the annexed advertisement was published in THE JEFFERSONIAN, a weekly newspaper printed and published in Towson, Baltimore County, Md., on each of the following dates before the 1st day of March, 1980, the first publication appearing on the 13th day of March, 1980

L. Leand Switzer
 Manager

Cost of Advertisement, \$ 18.00

CERTIFICATE OF PUBLICATION

TOWSON, MD., March 20, 1980

THIS IS TO CERTIFY, that the annexed advertisement was published in THE JEFFERSONIAN, a weekly newspaper printed and published in Towson, Baltimore County, Md., on each of the following dates before the 10th day of April, 1980, the first publication appearing on the 20th day of March, 1980.

THE JEFFERSONIAN

L. Leand Switzer
 Manager

Cost of Advertisement, \$ 18.00

PETITION FOR SPECIAL EXCEPTION

LOCATION: East side of Granite Road, 330 feet South of Marriottsville Road
 DATE & TIME: Thursday, April 10, 1980 at 1:30 P.M.
 PUBLIC HEARING: Room 106, County Office Building, 111 W. Chesapeake Avenue, Towson, Maryland
 The Zoning Commissioner of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County, will hold a public hearing on the above-captioned Petition for Special Exception for a wireless transmitting tower and receiving structure 500 feet in height including a control house.
 All that parcel of land in the Second District of Baltimore County (2) Beginning for the same at a point in the center of Granite Road, said parcel being 300 feet southerly 300 feet measured along the centerline of said Granite Road from its intersection with the center of Marriottsville Road (1) South 72 degrees 41' North 17 degrees East 240 feet (2) North 17 degrees East 219.0 feet (3) North 77 degrees 53 minutes East 170.50 feet (4) North 12 degrees 07' minutes East 200 feet (5) North 77 degrees 07' minutes East 225 feet (6) North 77 degrees 07' minutes East 395.30 feet (7) South 11 degrees 44' West 80.19 feet (8) North 04 degrees 48 minutes 50 seconds East 716.80 feet (9) North 72 degrees 41' minutes East 240 feet to a point in the center of said Granite Road thence binding thence North 17 degrees 18 minutes 30 seconds East 50 feet to the place of beginning.
 Containing 14.55 Acres of land, more or less.
 Being the property of Arthur R. Shaw, Jr., et ux, as shown on plat plan filed with the Zoning Department.
 Hearing Date: Thursday, April 10, 1980 at 1:30 P.M.
 Public Hearing: Room 106, County Office Building, 111 W. Chesapeake Avenue, Towson, Maryland.
 BY ORDER OF
 WILLIAM E. HAMMOND,
 Zoning Commissioner
 of Baltimore County
 Mar. 30.

BALTIMORE COUNTY, MARYLAND
 OFFICE OF FINANCE-REVENUE DIVISION
 MISCELLANEOUS CASH RECEIPT

No. 85078

DATE: July 9, 1981 ACCOUNT: 01-712

AMOUNT: \$20.00

RECEIVED FROM: H. Emalie Parks, Esq., 409 Washington Ave., Towson, Md. 21204
 FOR: Case No. 80-203-X, Arthur R. Shaw, Jr., et ux - Md. 21204

B 1165*****20D01a 8095F
 VALIDATION OR SIGNATURE OF CASHIER

BALTIMORE COUNTY, MARYLAND
 OFFICE OF FINANCE-REVENUE DIVISION
 MISCELLANEOUS CASH RECEIPT

No. 86365

DATE: March 28, 1980 ACCOUNT: 01-662

AMOUNT: \$31.00 (check)

RECEIVED FROM: Shaw Real Service, Inc.
 FOR: Posting & Advertising property Case No. 80-203-X

VALIDATION OR SIGNATURE OF CASHIER

BALTIMORE COUNTY, MARYLAND
 OFFICE OF FINANCE-REVENUE DIVISION
 MISCELLANEOUS CASH RECEIPT

No. 089638

DATE: July 24, 1980 ACCOUNT: 01-662

AMOUNT: \$80.00

RECEIVED FROM: H. Emalie Parks, Esquire
 FOR: Filing Fee for Appeal of Case No. 80-203-X

VALIDATION OR SIGNATURE OF CASHIER

BALTIMORE COUNTY, MARYLAND
 OFFICE OF FINANCE-REVENUE DIVISION
 MISCELLANEOUS CASH RECEIPT

No. 86323

DATE: March 4, 1980 ACCOUNT: 01-662

AMOUNT: \$50.00

RECEIVED FROM: Arthur R. Shaw, Jr.
 FOR: Advertising and Posting for Case No. 80-203-X

VALIDATION OR SIGNATURE OF CASHIER

CERTIFICATE OF POSTING

ZONING DEPARTMENT OF BALTIMORE COUNTY
 Towson, Maryland

District: 2nd Date of Posting: AUG. 2, 1980
 Posted for: APPEAL
 Petitioner: ARTHUR R. SHAW, JR., ET UX
 Location of property: E/S OF GRANITE RD., 330' S. OF MARIOTTVILLE RD.
 Location of Signs: #1 E/S OF GRANITE RD. 330' + or - S OF MARIOTTVILLE RD., #2 MARIOTTVILLE RD. OPPOSITE DEAD END OF LABURNUM RD.
 Remarks: ILLUMINATED SIGN
 Posted by: LIAMAS P. ROLAND Date of return: AUG. 9, 1980
 Signature
 Number of Signs: TWO

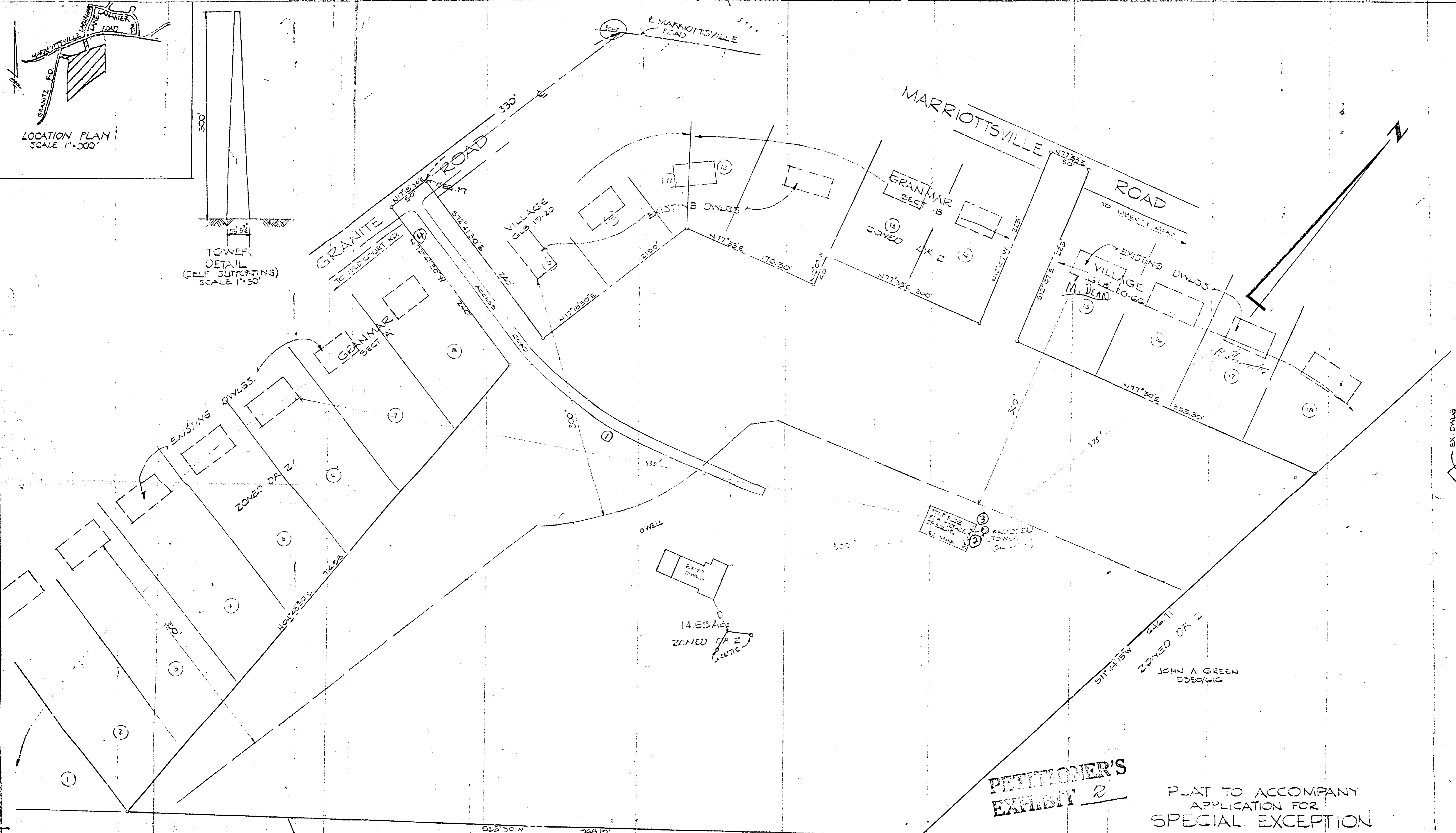
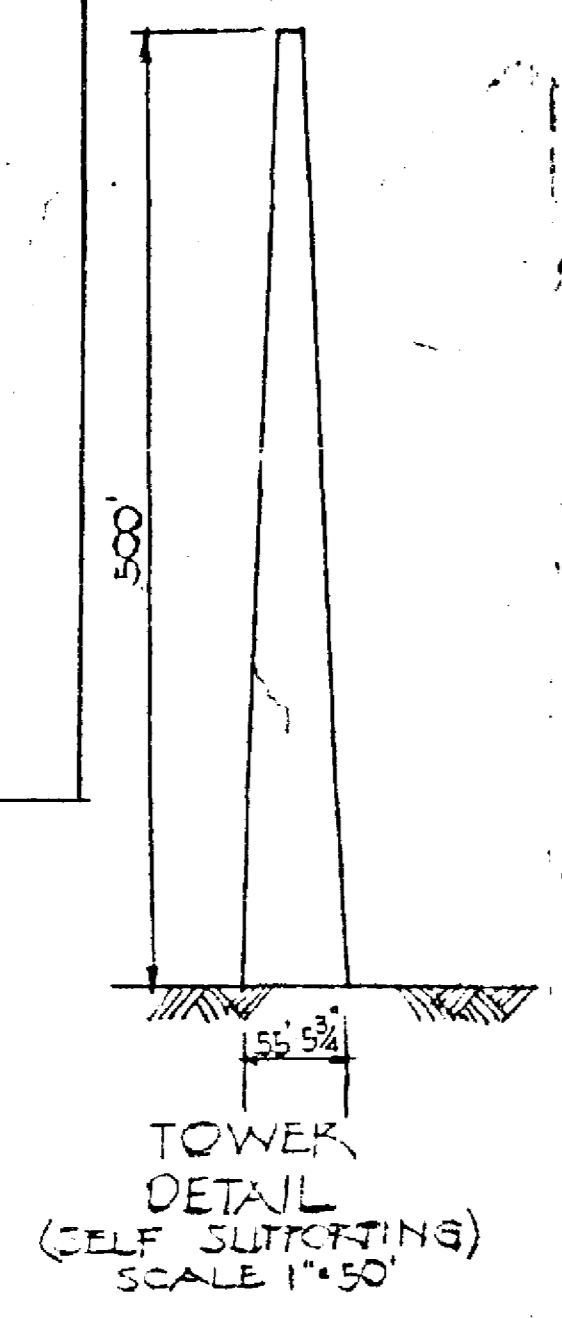
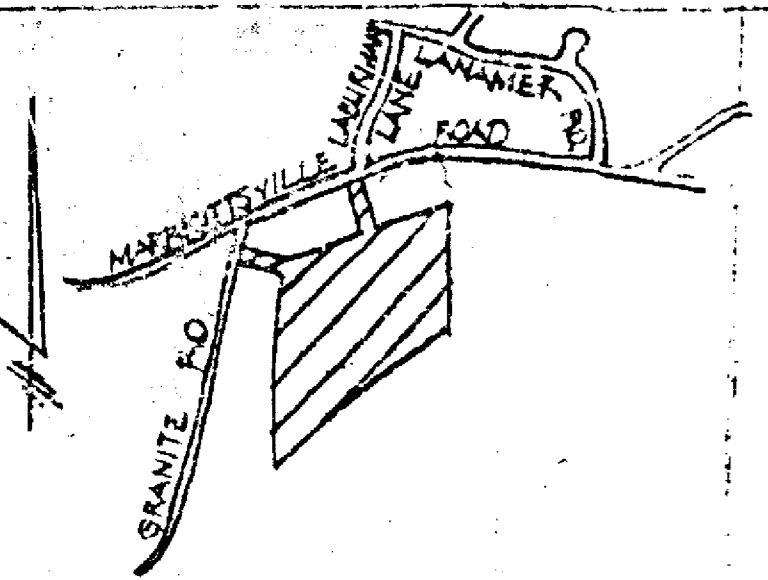
80-203-X

80-203-X
 (Item 144)

E/S of Granite Rd., 330' S of Marriottsville Rd.

Arthur R. Shaw, Jr., et ux

2 SIGNS



KATHRYN E. RIEBEN
4462/178



THE NATIONAL BIRCHWOOD CORP
4257-703
49.3 AC.
ZONED DR 2

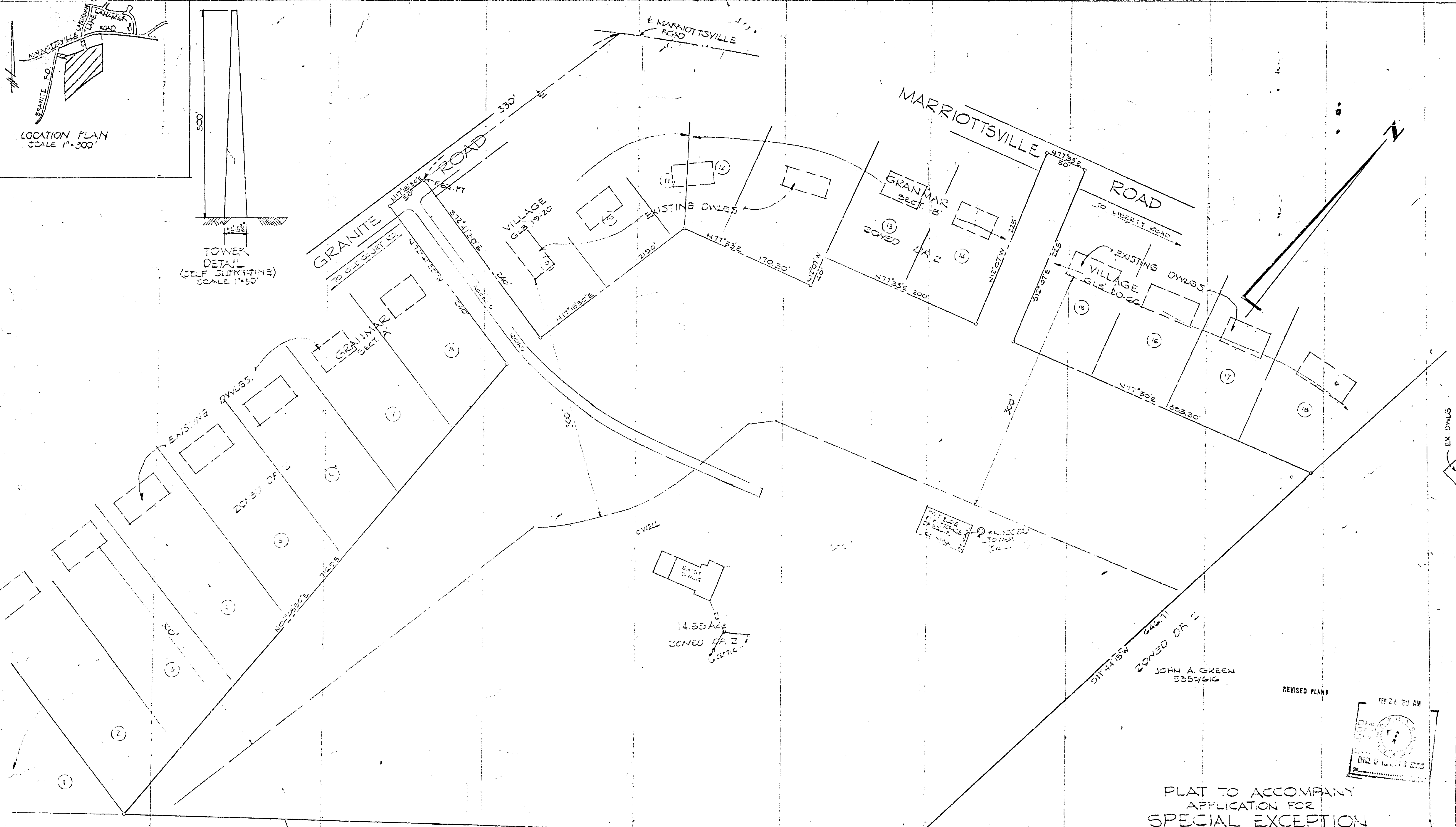
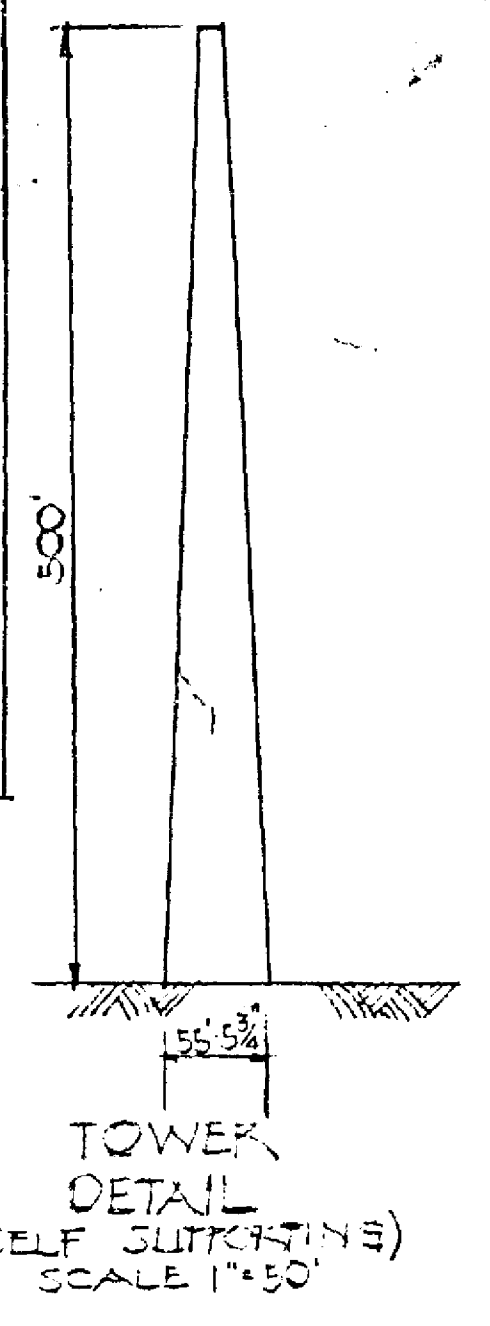
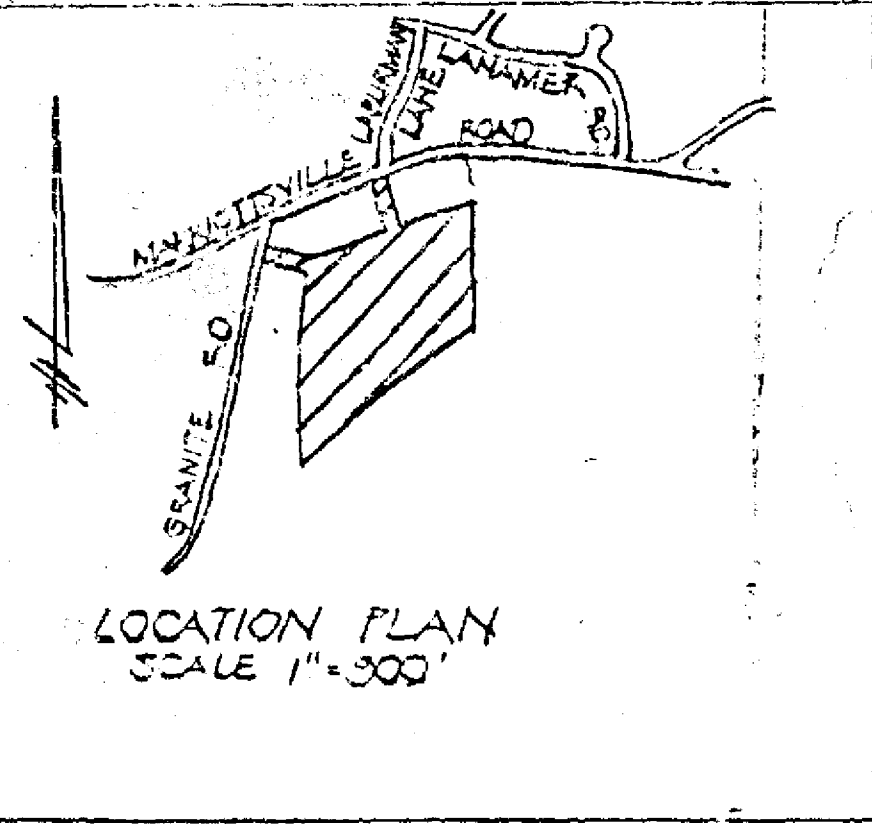
NOTES:
EX. ZONING DR 2

PETITIONER'S EXHIBIT 2

PLAT TO ACCOMPANY APPLICATION FOR SPECIAL EXCEPTION

PROPERTY LOCATED OFF
MARIOTTSVILLE & GRANITE RDS.
2ND ELECTION DISTRICT BALTIMORE CO.
MARYLAND
SCALE: 1"=50' APRIL 13, 1979
2:20:50

OWNER:
ARTHUR SHAW JR
418-119



KATHRYN E. RIEBEN
4422/275



THE NATIONAL BIRCHWOOD CORP.
4257-703
49.3 AC.
ZONED DR 2

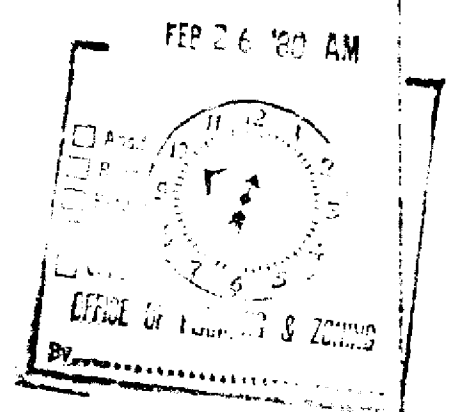
NOTES
1. EX. ZONING DR 2

PLAT TO ACCOMPANY
APPLICATION FOR
SPECIAL EXCEPTION

PROPERTY LOCATED OFF
MARIOTTSVILLE & GRANITE RDS.
2ND ELECTION DISTRICT BALTIMORE CO.
MARYLAND

SCALE 1"=50' APRIL 13, 1975
2:20:30

OWNER:
ARTHUR SHAW JR.
418-110



REVISED PLANS

JOHN A. GREEN
535/616

PETITION FOR SPECIAL EXCEPTION

2nd District

ZONING: Petition for Special Exception
LOCATION: East side of Granite Road, 330 feet South of Marriottsville Road
DATE & TIME: Tuesday, April 1, 1980 at 1:30 P.M.
PUBLIC HEARING: Room 105, County Office Building, 111 W. Chesapeake Avenue, Towson, Maryland

The Zoning Commissioner of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County, will hold a public hearing:

Petition for Special Exception for a wireless transmitting tower and receiving structure 500 feet in height including a control house

All that parcel of land in the Second District of Baltimore County

Being the property of Arthur R. Shaw, Jr., et ux, as shown on plat plan filed with the Zoning Department

Hearing Date: Tuesday, April 1, 1980 at 1:30 P.M.
Public Hearing: Room 105, County Office Building, 111 W. Chesapeake Avenue, Towson, Maryland

BY ORDER OF WILLIAM B. HANCOCK ZONING COMMISSIONER OF BALTIMORE COUNTY

PETITION OF OBJECTION

We the under-signed file this petition as an indication of our objection to the construction of a 500 ft. transmitting and receiving tower referenced in the zoning petition # 80203-X.

A partial list of the objections are as follows:

- * Height (Washington Monument 555ft.)
* Purpose (Commercial use)
* Location (Residential area)
* Unknown radio interference (appliances, television, telephone)
* Safety to residents & property (children climbing; ice blowing off; blowing paint during maintenance)
* Property devaluation

This list is by no means inclusive of all our objections.

Table with columns: NAME, ADDRESS, SIGNATURE. Lists 25 objectors including Patricia L. Smith, Barry Phipps, Evelyn D. Parks, etc.

WITH THIS SIGNATURE I CERTIFY THE WITNESSING OF THE ABOVE SIGNATURES

494-3165

County Board of Appeals
Room 219, Court House
Towson, Maryland 21204

Jan. 9, 1981

NOTICE OF ASSIGNMENT

NO POSTPONEMENTS WILL BE GRANTED WITHOUT GOOD AND SUFFICIENT REASONS. REQUESTS FOR POSTPONEMENTS MUST BE IN WRITING AND IN STRICT COMPLIANCE WITH BOARD RULE 2(b). ABSOLUTELY NO POSTPONEMENTS WILL BE GRANTED WITHIN FIFTEEN (15) DAYS OF SCHEDULED HEARING DATE IN ACCORDANCE WITH RULE 2(c), COUNTY COUNCIL BILL #108

CASE NO. 80-203-X ARTHUR R. SHAW, JR., et ux
SE-Wireless transmitting tower and receiving structure 500' in height
E/S of Granit Rd., 330' S of Marriottsville Rd.
2nd District
7/3/80 - Z.C. (Hammond) DENIED special exception

ASSIGNED FOR: TUESDAY, APRIL 14, 1981, at 10 a.m.

- cc: H. Emilie Parks, Esq. Counsel for Petitioners
Mr. & Mrs. Arthur Shaw, Jr. Petitioners
Mr. C. M. Schevker Protestant
Mr. Homer Seidel, Jr.
Mr. M. S. Dean
Mr. Barry Smith
John W. Hession, Esq. People's Counsel
J. E. Dyer Zoning Office
W. Hammond
Mr. C. Waller
Ms. Jane Phipps
Mr. Arnold Jablon

Entered 4/14/81 George W. Liebmann, Esq. Counsel for Protestants (Village of Kings Park Community Assn., Herwood Heights Community Assn., Michael Dean, Lawrence Phipps, and Jane Phipps)
June Holmen, Secretary

PETITION OF OBJECTION

We the under-signed file this petition as an indication of our objection to the construction of a 500 ft. transmitting and receiving tower referenced in the zoning petition # 80203-X.

A partial list of the objections are as follows:

- * Height (Washington Monument 555ft.)
* Purpose (Commercial use)
* Location (Residential area)
* Unknown radio interference (appliances, television, telephone)
* Safety to residents & property (children climbing; ice blowing off; blowing paint during maintenance)
* Property devaluation

This list is by no means inclusive of all our objections.

Table with columns: NAME, ADDRESS, SIGNATURE. Lists 25 objectors including Patricia L. Smith, Barry Phipps, Evelyn D. Parks, etc.

WITH THIS SIGNATURE I CERTIFY THE WITNESSING OF THE ABOVE SIGNATURES

April 14, 1981

Re: 80-203-X, Arthur R. Shaw, Jr.
The undersigned were present at the hearing Room 105, PROTESTANTS, DURING THE HEARING ON THIS CASE.

Table with columns: NAME, ADDRESS. Lists names and addresses of attendees including Lawrence Phipps, Jane Phipps, Patricia L. Smith, etc.

PETITION OF OBJECTION

We the under-signed file this petition as an indication of our objection to the construction of a 500 ft. transmitting and receiving tower referenced in the zoning petition # 80203-X.

A partial list of the objections are as follows:

- * Height (Washington Monument 555ft.)
* Purpose (Commercial use)
* Location (Residential area)
* Unknown radio interference (appliances, television, telephone)
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* Property devaluation

This list is by no means inclusive of all our objections.

Table with columns: NAME, ADDRESS, SIGNATURE. Lists names and addresses of attendees including Patricia L. Smith, Barry Phipps, Evelyn D. Parks, etc.

WITH THIS SIGNATURE I CERTIFY THE WITNESSING OF THE ABOVE SIGNATURES

PETITION OF OBJECTION

We the under-signed file this petition as an indication of our objection to the construction of a 500 ft. transmitting and receiving tower referenced in the zoning petition # 80203-X.

A partial list of the objections are as follows:

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* Purpose (Commercial use)
* Location (Residential area)
* Unknown radio interference (appliances, television, telephone)
* Safety to residents & property (children climbing; ice blowing off; blowing paint during maintenance)
* Property devaluation

This list is by no means inclusive of all our objections.

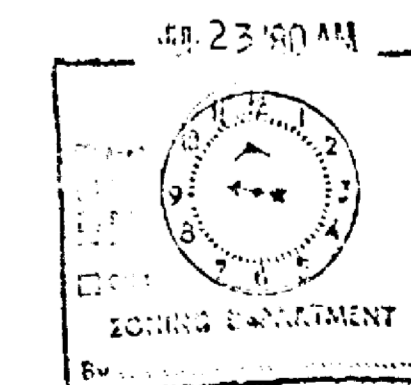
Table with columns: NAME, ADDRESS, SIGNATURE. Lists names and addresses of attendees including Patricia L. Smith, Barry Phipps, Evelyn D. Parks, etc.

WITH THIS SIGNATURE I CERTIFY THE WITNESSING OF THE ABOVE SIGNATURES

RE: PETITION FOR SPECIAL EXCEPTION *
E/S of Granite Road, 330' S. of *
Marriottsville Road - 2nd Election * BEFORE THE
District * ZONING COMMISSIONER
Arthur R. Shaw, Jr., et ux * OF
Petitioners * BALTIMORE COUNTY
No. 80-203-X (Item No. 406) *

NOTICE OF APPEAL BY ARTHUR R. SHAW, JR. AND DOROTHY B. SHAW

Mr. Commissioner:
Please enter an appeal by Arthur R. Shaw, Jr. and Dorothy B. Shaw, 6311 Windsor Mill Road, Baltimore, Maryland 21207, to the Board of Appeals of Baltimore County from the order entered in the above matter on July 3, 1980.



LEONARD S. VAN NOTEN
WRIGHT & PARKS
305 W. Chesapeake Ave.
Towson, Md. 21204
(301) 321-6350
Attorneys for Arthur R. Shaw, Jr., and Dorothy B. Shaw

I HEREBY CERTIFY that on this 22 day of July, 1980, I have mailed a copy of the above Notice of Appeal to Mr. Charles M. Schevker, 10101 Marriottsville Rd., Randallstown, Md. 21133, Mr. Homer Seidel, Jr. 10012 Marriottsville Rd., Randallstown, Md. 21133, Mr. Michael S. Dean, 10017 Marriottsville Road, Randallstown, Md. 21133, Mr. Larry Smith, 3615 Granite Road, Randallstown, Md. 21133, John W. Hession, III, Esquire, People's Counsel, County Courts Bldg., Towson, Md. 21284.

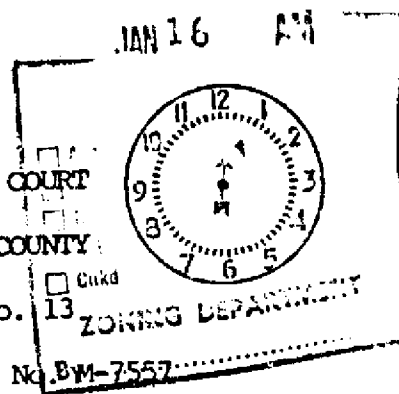
PETITION FOR SPECIAL EXCEPTION
for a wireless transmitting tower
and receiving structure 500' in
height including a control house
E/S of Granite Rd., 3302 S. of
Marriottsville Road, 2nd District

ARTHUR R. SHAW, JR., et ux,
Petitioners

Zoning File No. 80-203-X

: : : : : :

IN THE CIRCUIT COURT
FOR BALTIMORE COUNTY
Misc. Docket No. 13
Folio 207/File No. BM-7557



ANSWER TO MOTION TO REVISE ORDER AND REQUEST FOR HEARING

People's Counsel for Baltimore County answers as follows:

1. People's Counsel admits Paragraphs 1-3, but further states that the reference to Section 502.3 of the Baltimore County Zoning Regulations (BCZR) is incomplete and misleading.
2. People's Counsel denies Paragraph 4.
3. In further answering, People's Counsel states:
 - (a) There has been no fraud, mistake, or irregularity.
 - (b) Pursuant to BCZR Section 502.3, the Zoning Commissioner, and on appeal, the County Board of Appeals, have authority to establish the time limit for utilization of a Special Exception, and the Court has no original jurisdiction to establish the time limit.
 - (c) Pursuant to BCZR 502.3, the time limit is generally established at two years, unless the Commissioner or Board specifies a longer period not exceeding five years.
 - (d) In the present case, because the Order did not specify a period longer than two years, the time limit was thereby necessarily set at two years.
4. In further answering, People's Counsel states that the jurisdiction to grant extensions of time limits is in the Zoning Commissioner and not in the Circuit Court. In the present case, the time for requesting

- 2 -

an extension has passed, and the Special Exception has expired.

5. In further answering, People's Counsel states that the Movants' remedy is to file a new Special Exception proceeding. The rights under the old Special Exception have been extinguished.

Phyllis Cole Friedman
People's Counsel for Baltimore County

Peter Max Zimmerman
Deputy People's Counsel
Room 223, Court House
Towson, Maryland 21204
494-2188

STATEMENT OF POINTS AND AUTHORITIES:

BCZR 502.3 states,

"A Special Exception which has not been utilized within a period of two years from the date of the final order granting same, or such longer period not exceeding five years, as may have been specified therein, shall thereafter be void. The Zoning Commissioner or, on appeal, the County Board of Appeals, in connection with the grant of any Special Exception, shall fix within the foregoing limits, the period of time for its utilization. Any party to the proceedings may, by so specifying, appeal from either the order of the Zoning Commissioner or of the County Board of Appeals as the case may be, solely as to the reasonableness of the period of time allowed or, alternatively, may have such question determined in conjunction with any appeal from the grant or refusal of the application for a Special Exception. After a final order granting a Special Exception the Zoning Commissioner, at any time prior to expiration of the period of time authorized for its utilization, may grant one or more extensions of such period, provided that a maximum time for utilization of the Special Exception is not thereby extended for a period of more than five years from the date of the final order granting same. [B.C.Z.R., 1955; Bills No. 42, 1962; No. 85, 1967.]

⁶ Thus (comma) in Bills No. 42, 1962 and No. 85, 1967."

- 3 -

Until the filing of the present Motion, the Petitioner never made an issue of the two year time limit for utilization and failed to take advantage of the opportunity to request an extension in timely fashion. In any event, the question of time limit is clearly not an "irregularity" under Rule 2-535, such being limited to matters which go to the heart and integrity of the judicial process.

People's Counsel reserves the right to file a supplemental Memorandum as necessary and appropriate.

Peter Max Zimmerman

I HEREBY CERTIFY that on this 14th day of January, 1986, a copy of the foregoing Answer to Motion to Revise Order and Request for Hearing was mailed to H. Enslie Parks, Esquire and Leland S. Van Koten, Esquire, Parks, Hansen & Ditch, Suite 1012, 409 Washington Ave., Towson, MD 21204, Attorneys for Appellant; Malcolm F. Spicer, Jr., Esquire, County Attorney, Office of Law, Mezzanine, Court House, Towson, MD 21204; and Arnold Jablon, Zoning Commissioner, County Office Building, Towson, MD 21204.

Peter Max Zimmerman

PETITION FOR SPECIAL EXCEPTION * IN THE
 for a wireless transmitting tower * CIRCUIT COURT
 and receiving structure 500' in *
 height including a control house * FOR BALTIMORE COUNTY
 E/S of Granite Road, 330² S. of *
 Marriottsville Road * Mis. Docket No. 13
 2nd District *
 ARTHUR R. SHAW, JR., et ux * Folio 207/File No. M-7557
 Petitioners *
 Zoning File No. 80-203-X *

MOTION TO REVISE ORDER

Arthur R. Shaw, Jr. and Dorothy B. Shaw, Petitioners, by its undersigned counsel of record, moves this Court to revise its Order dated May 26, 1982, and as grounds therefor states as follows:

1. The said Order did not set forth a date for the expiration of the special exception granted therein.
2. Section 502.3 of the Baltimore County Zoning Regulations provides, in pertinent part, that an order granting a special exception "shall fix within the foregoing limits, the period of time for its utilization."
3. Pursuant to Section 502.3 of the Baltimore County Zoning Regulations, a special exception may be granted for a period of not less than two (2) nor more than five (5) years.
4. The failure to specify a time for utilization of the of the special exception is either a mistake or irregularity or a clerical mistake, thus justifying the exercise of this Court's revisory power under Rule 2-535 of the Maryland Rules of Procedure.

WHEREFORE, Appellant respectfully prays that the Order of this Court entered on May 26, 1982 be revised to include the following language: "The

said special exception shall expire five (5) years from May 26, 1982, unless construction of the improvements permitted by this Order shall have commenced prior thereto."

H. Emslie Parks
 H. Emslie Parks
Leland S. Van Koten
 Leland S. Van Koten
 Parks, Hansen & Ditch
 Suite 1012
 409 Washington Ave.
 Towson, Md. 21204
 (301) 821-6350

Attorneys for Appellant

I HEREBY CERTIFY that on this 5th day of January, 1986, I have mailed a copy of the within Motion, Memorandum and proposed Order, to Phyllis Cole Friedman, Esquire, People's Counsel for Baltimore County, Peter Max Zimmerman, Esquire, Deputy People's Counsel, Room 223 Court House, Towson, Maryland 21204, Arnold Jablon, Esquire, 2338 York Road, Timonium, Md. 21093, attorney for Protestants, and County Board of Appeals of Baltimore County, Room 219 Court House, Towson, Md. 21204.

Leland S. Van Koten
 Leland S. Van Koten

PETITION FOR SPECIAL EXCEPTION * IN THE
 for a wireless transmitting tower * CIRCUIT COURT
 and receiving structure 500' in *
 height including a control house * FOR BALTIMORE COUNTY
 E/S of Granite Road, 330² S. of *
 Marriottsville Road * Mis. Docket No. 13
 2nd District *
 ARTHUR R. SHAW, JR., et ux * Folio 207/File No. M-7557
 Petitioners *
 Zoning File No. 80-203-X *

MEMORANDUM OF POINTS AND AUTHORITIES
 IN SUPPORT OF MOTION TO REVISE ORDER

Section 502.3 of the Baltimore County Zoning Regulations requires that an order granting a special exception "shall fix within the foregoing limits, the period of time for its utilization." The limits referred to are a minimum duration of two (2) years and a maximum duration of five (5) years. The obvious purpose of this requirement is to give the property owner notice of the time within which he must use the special exception.

Despite the above requirement, the Order entered by the Court on May 26, 1982, failed to state a time for utilization of the special exception—an omission which was not noticed by anyone at the time. Although more than thirty days have passed since the entry of the Order, Rule 2-535(b) of the Maryland Rules of Procedure specifically permits the Court to exercise revisionary power over a judgment on motion of a party "filed at any time," in the case of "mistake, or irregularity." Similarly, Rule 2-535(d) permits clerical mistakes to be corrected at any time.

An "irregularity" has been consistently defined by the Court of Appeals as "the doing or not doing of that, in the conduct of a suit at law, which, conformable with the practice of the court, ought or ought not to be done." Mutual Benefit Society of Baltimore, Inc. v. Haywood, 257 Md. 538, 541, 263

A.2d 868 (1970), quoting Berwyn Fuel and Feed Co. v. Kolb, 249 Md. 475, 479, 240 A.2d 239 (1968).

It seems clear that failure to state a time for utilization of the special exception was an "irregularity" within the contemplation of Rule 2-535 and that the Court may revise its Order to provide that the special exception must be used within five (5) years of the original order. It is therefore respectfully urged that the Motion to Revise Order be granted.

H. Emslie Parks
 H. Emslie Parks

Leland S. Van Koten
 Leland S. Van Koten
 Parks, Hansen & Ditch
 Suite 1012
 409 Washington Ave.
 Towson, Md. 21204
 (301) 821-6350

Attorneys for Appellant

PETITION FOR SPECIAL EXCEPTION * IN THE
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 Petitioners *
 Zoning File No. 80-203-X *

ORDER

Upon consideration of Petitioners' Motion to Revise Order and of the Memorandum of Points and Authorities filed in support thereof, it is this day of

1986, by and for the Circuit Court for Baltimore County

ORDERED that the Order entered by this Court on May 26, 1982, be and it is hereby revised to include the following language:

"The said special exception shall expire five (5) years from May 26, 1982, unless construction of the improvements permitted by this Order shall have commenced prior thereto."

 Judge

MATTHEW J. VLISSIDES & ASSOCIATES
ENGINEERING CONSULTANTS
7601 BURFORD DRIVE
MCLEAN, VIRGINIA 22102
(703) 356-9504

KEY PERSONNEL RESUME'S
&
LIST OF MAJOR PROJECTS

1970 - 1980

- WKBN-TV 1500' G. Tower Analysis & Design
- Design of 5 Sectionalized Loran "C" Antenna Systems
- Design of 3 Loran "B" Antenna Systems
- 105' Tracking Antenna, Muscat, Oman
- WLBT-TV 2000' G. Tower Inspection & Analysis
- WPLG-TV 1000' G. Tower Inspection, Analysis & Modification
- WCKT-TV 1000' G. Tower Inspection, Analysis & Modification
- WMAU-TV 1000' G. Tower Inspection, Analysis & Modification
- WWDC-FM 400' G. Tower Expansion
- WRC-TV 400' S.S. Tower Inspection, Analysis & Modification
- American University 400' S.S. Tower Analysis & Modification
- Louisville Police Department 200' S.S. Tower Inspection, Analysis & Reinforcement
- Norfolk & Western Railways M/W System Design of Civil Works for GT & E International, Waltham, Massachusetts
- Supervision of Construction for the Etam, W. Va. and Andover, Earth Satellite Stations for COMSAT Corp.
- WNDU-TV 1000' G. Tower Replacement of Existing Guying System with Insulated One
- Greater Motower, 1000' G. Tower Turnkey Contract
- E. Mernone, 800' S.S. Tower Reinforcement & Addition of New Antennas
- WKBN-TV 1500' G. Tower Turnkey Contract
- KOLR 500' G. Tower Inspection, Analysis & Evaluation
- WEAU-TV 1000' & 2000' G. Towers Inspection, Analysis & Evaluation
- WJBC-2 Addition of NURAD Microwave Antenna to existing 1000' G. Tower
- WFGC 400' FM G. Tower Analysis
- WIVK-AM/FM 900' G. Tower Erection
- Fairchild OLAA/STC Data Link U.S. Air Force Terminals

- Kankakee Cable TV 400' G. Tower Inspection & Analysis
- WTMJ-TV 1000' G. Tower Inspection & Analysis
- WNYS-TV 886' G. Tower Inspection & Evaluation
- WLCY-TV 461' G. Tower Inspection & Evaluation
- T-Cas Inc., Technical Evaluation of Bidder Responses to the Nigerian Ministry of Communications Standard Specification, Design, Fabrication and Erection of Towers
- Motorola, Inc. 125' S.S. Tower Inspection & Analysis
- KEDT-TV 1000' G. Tower Inspection & Analysis
- WESH-TV 1000' G. Tower Inspection, Analysis & Evaluation
- MCI Telecommunications Colorado-California M/W System Tower Analyses
- WBNS-TV 1300' Candelabra G. Tower Analysis & Preliminary Design
- WITG-TV 640' S.S. Tower Inspection, Analysis & Evaluation
- Sanders Associates Low and High Band Rombic Antenna Analyses
- WKQQ-FM 550' G. Tower Inspection, Analysis & Evaluation
- WJXT-TV 900' G. Tower Inspection, Analysis & Evaluation
- KIMT-TV 1500' G. Tower Inspection, Analysis & Evaluation
- Intelsat Kuwait 105' Tracking Antenna Consulting
- WREX-TV 600' G. Tower Inspection, Analysis & Evaluation
- KCTS-TV 500' S.S. Tower Inspection & Analysis
- WTVF-TV 1200' G. Tower Inspection, Analysis & Evaluation
- KOTV-TV 1133' G. Tower Inspection, Analysis & Evaluation
- NOAA/NESS (3) 24' Tracking Antennas Design & Installation of New Driving System.
- WABB-FM 840' G. Tower Analysis & Design
- COMSAT Torus Antenna Structural Analysis & Design for Andover, Etam, California & Alaska
- WSBK-TV 1250' G. Tower Inspection, Analysis & Evaluation
- WSBT-TV 1000' G. Tower Analysis, Evaluation & Reinforcement Design

MATTHEW J. VLISSIDES, P.E.

"Mr. M.J. Vlissides, an Engineering Consultant, has 20 years experience in structural and mechanical engineering and is a specialist in antenna and tower design, fabrication supervision and installation.

"During the past ten years he has performed extensive successful consulting work in the area of communications for L.T.V. Electro-systems, Inc., Comsat Corporation, Northrop-PAGE Communications Engineers, Inc., NASA Goddard Space Flight Center, ITT-SPC, COSMOS Engineers, Inc., Stainless, Inc., Bachtel Corporation, MCI, Micro-flect Company, Inc., R.F. Systems, Inc., Telcom, Inc., DCA, Coast Guard, Plessey Ltd., Burleson Associates, Inc., E-Systems, Inc., RCA, Fairchild Space & Electronics, Inc., David L. Steel, Sr., P.E., Harris International, RCA Global, RMS, Sanders Associates, T-Cas, TELCOM, Teleconsult, Intelsat, numerous Broadcasting Stations throughout the USA, and others.

"Prior to establishing his consulting office, Mr. Vlissides was chief structural engineer for Northrop-PAGE where he was responsible for the analysis, design, specification writing and fabrication supervision of advanced structures, such as self-supporting and guyed communication towers, antennas, tracking stations, radio telescopes and structures for the space communications program. He was instrumental in the development of the 42' antenna transportable commercial station operated by Comsat, and in the design of the wheel and track antenna and the integrated two-story building with antenna on top, utilized by LTV Aircraft Company.

"Mr. Vlissides has participated in the successful engineering and implementation of several multimillion dollar projects, including the structural design and implementation of earth stations in Panama, Iran, Lebanon, Brazil, and the Comsat stations at Brewster, Andover and Paumotu. He was responsible for the mechanical design of earth stations in Australia, Thailand and the Philippines, as well as West Coast tracking stations for the U.S. Navy.

"In the intricate area of shock and vibration isolation and electronic equipment packaging in shelters, Mr. Vlissides has solved difficult problems for Page Communications Engineers at OGDEN Laboratories involving the MRC-113 U.S. Air Force Program.

"Mr. Vlissides participated in the analysis, design and implementation of large microwave and troposcatter communication programs, including the multimillion dollar IWCS in Vietnam, The Iranian Microwave (INTS), the NATO Bypass, and the Hongkong-Taiwan-Philippines tropo system. The major areas of involvement covered feasibility studies, advance survey details, civil-mechanical and electrical designs, and final implementation.

'Mr. Vlissides' major recent studies and prototype designs include:

- Large Tracking Antenna Tower & Foundation Analysis & Design Consideration (July 1968)
- Large Tracking Antenna Building & Foundation Earthquake Analysis & Design Considerations (July 1968)
- Application of Fiberglass/Plastic to transportable Communications systems
- High-gain Antennas Surface Geometry Determination (Jan. 1968)
- Optimum Antenna Design for Synchronous Communications Satellites (Jan. 1970)
- Original Design of 32-foot Transportable or Fixed Tracking Antennas (April 1971)
- Participation in the preparation of Earth Station Antenna Standards for the Electronics Industries Association (EIA) (1969-1971)

"Effective low cost methods for equipment shock and vibration isolation (June 1971)

Design of an experimental multibeam antenna system of satellite communications (1971-1972) Comsat Corporation

Analysis, design & fabrication supervision of the Sectionalized Loran-C Transmitting Antenna for Cosmos Engineers, Inc. and the U.S. Coast Guard (1972-1973)

"Mr. Vlissides has a B.S. degree from the Athens Greece Military Academy, B.C.E. and M.C.E. in Structural Mechanics from the Catholic University of America, where he has been a Doctoral Candidate in Structural Mechanics and Dynamics.

His language capabilities include English and Greek.

BIOGRAPHICAL SKETCH

Name: Sol Hirsch

Born: February 8, 1923, New York, N.Y.

Education: B.S. degree, City College of New York, 1950.
Meteorology Major
M.S. degree, Johns Hopkins University, 1971.
Management Science, Operations Research, Statistics

Experience: Served in Army Air Force, 1943-1946, as an observer.

Entered service with United States Weather Bureau in October 1950 at Baltimore, Maryland. Served as an observer-briefer, 1950-1952. Public Service forecaster for period 1952-1962; originated Maryland State forecasts during portion of this period.

Began service with the National Environmental Satellite Service in 1962 and was involved in the following activities:

- Surveillance of tropical systems on a world-wide basis; obtained empirical estimates of max wind speed; sent bulletins to foreign countries.
- Summaries of tropical conditions on a world-wide basis.
- Empirical estimates of moisture in cloud systems which were entered into the N M C analyses and progs.
- Frontal Analyses of weather systems in the northern and southern hemispheres.
- Participant in excessive precipitation estimation program.
- Prepared cloud progs based on PE progs for N M C Aviation Branch.
- Briefed forecasters in most N M C Branches.
- Developed and wrote most of the SOP's in the Satellite Analysis Branch.

In July of 1978 began special assignment to the Department of Agriculture; objective was to develop a unit to service needs of the Department. Established satellite section in this unit and set procedures to maintain surveillance of the entire world. Established procedures to facilitate briefing in areas from Australia, Southeast Asia westward to South America. Made short range forecasts for these areas on an irregular basis. Developed format for daily briefings of agriculture officials. A special briefing was held for Secretary Bob Bergland. Assignment ended in January of 1979.

WILLIAM D. CRENSHAW
DESIGNER

Summary of Experience

Over 22 years of professional experience as a designer of structures. Most recent and largest part of experience has been in the analysis and design phases of all types of guyed and self-supporting towers. Tower design and inspection assignments have been overseas as well as in the USA.

Education

Washington-Lee High School
Technical Design Courses in Structural Steel & Concrete Structures

Experience

- 1974 to Present - Matthew J. Vlissides & Associates, Designer
- 1972 to 1974 - Page Communications Engineers, Inc., Vienna, VA, Designer
- 1970 to 1972 - Matthew J. Vlissides, P.E., Washington, D.C., Designer
- 1961 to 1970 - Page Communications Engineers, Inc., Washington, D.C. Designer
- 1957 to 1961 - Atlas Machine & Iron Co., Arlington, VA, Detailer
- 1956 to 1957 - Ceco Steel Corp., Kenilworth, MD, Detailer
- 1955 to 1956 - Rosslyn Steel & Cement Co., Washington, D.C. Draftsman

CLINT CAPPS

ERECTION SUPERVISOR

Summary of Experience

Over 25 years of steel erection experience especially in the erection of communication towers and tracking antennas. He is one of the very few chief riggers recognized nationwide and has been involved in the erection of at least 250 towers ranging from 100' to 2063'. Recently, he completed for us the unique 1500' WKBN-TV guyed tower in Youngstown, Ohio made exclusively for the first time in history of Cor-Ten Steel. Mr. Capps erected the SLT-Antenna Systems in Searchlight, Nevada.

Education

High School Diploma

Experience

From April 1953 to present he worked exclusively in steel tower erection as a rigger and chief rigger with the following companies:

- J.M. Hamilton Company
- Hamilton Erection Company
- International Tower Systems Company
- King Tower Company
- High Tower Company
- G. Olsen Tower Company

QUALIFICATIONS OF THE APPRAISER

MEMBER:

Maryland Real Estate Commission (Associate Broker)
National Association of Independent Fee Appraisers (IFA designation)
Past President, N.A.I.F.A. Local Chapter, 1979
Associate Member of the Society of Real Estate Appraisers
Candidate Member of the American Institute of Real Estate Appraisers.
Faculty Member of Catonsville Community College, Real Estate Department

EDUCATIONAL BACKGROUND

Salisbury State College, B.S., 1959
Graduate student, University of Baltimore, M.B.A. Program
Real Estate Appraisal Course 1A, American Institute of Real Estate Appraisers and successful writing of examination, 1973.
Real Estate Appraisal Course 1B, American Institute of Real Estate Appraisers, 1974
Successful writing of the National Association of Independent Fee Appraisers, Residential Examination, 1975
Successful writing of the American Institute of Real Estate Appraisers, Examination #8, 1976
Real Estate Appraisal Course #201, Society of Real Estate Appraisers and successful writing of examination, 1977.
Inner City Valuation Seminar, Society of Real Estate Appraisers, 1979

PROFESSIONAL EXPERIENCE:

November, 1971 - December, 1975:
Real estate appraisals and sales for Westview Realty, Inc.
Vice President, December, 1974
December 1975 - August, 1979:
Real estate appraiser for H.F. Cole & Company, Inc. Assignments include residential (single and multi-family), commercial and industrial properties. Appraisals, as well as market analysis, development and construction management, feasibility studies among others.
August, 1979:
Established own appraisal practice. Assignments include residential (single and multi-family) and commercial properties.

APPRAISAL ASSIGNMENTS - (PARTIAL LIST)

Columbia Bank & Trust Co.	Patapsco Federal Savings & Loan Assn.
Savings Bank of Baltimore	Mortgage Guaranty Insurance Corp.
Investors Mortgage Insurance Corp.	Merrill Lynch Relocation Mgt.
Stead Mortgage Company	Bank of Oklahoma
Pratermy Federal Savings & Loan	Bank of St. Louis
First Mortgage Corporation	State of Maryland - Dept. of General Services
Maryland National Bank	

QUALIFIED AS EXPERT WITNESS BEFORE:

Howard County Circuit Court
Federal District Court

BRIAN D. MCGRAW

- U.S. Coast Guard Tower Analysis of Proposed Modifications to the SLT Antenna
- Omega Navigation Station 1200' G. Tower Inspection of Rehabilitation
- KCLO-TV 1500' Tower Replacement of TV Antenna & 6th G. Level Cables
- MCI-Collins Ohio Valley M/W System Sites Design
- WBNS-TV 760' S.S. Tower Inspection, Analysis & Evaluation
- WPIK/WXRA-FM 400' G. Tower Extension to 500' & Other Associated Work
- Consultant to PBS for MO Satellite Terminal Development & Installation in Fairfax County, VA
- Design of the Concrete Building & Special Foundation for the 60' Tracking Antenna "C" Station COMSAT Eatam, W. Va.
- Design of the Concrete Building & Special Foundation for the 60' Tracking Antenna "S" Station COMSAT Lenox, W. Va.
- Design of the Concrete Building & Special Foundation for the 105' Tracking Antenna in Nigeria, for Harris International
- WFMV-TV 759' G. Tower Inspection, Analysis & Evaluation
- KDUH-TV 1965' G. Tower Inspection, Analysis & Evaluation
- WAFE-AM 330' G. Tower Inspection
- Page Boy Communications 310' G. Tower Inspection
- WTHR-TV 941' G. Tower Analysis & Evaluation
- WILX-TV 924' G. Tower Inspection, Analysis & Evaluation
- WIIC-FM 415' G. Tower Analysis & Evaluation
- WWAY-TV 1100' G. Tower Inspection, Analysis & Evaluation
- WBT 450' S.S. Tower Analysis & Evaluation
- WHIO-TV 1019' G. Tower Inspection & Analysis
- WWBT-TV 715' Guyed Tower Inspection, Analysis & Tensioning of Tower
- WNET-TV 480' Guyed Tower Inspection
- KOCO-TV 1430' G. Tower Inspection, Analysis & Measuring of Guy Tensions
- Comtech Laboratories, Medscat Site Survey in Libya

He has extensive experience in the design of structures using non-conventional materials as plastics, non-metallic filaments, glass filaments, etc.

In the area of multi-leveled guyed towers, Mr. Vlissides expanded a computer program able to handle guyed towers of up to 20 guy levels, and carrying concentrated loads and a top electronic umbrella with up to 36' long radials. The tower is treated as a beam-column on elastic supports with all secondary effects taken into consideration. Recently, Mr. Vlissides has developed a computerized design of a family of self-supporting and guyed microwave towers, covering a range of heights from 20-foot stub antenna mounts to 500-foot applicable and very economical for large communication projects.

Mr. Vlissides, in addition, has extensive experience in building structural analysis and design, such as highrise office and apartment buildings, hospitals, churches, communications buildings, etc.

Earlier, Mr. Vlissides was employed as a Structural Engineer by the U.S. Navy Department, Bureau of Harbors and Docks, where he was responsible for the development of BUDOCKS criteria and standards and the design of structures for antennas and other communications facilities, and was heavily involved in the Nord Antenna and West Pac, Australia Antenna Projects. In a previous position with the District of Columbia Highway Department, Bridge Division, he was Field Engineer for the D.C. approaches of the Theodore Roosevelt Bridge. Prior to this, he was involved in the engineering, administration, design and construction supervision of Public Works for the Greek Government.

- Mr. Vlissides' professional affiliations include:
- Association of Federal Communications Consulting Engineers
 - American Society of Civil Engineers
 - National Society of Professional Engineers
 - American Concrete Institute
 - Professional Engineer in the District of Columbia, Lic. #5949
 - Professional Engineer in the State of New York, Lic. #044849
 - Professional Engineer in the State of Maine, Lic. #2639
 - Professional Engineer in the State of Maryland, Lic. #7868
 - Professional Engineer in the State of Virginia, Lic. #05782
 - Professional Engineer in the State of Pennsylvania, Lic. #20621.E
 - Professional Engineer in the State of Illinois, Lic. #62-32261
 - Professional Engineer in the State of New Jersey, Lic. #12618
 - Professional Engineer in the State of Kentucky, Lic. #11506
 - Certificate of Qualification by the National Engineering Examiners, No. 4003
 - Tau Beta Pi Honorary Engineering Society
 - Certified Fallout Analyst and Protective Construction Analyst, DOD - 2T0318865
 - Electronic Industries Association, TR-34.2 Subcommittee on Earth Station Antennas. TR 14.7 Tower Committee

FRED W. PURDY, P.E.
SENIOR ENGINEER

Summary of Experience

Over 23 years of professional experience as a civil and structural engineer, experienced in all phases of general design and construction. Most recent experience has been surveying, designing, supervision and construction of communication sites in various parts of the world and mainly the design, supervision and inspection of the installation/erection of tall guyed and self-supporting towers and large tracking antennas.

Education

B.S.C.E. - Chicago Technical College, 1951

Registration

Professional Engineer - North Carolina and Ohio

Experience

- 1974 to Present - Matthew J. Vlissides & Associates, Senior Engineer
- 1971 to 1974 - Rel-Reeves, Inc. Boynton, FL, Mgr. Construction Eng.
- 1968 to 1971 - Page Communications Engineers, Inc., Washington, D.C. Senior Engineer
- 1966 to 1968 - Allison Engineering Corp., Eaton, NJ, Senior Engineer
- 1956 to 1966 - Consulting Engineer, self-employed, Greensboro, NC
- 1953 to 1956 - Joorhees & Everhart-Architects, High Point, NC, Design Engineer
- 1951 to 1953 - Armour & Company, Junior Structural Engineer

JOEL E. EDELMAN
ENGINEER, ANALYST

Summary of Experience

Over 7 years of professional experience in mathematical analysis and engineering with heavy concentration in computer programming, structural modeling and computer analysis of tall communication towers and space communication antennas.

Education

- B.A. - Kent State University, Major in Mathematics, 1964
- M.A. - Kent State University, Major in Mathematics, 1967
- M.S. - Rensselaer Polytechnic Institute, Major in Mechanical Engineering, 1979

Experience

- 1979 to Present - Matthew J. Vlissides & Associates, Engineer-Analyst
- 1978 to 1979 - ENSCO, Engineer-Analyst
- 1976 to 1978 - Student, Rensselaer Polytechnic Institute
- 1971 to 1976 - Mathematics Department Chairman, Private High School
- 1968 to 1971 - Student, Indiana University
- 1966 to 1968 - Student, Kent State University
- 1964 to 1966 - Computer Programmer, System Level
- 1961 to 1964 - Student, Kent State University

LIST OF MAJOR PROJECTS

- 100' Parabolic Tracking Antenna, Peking, China
- 100' Parabolic Tracking Antenna, Shanghai, China
- 100' Parabolic Tracking Antenna, Lisbon, Portugal
- 100' Parabolic Tracking Antenna, Lorenzo Marques, Mozambique
- 100' Parabolic Tracking Antenna, Luanda, Angola
- WDCG-FM 400' G. Tower Analysis
- WTTG Metromedia 540' S.S. Tower Analysis & Modification
- WMOD-FM 400' S.S. Tower Analysis & Modification
- WFLN 320' S.S. Tower Analysis & Modification
- WTAM 480' G. Tower Analysis & Inspection
- WJ-TV 1000' G. Tower Inspection & Analysis
- KNUT-TV 1430' G. Tower Analysis & Design
- WKAR 1000' G. Tower Inspection, Analysis & Guy Retensioning
- KUDE-FM S.S. Tower Analysis & Modification
- KQTV 751' S.S. Tower Inspection, Analysis & Upgrading
- KCMO-TV 1061' S.S. Tower Inspection, Analysis & Modification
- American University, 400' S.S. Tower Analysis
- WDCG 809' S.S. Tower Structural Evaluation
- Educational TV, Channel 19 1200' G. Tower Inspection
- U.S. Coast Guard Loran-C Antenna 700' G. Tower & Antenna System Election Supervision
- AMSAT Satellite Earth Terminal Site Criteria & Design
- WDCG 809' S.S. Tower Inspection & Analysis, for Mr. Edward Mernone
- Comsat Corp. 100' Replacement Satellite Tracking Antenna Modification Design, Fabrication & Installation Supervision
- Motower, Inc. 1088' G. Tower Analysis & Design
- KGLO-TV 1500' G. Tower Inspection, Analysis & Modification
- WSBT-TV 1100' G. Tower Inspection

- KPRC-TV 1377' Candelabra G. Tower Inspection, Analysis & Evaluation
- WALA-TV 1200' G. Tower Inspection, Analysis & Evaluation
- WITN-TV 1523' G. Tower Inspection
- MCI Communications Several Tower Projects throughout the Country
- WAFB-TV 1726' G. Tower Inspection & Analysis
- WDBN-FM 500' G. Tower Analysis
- WDMV-TV 600' S.S. Tower Inspection & Analysis
- WDCM-TV 400' S.S. Tower Inspection & Analysis
- WCIV-TV 1800' G. Tower Inspection & Analysis
- WCIV-TV 2000' G. Tower Consulting
- KCRA-TV 2000' G. Tower Consulting
- WBNS-TV 1000' G. Tower Turnkey Contract
- WBBH-TV 1000' G. Tower Inspection
- WKOK-Radio (5) 300' AM Tower Inspection
- WJLA-TV 600' S.S. Tower Installation Murad Antenna
- KFDM-TV 900' G. Tower Inspection & Analysis
- WRIV-TV 950' G. Tower Inspection & Analysis
- WATU-TV 1500' G. Tower Inspection & Analysis
- WBTV-TV 1200' Candelabra G. Tower Feasibility Study
- WWBT-TV 900' G. Tower Feasibility Study

ROLLINS BROADCASTING OF DEL, INC. v. HOLLINGSWORTH Del. 143
Cite as 218 A.2d 143

ROLLINS BROADCASTING OF DELAWARE, INC. and Board of Adjustment of New Castle County, Defendants Below, Appellants.

John H. HOLLINGSWORTH, Mary A. Ingersoll, Frederick P. Chappell, Wayne D. Suttler and Robert R. Moneymaker, Plaintiffs Below, Appellees.

Supreme Court of Delaware.
Nov. 4, 1968.

The New Castle County Board of Adjustment granted a special zoning exception to applicant to construct a community antenna television tower, and neighboring property owners appealed. The Superior Court rendered a judgment reversing the exception, and the applicant appealed. The Supreme Court, *Herrmann, J.*, held that Board erred in granting permit to construct tower in agricultural and general purpose district under exception to zoning code of county, where members of Board relied on facts known to them personally, and only other source of much of factual material appearing in Board's decision was in oral statements and argument of counsel, since neither source of information was sufficient to fulfill requirement that factual grounds necessary for exception to zoning code be established by evidence of record, susceptible of cross-examination, rebuttal, and judicial review.

Affirmed.

1. Zoning Code 218

County board of adjustment erred in granting permit to construct community antenna television tower in agricultural and general purpose district under exception to zoning code of county, where members of board relied on facts known to them personally, and only other source of much of factual material appearing in Board's decision was in oral statements and argument of counsel, since neither source of information was sufficient to fulfill requirement that factual grounds necessary for exception to zoning code be established by evidence of record, susceptible of cross-examination, rebuttal, and judicial review.

Part of a system, known as CATV, by which improved and greater television reception is made available to subscribers to the service. For a detailed discussion

144 Del. 218 ATLANTIC REPORTER, 2d SERIES

[1] The application for the permit to construct the tower in an R-2 District was made pursuant to Article IV, Section 2(16) and Article XIX, Section 4 of the Zoning Code of New Castle County.* After a hearing, the Board of Adjustment approved the application and granted the special exception, subject to certain conditions not pertinent here. By certiorari, the appellee property owners obtained review by the Superior Court. That Court reversed the Board by granting summary judgment in favor of the property owners, holding that there was no evidence to support the Board's conclusion. We agree.

The application to the Board consisted of a very sparse, unacknowledged form Application for a hearing, accompanied by a plot plan of the subject tract, a block zoning map of the nature and functions of CATV systems, see *United States v. Southwestern Cable Co.*, 332 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1091 (1969).

** Article IV provides in pertinent part: "SECTION 2. R-2 DISTRICTS (AGRICULTURAL AND GENERAL PURPOSE)—In an R-2 District, no building or structure shall be used and no building shall be erected or altered which is arranged, intended, or designed to be used, except for one or more of the following uses: "(a) Any principal part of an antenna tower, excluding guy cables, shall be set back from the street line or any other lot line of the lot on which it is located a distance of not less than the height of such tower. "(b) Any blinking or rotating light thereon shall be screened so as not to throw its light below the horizontal plane in which it is installed. "(c) No identification sign thereon shall be illuminated. "(d) The proposed height of the tower is reasonably necessary to render satisfactory service to all parts of the service area.

map with the parcel marked, and a "building plan showing a windowless concrete structure to house receiving equipment." The application was submitted with a letter of transmittal from counsel with which was forwarded, without reference, an undated "Report", generally explaining the community antenna television system and site requirements for tower-components thereof, and certain rules and regulations of the Federal Communications Commission.

At the hearing before the Board, Rollins called no witnesses in presenting its case in chief; its presentation at that stage consisted only of an oral statement by its attorney, summarizing the proposal for the erection of the tower and the reasons for selecting the site here in question. No drawing of the proposed tower, or other

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Rollins' evidence verbal or documentary, was submitted. In response, the property owners contended that the proposed tower was for the reception of television signals—that it was not a broadcasting tower within the scope and meaning of Article XIX, Section 4 of the Zoning Code. The property owners also asserted that Rollins had failed to adduce any evidence establishing the grounds for exception set forth in Article IV, Section 2 and Article XIX, Section 4 of the Code. The property owners presented several witnesses who testified that the proposed tower would have a detrimental effect upon nearby residential areas. In rebuttal, Rollins presented its vice president as a witness who testified that the tower would not interfere with regular television reception; he admitted, however, that the tower would be detrimental to the neighborhood. In broad outline, that was the sum and substance of the hearing before the Board.

Following the hearing, by leave granted: Rollins' attorney forwarded drawings of the tower under cover of an explanatory letter; the property owners' attorney filed a memorandum of law to which was attached an engineering analysis giving the technical reasons why the proposed tower would cause interference with local television reception; and Rollins replied by another letter of counsel agreeing to correct any such interference, and forwarding photographs of various radio towers and an unidentified CATV tower.

Upon that record, the Board rendered its decision granting the special exception and the permit.

We are unable to find in the record of this case any evidence addressed to the grounds explicitly stated in the Zoning Code as the bases for an exception. Specifically, we find no evidence to support a finding: 1) That the tower was "reasonably necessary for the convenience and welfare of the public"; as required by Article XIX, Section 4. 2) That the tower would not be "detrimental or injurious to the neighborhood and to the County"; as required by Article XIX, Section 4. 3) That the tower's height was "reasonably necessary to render satisfactory service to all parts of the service area"; as required by Article IV, Section 2(16) (d). 4) That the tower would not "affect adversely the use of neighboring property"; as required by Article IV, Section 2(16) (e).

[2] Rollins, as applicant for the special exception, had the burden of meeting the requirements set forth in the Code as the grounds for the exception. Application of *Emmett S. Hickman Co., 10 Terry 118, A.2d 667 (1951)*. This Rollins was obliged to do by substantial evidence, verbal or documentary, susceptible of cross-examination and rebuttal by opponents and of appellate review by the courts. Attorneys' letters, argument of counsel, unsigned reports, and unsupported, unauthenticated drawings do not constitute such evidence.

Recently, in *Zoning Board of Adjustment of New Castle County v. Dragon Run Terrace, Inc., Del. 222 A.2d 315, 318 (1966)*, we stated with reference to the Board of Adjustment: "It is manifest from questions asked by members of the Board at the hearing that, in considering various aspects of this case, they were relying upon facts known to them personally but not made a matter of record by proper evidence. Our various administrative and quasi-judicial bodies should understand that any pertinent information known personally by the members, but not placed into the record by proper evidence, cannot be considered by a court on appellate review. See *Fitzsimmons v. McCorkle, Del. 214 A.2d 334, 2 Am.Jur.2d 623 (1966)* January 17, 1962) regarding substantial evidence rule.

This requirement applies to zoning matters, 2 Rethkopf on Zoning and Planning (3rd Ed.) 64-67.

See also Searles v. Darling, 7 Terry 263, 83 A.2d 96 (1951); Petition of Shelu Oil Company, Del.Super., 203 A.2d 845 (1964); Application of Julian, 3 Storey 175, 167 A.2d 21 (1960).

From the Board's detailed decision, it is manifest in the instant case as in the Dragon Row case, that the members of the Board of Adjustment relied upon facts known to them personally. The only other source of much of the factual material appearing in the Board's decision was in the oral statements and argument of counsel. Neither source of information is sufficient to fulfill the requirement that the factual grounds necessary for an exception to the Zoning Code be established by evidence of record, susceptible of cross-examination, rebuttal, and judicial review.

Raymond H. SMITH, Defendant Below, Appellant, v. STATE of Delaware, Plaintiff Below, Appellee. Supreme Court of Delaware, Oct. 29, 1968.

Defendant was convicted in the Superior Court of burglary in the first degree and of larceny of an automobile and he appealed. Supplementing 243 A.2d 719, the Supreme Court, Carey, J., held that asserted fact that it was only after conviction that defendant was given addresses of some witnesses who were not present at his trial could not be presented for first time on appeal.

Judgment affirmed.

- (3) While it is not necessary to the disposition of this appeal for us to resolve the question of whether a CATV tower is a "broadcasting tower" within the meaning of Article XIX of the Code, we do so nevertheless for the guidance of the Board in any future proceeding. In United States v. Southwestern Cable Co., 392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (1968), the nature and functions of CATV systems were fully explained. It there appears that CATV systems receive the signals of ordinary television broadcasting stations, amplify them, transmit them by cable or microwave, and ultimately distribute them by wire to the receivers of their subscribers. It is stated, too, that a CATV system may originate and produce its own programming. Also, it appears that in size, shape, and general design and construction, there is no material difference between a CATV tower and an ordinary television or radio broadcasting tower. With that understanding of its nature, function, and design, we hold that a CATV tower is a "broadcasting tower" within the meaning of the Zoning Code. The judgment below is affirmed.

ZONING BOARD OF ADJUSTMENT OF THE CITY OF SAN ANTONIO, Appellant, v. Don MARSHALL, Appellee. No. 14345. Court of Civil Appeals of Texas, San Antonio, Feb. 10, 1965. Rehearing Denied March 11, 1965.

Proceeding by property owner on writ of certiorari complaining of ruling of city zoning board of adjustment which had denied him a building permit to construct radio tower. The 45th District Court, Bexar County, Robert R. Murray, Jr., entered a judgment for property owner and the board appealed. The Court of Civil Appeals, Barrow, J., held that affidavits filed by property owner were insufficient to overcome presumption of legality of zoning board of adjustment's order denying variance to build 125-foot tower on ground that proposed tower would create a hazard and be against public interest.

- 1. Zoning 6-78. A legal presumption exists in favor of order of zoning board of adjustment and burden of proof to establish its illegality rests on person challenging ruling.
2. Zoning 704. Court when considering legality of zoning board of adjustment order must substitute its findings for that of board, even though court concludes that overwhelming preponderance of evidence is against board's decision.
3. Zoning 703. On appeal from zoning board of adjustment's order question is whether there is any substantial evidence affording rea-

sonable support for findings and order entered by the board, and this is a question of law and not of fact.

- 4. Zoning 6-702. If evidence before court as a whole is such that reasonable minds could have reached conclusion that zoning board of adjustment must have reached in order to justify its actions, board's action must be sustained.
5. Zoning 6-503. Although zoning code which excluded commercial type broadcasting excluded radio towers in determining height of buildings which might be erected in zone in which property was situated, a variance was required before granting a permit to construct a new radio tower of 125 feet on building to be used to contact repair truck.
6. Zoning 6-78. Affidavits filed by property owner seeking variance for erection of 125-foot radio tower atop his building were insufficient to overcome presumption of legality of zoning board of adjustment's order denying variance on ground that proposed tower would create a hazard and be against public interest.
7. Zoning 6-503. Zoning board of adjustment did not abuse discretion in refusing to dismiss, at pro- perty owner's request, a television sales and repair business, to erect a 125-foot radio tower on building roof to communicate with truck. Vernon's Ann.Civ.St. art. 101g. Sam S. Wolf, City Atty., William R. Ward, Asst. City Atty., San Antonio, for appellant. Groce, Heblon, Fahey & Smith, San Antonio, for appellee.

BARROW, Justice. Don Marshall brought this writ of certiorari pursuant to the terms of Art. 101g, Vernon's Ann.Civ.Stats., complaining of the Zoning Board of Adjustment of the City of San Antonio, and seeking to reverse the ruling of the Board denying him a building permit to construct a 125-foot radio tower on the roof of his building. Both sides filed motions for summary judgment. The trial court overruled the motion of the Board and granted judgment on Marshall's motion requiring the Board to issue him a building permit to construct a radio tower on top of his building.

The motions were based upon the pleadings of the parties, a stipulation of certain facts, the certified record of the proceedings before the Board, and three affidavits filed by Marshall. Marshall owns two lots located at 120 W. Mirabele, which are in a "B" zone in the City of San Antonio. In 1959, permission was granted to construct a post office building on this property, although an "I" zone is required for same under the City Code. After the post office left the premises, Marshall applied for and on May 3, 1962, was granted permission by the Board to operate a TV sales and repair business at this location. The Board's order did not authorize construction of a radio tower, although its minutes recognized that a dispatcher would be on duty at night with a radio equipped truck.

Marshall remodelled the building, and at the same time constructed a 115' tower at the rear of it. In June 1963, eighty feet of this tower was blown down with some damage to neighboring property. On July 18, 1963, the Board denied Marshall's application for a permit to construct a radio tower at the rear of the building because "it is against the public interest substantiated by the fact that it would be within 25 feet of each side property line as well as 67 feet from the rear property line and would constitute a hazard in the neighborhood. In the Board's opinion, the owner has the possibility of leasing or renting other towers in the City whereby he would be able to make contact with his trucks to carry out his business thereby, offering him some relief."

On July 26, 1963, Marshall filed a new application seeking permission to construct a 125' radio tower on the roof of his building. The building inspector denied this application. This denial was appealed to the Board, and on August 15, 1963, after a full hearing, the Board denied this new application. After the Board's denial, Marshall brought this action and asserted that the decision of the Board is illegal, arbitrary and capricious, and not based on competent evidence. He further asserted that it imposes an undue hardship on him in that he has no other recourse, and the radio tower would not create a hazard and not be against the public interest.

[1-4] The following legal principles govern this appeal: (1) A legal presumption exists in favor of the Board's order, and the burden of proof to establish its illegality rests upon Marshall; (2) the Board's order must not put itself in the position of the Board and substitute its findings for that of the Board, even though the preponderance of the evidence is against the Board's decision; (3) the question on appeal from the Board's order is whether or not there is any substantial evidence affording reasonable support for the findings and order entered by the Board, such being a question of law and not of fact. If the evidence before the Court, as a whole, is such that reasonable minds could have reached the conclusion that the Board

must have reached in order to justify its action, the Board's action must be sustained. City of San Angelo v. Roehne Bakery, 114 Tex. 281, 190 S.W.2d 67 (1945); Jacobson v. Preston Forest Shopping Center, Inc., Tex.Civ.App., 359 S.W.2d 156, wr. ref., n. r. e.

[5] One of the primary questions is whether a variance is required for the erection of the tower on Marshall's building. The City Code prohibits the erection of a tower exceeding 35' in height, but excludes chimneys, cooling towers, radio towers, etc., in determining the height. The City Code does not authorize commercial type broadcasting in a "B" residence district, and it is our opinion that a variance is required for the granting of the permit to construct a new tower. Marshall urges, however, that a tower is authorized under the variance granted him in 1962, for the use of the building for TV sales and repair business, in that a radio setup is absolutely essential to his business. He further urges that a tower on his building would not constitute a hazard or be against the public interest.

Marshall filed three affidavits in support of his motion for summary judgment. In his own affidavit, he averred that it was essential to have a radio setup in order to operate his business, and that the cost of renting telephone lines from another tower would be prohibitive. Mr. Rhodes, who is the communication officer for the City of San Antonio, executed an affidavit stating that it was necessary for Marshall to have access to a radio tower in order to operate his business. Both Mr. Rhodes and Mr. Crump, an experienced radio tower installer, expressed the opinion that a radio tower could be safely installed on top of Marshall's building in accordance with existing plans and specifications.

The Board did not file any affidavits in support of its motion, but relies upon the certified minutes of the hearing at which Marshall's permit was denied. The minutes of the Board do not purport to be a report-

er's transcript of the proceedings and leave much to be desired as to what testimony was given. It is seen, however, that a number of residential property owners, within 200 feet of Marshall's property, opposed this application and were represented at the hearing by counsel. The minutes consist largely of statements by this attorney and Marshall's attorney as to what testimony was given at the prior Board hearing when the application for construction of the 115' tower was denied. It was stated that it is feasible and efficient to use another tower, although it would involve "considerable cost." There were also statements concerning the fall of the first tower, and whether or not the proposed tower would constitute a hazard. The Board found that the proposed tower would create a hazard and be against the public interest. It further found that Marshall has other recourse.

[6] It is our opinion that the affidavits filed by Marshall do not overcome the presumption of legality of the Board's order. No facts are set forth to support the conclusions that a radio setup is necessary for the operation of a TV rental and repair business, and that it would not be economically feasible to use a tower away from this location. Furthermore, the question of whether or not the tower was authorized under the variance granted in 1962 is propounded in the appeal from the Board's refusal to permit the reconstruction of the 145' tower at the rear of Marshall's building, and is not before us on this appeal. The trial court erred in granting Marshall a summary judgment.

[7] The Board urges that its motion should be granted in that Marshall has failed, as a matter of law, to show that the Board abused its discretion in refusing to grant a variance for construction of a new tower on the roof of the building. Although the summarized minutes of the proceedings before the Board are not complete as might be desired, we cannot say from the record as a whole, that the Board

abused its discretion in refusing to grant this variance. Montgomery v. City of Dallas, Tex.Civ.App., 215 S.W.2d 733, wr. ref., n. r. e.; Driskell v. Board of Adjustment, Tex.Civ.App., 195 S.W.2d 594, wr. ref., n. r. e. The judgment is reversed and here rendered that Marshall take nothing by his appeal from the order of the Board of Adjustment of August 15, 1963.

James B. SIMPSON, Appellant, v. Modesta Good SIMPSON, Appellee. No. 7904. Court of Civil Appeals of Texas, Eastland, Jan. 29, 1965.

Divorce action. The District Court, Borden County, Sterling Williams, J., entered judgment granting a divorce and confirmed a property settlement agreement which had been executed by the parties prior to commencement of the divorce action, and husband appealed from the judgment insofar as it related to the property division. The Court of Civil Appeals, Cullings, J., held that fact that parties were mistaken in believing they were divorced by virtue of a Mexican decree was not such a mistake of fact as constituted a ground for cancellation of conveyances and division of property pursuant to a property settlement agreement executed by the parties while they were separated. Judgment affirmed.

1. Husband and Wife 274(2). A division of property was not void as against public policy on theory it was promotive of a divorce where such agreement was executed by the parties while they were permanently separated and under a belief that a divorce which husband had secured in Mexico was valid.
2. Husband and Wife 278(2). If a separation agreement is made at a time when the parties have already separated with the expectation of remaining permanently apart such an agreement is not contrary to public policy and will be upheld if entered into without coercion or other undue influence and the division is just and equitable.
3. Contract 83(3). For a mutual mistake of fact to constitute grounds for cancellation or rescission of an instrument it must appear that the parties contracted under a mistake of fact that was material and essential to an understanding of the consequences of the agreement, and that the mistake did not relate to a mere incidental detail.
4. Husband and Wife 278(1). Fact that parties were mistaken in believing they were divorced by virtue of a Mexican decree was not such a mistake of fact as constituted a ground for cancellation of conveyances and division of property pursuant to a property settlement agreement executed after the parties had become permanently separated.

5. Husband and Wife 278(1). Husband could convey or agree to convey his separately owned undivided interest in real property held by parties as tenants in common as part of a settlement agreement executed after the parties had become permanently separated.

Legg, Saxe & Baskin, Pat M. Baskin, Midland, for appellant.

if, one was made, desirability of assigning attorney to represent petitioner was to be carefully considered. CPLR 1101(c), 1102(a).
2. Mandamus 73(1). Allegations in petition proceeding to recover certain property claimed to be in possession of town police property clerk and other defendants were more properly cognizable in action for replevin than in Article 73 proceeding. CPLR 7601 et seq.; Penal Law 410.00.

Leonard Stanley, appellant pro se.

Before HOPKINS, J. P., and TITONE, GULOTTA and O'CONNOR, JJ.

MEMORANDUM BY THE COURT.

In a proceeding pursuant to CPLR article 73 inter alia to recover certain property claimed to be in the possession of the respondents, petitioner appeals from an order and judgment (one paper) of the Supreme Court, Rockland County (KELLY, J.), entered September 15, 1977, which (1) denied petitioner's motion for leave to proceed as a poor person, without prejudice to the respondent's motion for summary judgment, and (2) granted, without prejudice, the motion of the respondent Property Clerk of the Police Department of the Village of Spring Valley to dismiss the petition for failure to state a cause of action. Order and judgment affirmed, without costs or disbursements.

[1] The denial of the application for leave to proceed as a poor person was proper in view of petitioner's failure to serve the County Attorney of Rockland County. Service upon the District Attorney is not sufficient (see CPLR 1101, subd. 1). Upon recapplication, if one is made, the desirability of assigning an attorney to represent petitioner pursuant to CPLR 1102 (subd. 1a) should be carefully considered.

[2] Turning to the balance of the order appealed from, it is our belief that while section 410.00 of the Penal Law is not dis-

positive of the motion to dismiss, the allegations contained in the petition are more properly cognizable in an action for replevin and not, as presently pleaded, in the posture of an Article 73 proceeding (see Clay v. McCabe, 56 A.D.2d 747, 392 N.Y.S.2d 29, cf. Matter of Gagliano v. Frank, 44 A.D.2d 828, 355 N.Y.S.2d 170; see, also, Metallic Flowers v. City of New York, 4 A.D.2d 292, 228 229, 164 N.Y.S.2d 227, 223 235, n. 1. 5 N.Y.2d 246, 183 N.Y.S.2d 801, 157 N.E.2d 170; People v. Spencer, 64 Misc.2d 1013, 1016, 317 N.Y.S.2d 480, 483).

Before HOPKINS, J. P., and TITONE, GULOTTA and O'CONNOR, JJ.

MEMORANDUM BY THE COURT.

In the Matter of UNITED STATES TRANSMISSION SYSTEMS, INC., Petitioner, v. Raymond H. SCHOEFFLIN et al., constituting the Board of Appeals of the Town of Oyster Bay, Respondents. Supreme Court, Appellate Division, Second Department, June 5, 1978.

Article 78 proceeding was brought to review determination of board of appeals of town which, after hearing, denied application for variance pertaining to height of a tower. The Supreme Court, Appellate Division, held that, even if petitioner, lease optionee of parcel of property located in area zoned for industrial use, were public utility, zoning board properly denied petitioner's application for variance pertaining to height of proposed tower, where height was 280 feet, but restriction in ordinance was 50 feet, large residential area was near and existing residential area was near and existing residential area was about 700 feet away, there was possibility that ice forming on

tower would be blown onto adjacent highways, services provided by petitioner were limited to needs of large business concerns and there was no evidence that any individual in community or state would be served. Determination confirmed and proceeding dismissed.

- 1. Zoning 6-536. Although applicant for area variance need show only that strict compliance with zoning law will cause "practical difficulties," magnitude of variance sought is significant factor.
2. Zoning 702, 703. Even where applicant for area variance is public utility, court will sustain zoning board's determination if it has rational basis and is supported by substantial evidence.
3. Zoning 6-353. While zoning board may not exclude utility from community where utility has shown need for its facilities, utility may not place facility wherever it chooses within community.
4. Zoning 6-514. Even if petitioner, lease optionee of parcel of property located in area zoned for industrial use, were public utility, zoning board properly denied petitioner's application for variance pertaining to height of proposed tower, where height was 280 feet, but restriction in ordinance was 50 feet, large residential area was near and existing residential area was near and existing residential area was about 700 feet away, there was possibility that ice forming on tower would be blown onto adjacent highways, services provided by petitioner were limited to needs of large business concerns, and there was no evidence that any individual in community or state would be served.

Stanley P. Amelkin, Jeicho, for petitioner.

Murray Pudalov, Massapequa Park, for respondents. Before GULOTTA, J. P., and SHAPIRO, COHALAN and O'CONNOR, JJ.

MEMORANDUM BY THE COURT.

Proceeding pursuant to CPLR article 78 to review a determination of the respondent Board of Appeals of the Town of Oyster Bay, dated August 31, 1977, which, after a hearing, denied petitioner's application for a variance pertaining to the height of a tower. Determination confirmed and proceeding dismissed on the merits, with costs. The petitioner, the "lease optionee" of a parcel of property located in an area which is zoned for industrial use, was denied a variance which would have enabled it to construct a microwave transmission tower 280 feet high. The height restriction in the zoning ordinance is 50 feet. While the petitioner contends that it is a public utility, the only evidence in that regard is the statement by the petitioner's project engineer, William Chambers, that petitioner is a "common carrier" which provides "telephone channels to long haul customers such as air lines, brokerage houses, construction companies and so forth." Chambers informed the board that the tower was needed so that petitioner could expand its system from New York City to Connecticut.

[1-3] Although the applicant for an area variance need show only that strict compliance with the zoning law will cause "practical difficulties," the magnitude of the variance sought is a significant factor (Matter of Consolidated Edison Co. of N. Y. v. Hoffman, 43 N.Y.2d 598, 606, 403 N.Y.S.2d 193, 198, 374 N.E.2d 105, 110, supra). On this record, the denial of the variance is supported by substantial evidence.

this has never meant that a utility may place a facility wherever it chooses within the community [citations]. (Matter of Consolidated Edison Co. of N. Y. v. Hoffman, supra, p. 610, 403 N.Y.S.2d p. 199, 374 N.E.2d p. 111).

[4] Assuming, arguendo, that petitioner is a public utility, the determination should nevertheless be confirmed. The magnitude of the variance sought is great (the proposed height is 280 feet; the restriction in the ordinance is 50 feet). There is a large residential area to the north and east of the subject property, "just beyond the three-hundred (300) foot radius"; the petitioner concedes that there is an existing residence about 700 feet from the subject site. The proximity of the high voltage lines of the Long Island Lighting Company and the normal occurrence of win storms, with the possibility that ice forming on the proposed tower will be blown off, pose a threat to vehicular traffic on the adjacent highways, one of which is Jericho Turnpike, a main arterial highway, running east and west. The services provided by the petitioner are limited to the needs of large business concerns and there is no evidence that any individual in the community or the State will be served (cf. Matter of Consolidated Edison Co. of N. Y. v. Hoffman, 43 N.Y.2d 598, 609, 403 N.Y.S.2d 193, 198, 374 N.E.2d 105, 110, supra). On this record, the denial of the variance is supported by substantial evidence.

Defendant moved to dismiss indictment for failure to afford him a speedy trial and the Supreme Court, Kings County, Leonard E. Yoswin, J., granted motion, and the People appealed. The Supreme Court, Appellate Division, held that where defendant, during preceding nine years, had no less than 12 different addresses, where defendant's police records had him listed under no less than ten different names, more than mere denial of receipt of letter sent in regular course of business by the grand jury's clerk's office would be required to establish that defendant was not duly and timely notified of his scheduled arraignment. Reversed.

Reversed.

Criminal Law 273

Where defendant, during preceding nine years, had no less than 12 different addresses, where defendant's police records had been listed under no less than ten different names, more than mere denial of receipt of letter sent in regular course of business by the grand jury's clerk's office would be required to establish that defendant was not duly and timely notified of his scheduled arraignment and, thus, defendant was not denied his right to speedy trial on ground that People failed to establish due and timely notification, even though there was transposition of number of building listed by investigating officer as "303" rather than "320".

Eugene Gold, Dist. Atty., Brooklyn (Norman S. Heller, Brooklyn, of counsel), for appellant.

defendant at the time of termination and where the contract and notices mailed to the plaintiff by the defendant all referred to the credit requirements maintained by the defendant, and where the contract provisions concerning termination were substantially followed, the court finds no lack of cause or lack of good faith, as those terms are used in sections 197 and 197-a of the General Business Law, in the defendant's action in terminating the agreement. Accordingly, the plaintiff's demand for an injunction must be denied.

As to the defendant's counterclaim, the proof showed that by the time of trial the plaintiff had admirably reduced its indebtedness to the defendant to the sum of \$28.12 which the court finds due and owing the defendant by the plaintiff and for which the defendant is entitled to judgment together with statutory costs and disbursements.



77 Misc.2d 798

VIDEO MICROWAVE, INC. and Stevens Memorial Methodist Church, Inc., Petitioners v. ZONING BOARD OF APPEALS OF THE TOWN OF LEWISBORO, State of New York, Respondent.

Supreme Court, Westchester County. April 8, 1974.

Article 78 proceeding to annul and set aside town zoning board of appeals' denial of application for zoning variance and special permit authorizing construction, maintenance and operation of building and tower for interstate communication purposes. The Supreme Court, Westchester County, George Beisheim, Jr., J., held that even if corporation organized for purpose of constructing, maintaining and operating regional system of signal transmission by radio to television broadcasting stations was a "public utility" within zoning ordinance requiring that public utility be permitted in any district under such conditions as would protect character of district, corporation was not entitled to special permit.

Petition denied.

- 1. Zoning - 11
Public utilities which are essential to public health, safety and welfare enjoy a favored position in relation to zoning regulations.
2. Zoning - 384
Even if corporation organized for purpose of operating regional system of signal transmission by radio to television broadcasting

stations was a "public utility" within zoning ordinance requiring that public utility be permitted under conditions as would protect character of district, corporation was not entitled to special permit for building and 340-foot high microwave relay tower with flashing or revolving lights in district, in which land use was limited to single-family homes on two-acre lots, in that permit was not necessary for public health, safety or welfare and no conditions could ameliorate harmful effects of tower.

Bleasley, Platt, Schmidt & Fritz, New York City, for petitioners. McCarthy, Firgar, Donovan & Glatthaar, White Plains, for respondent.

GEORGE BEISHEIM, Jr., Justice.

Petitioners have instituted this Article 78 proceeding to annul and set aside the determination of respondent Zoning Board of Appeals of the Town of Lewisboro denying petitioners' application for a zoning variance and special permit authorizing the construction, maintenance and operation of a building and tower for alleged interstate communication purposes.

Petitioner, Video Microwave, Inc. (hereinafter called "Video") is a Massachusetts corporation organized for the purpose of constructing, maintaining and operating a regional system of signal transmission by radio to television broadcasting stations. It is the proposed lessee of the property involved in this proceeding. The petitioner, Stevens Memorial Methodist Church, Inc., is the owner of the property in the Town of Lewisboro proposed to be leased to Video for the purpose hereinafter indicated.

Preliminarily, it should be stated that petitioners, during the oral argument of this matter, withdrew certain objections contained in the affidavit of Charles H. Carson, commercial manager of Video, as to the completeness of the record before the court when the alleged missing items were produced for the court by either petitioners or respondent. Respondent also withdrew its defense that Video was not doing business within the State of New York.

Specifically, petitioners sought a Special Permit pursuant to Article XVI, Section 2(m), of the Lewisboro Zoning Ordinance to erect a 340-foot high microwave relay tower on property designated as Part of Lot 1 in Block 10056 on Sheet 47 on the Tax Map of Lewisboro. The aforesaid property is in an R-2 (2-acre) residential district and consists of approximately 2 acres. Petitioners also requested a variance of Article V of the Zoning Ordinance which limits the use of the property in question to single-family homes on 2-acre lots; and an

large, that is which is not limited or restricted to any particular class of the community."

Respondent argues that the Staminski case, supra, cited by petitioners is not applicable to the facts of the case at bar since the function of the CATV company is to receive broadcast signals and transmit them to the public by voice while the function of the petitioner Video is to serve the television networks by relaying programs from the point of their origination to various broadcast stations. Respondent contends that Video provides no service to the public and, therefore, does not come within the definition of a public utility prescribed in the Staminski case, 62 Misc.2d at page 1052, 310 N.Y.S.2d at page 171:

"A business or service which is engaged in regularly supplying the public with some commodity or service which is of public consequence or need, such as electricity, gas, water, transportation or telephone or telegraph service" (emphasis added).

Respondent's position is weakened by the fact that the Town of Lewisboro Zoning Board of Appeals in a prior decision handed down on September 14, 1967, granted a special permit to the American Telephone and Telegraph Company to erect a 125-foot tower whose application had been made "for a permit to a public utility under Article XVI, Section 2(m) of the Lewisboro Zoning Ordinance. This determination, of course, would not be conclusive on the present Board since there had been no opposition to the American Telephone and Telegraph Company application and, moreover, if the Board had erred in 1967 the present Board would not be obligated to perpetuate such error.

[1] This court believes that whether or not Video may be a public utility in the "broad sense of that term" is not the determining factor in the case at bar. Those public utilities which are essential to the public health, safety and welfare enjoy a favored position in relation to zoning regulations. Long Island Water Corp. v. Michaelis, 28 A.D.2d 887, 282 N.Y.S.2d 22; Long Island Lighting Co. v. Horn, 23 A.D.2d 583, 256 N.Y.S.2d 690; Long Island Lighting Co. v. City of Long Beach, 280 App.Div. 823, 113 N.Y.S.2d 762, aff'd, 305 N.Y. 880, 114 N.E.2d 429; Consolidated Edison Co. v. Village of Briarcliff Manor, 208 Misc. 225, 144 N.Y.S.2d 379; Long Island Lighting Co. v. Village of Old Brookville, Sup., 72 N.Y.S.2d 718, aff'd, 273 App.Div. 856, 77 N.Y.S.2d 143, aff'd, 298 N.Y. 569, 81 N.E.2d 104; Wallerstein v. Westchester Joint Water Works, 166 Misc. 34, 1 N.Y.S.2d 111; Municipal Gas Co. v. Nolan, 121 Misc. 606, 201 N.Y.S. 582, aff'd, 208 App.Div. 753, 202 N.Y.S. 939.

[2] In all of the cases hereinbefore cited, the decision of a zoning board in granting a special permit to a public utility was affirmed, or the denial thereof was reversed by the courts, upon a showing that the

interpretation of, and if necessary, a variance of Article IV, Section 2(d) and (g), which limits the height of any structure to 45 feet, except that flagpoles, aerials and certain other projections are exempted from said height requirement, and from the minimum 40-foot rear yard requirement contained in said section.

The pertinent sections of the zoning law are as follows:

ARTICLE XVI, SECTION 2(m)

"Permit any public utility in any district under such conditions and safeguards as will protect the character of the district."

ARTICLE IV, SECTION 2(d)

"No building or structure shall be erected to a height exceeding four stories or forty-five feet."

The decision of the Board of Appeals (Exhibit 10 attached to the return) contained, inter alia, the following findings:

"VMI is in the process of designing for future construction a microwave relay system linking New York and Boston, and with spurs to certain other cities, e. g., Albany and Providence. The system is designated to carry, in both directions, television programs for ultimate re-broadcast. The proposed system itself [sic] however, is not a broadcast system, but one which is designed for point-to-point transmission of program material between television stations. There will be no direct service to the general public (i. e., the television audience) by means of the proposed system. VMI is a commercial enterprise which is in competition with AT & T for the business of transmitting television programs from the point of their origination to broadcast stations which in turn broadcast the programs to the public. VMI serves the television industry only and thus is not a public utility as that term is used in Article XVI(2)(m)."

"The proposed location of the Tower is on a hill so that it will be visible from the many homes located within the immediate area. It cannot be seriously denied that this structure is extremely tall and in the location selected, will be an eyesore, both to the immediate residents who cannot escape looking at it, and to all those within a rather large radius. By its very nature and intended use the tower must be highly visible. Indeed the requirement for orange and white colors and flashing lights is intended to insure high visibility.

"VMI claimed at the hearing that the site selected was the only practical one in view of its availability, height, location and relation to other radio facility paths. The board has carefully considered this evidence, and the testimony by VMI's representative that another site in Wilton is technically feasible, and concludes that applicant has not demonstrated that the chosen site is the only

as such is the principal building proposed for this parcel. It is not exempt from the height limitations of the ordinance.

"For the foregoing reasons, the application must be and is hereby denied both as to the requested variance and alternatively, for a special permit."

Petitioners contend that the Board of Appeals arrived at the erroneous conclusion that Video is not a public utility, and they argue to the contrary, that Video is a public utility within the scope of Article XVI, Section 2(m) of the zoning law. They contend further that the Board's refusal to issue a special permit on the ground that the character of the district could not be protected was an arbitrary and capricious determination unsupported by substantial evidence.

Respondent points out that Section III of the Ordinance grants to the Board of Appeals the authority to make interpretations of the Ordinance. It contends that the Board's interpretation that a corporation which does not directly serve the public is not a public utility within the meaning of Article XVI, Section 2(m), was correct and proper. Respondent also maintains that petitioner had no valid claim of hardship for which a variance might be granted since the alleged hardship was not caused by the nature of the particular property, but by the alleged need for this particular location in Video's overall system. Respondent further argues that there were no safeguards which the Board of Appeals could have prescribed which would have protected the surrounding residential neighborhood from the adverse effects of the proposed 340-foot tower.

In support of its contention that the proposed tower was a "public utility structure", petitioners rely upon the case of Staminski v. Romeo, 62 Misc.2d 1051, 1055, 310 N.Y.S.2d 169, 174, where the Supreme Court, Suffolk County, upheld a decision of a Board of Appeals which had issued a special permit for a CATV antenna mast upon the ground that CATV companies which transmit television signals by wire are regulated in the public interest by the Federal Communications Commission and hence "are impressed with a public interest and can be classified as public utilities in the broad sense of that term". Petitioners also rely upon Black Hills Video Corp. v. Federal Communications Commission, 8 Cir., 399 F.2d 65; State of Washington ex rel. Pruzan v. Redman, 60 Wash.2d 521, 374 P.2d 1002. In the Redman case, the court upheld the Zoning Board's issuance of a conditional use permit for the erection of a radio transmission station and three 240-foot steel towers on land zoned for agricultural use on the basis that a radio station is a public utility impressed with a public interest.

Respondent relies upon the definition of a public utility contained in Black's Law Dictionary (3rd Edition) at page 1463, to wit: "Any agency, instrumentality, business industry or service which is used or conducted in such a manner as to affect the community at

feasible one. It is unbelievable that the system could be planned all the way down to the last location needed with no alternative if the chosen site was unavailable.

"The members of the Board have inspected the proposed site and surrounding area. The general vicinity of the proposed tower is a low density residential neighborhood consisting of single family homes on plots of two acres or larger with a considerable amount of vacant land. The recently adopted master plan proposes that this area of the Town retain its low-density rural character. The proposed tower will be clearly visible from homes in the area.

"This tower simply cannot be located at the chosen site without doing visual damage to the neighborhood. It will be an eyesore which cannot be camouflaged, and indeed must, by virtue of its height and purpose be made highly visible."

It also contained the following "Conclusion":

"The Board notes that the tower is, by virtue of its size and importance, the key part of this installation. Without the tower, the related building and equipment would be useless. The tower can therefore be considered to be the principal structure on the site. As such, it clearly violates the applicable provisions of the Zoning Ordinance.

"The Board is of the opinion and indeed the applicant has admitted that the tower will have an adverse effect on nearby property. The tower itself will be an eyesore and the flashing lights a constant annoyance to surrounding residents.

"The Board is of the opinion that the requested variances are use variances and cannot be granted without an adverse effect on surrounding property. The proposed [sic] commercial use is not in conformity with the Zoning Ordinance or the master plan. The applicant has not shown undue hardship and has not even attempted to show that the property in question is not suitable for the uses for which it is zoned.

"Since VMI does not in any way directly serve the public, either in the Town of Lewisboro or elsewhere, we have concluded that it is not a public utility as that term is used in Article XVI(2)(m) of the Ordinance. It is thus not eligible for a special permit.

"In addition, were we to conclude that VMI was a public utility, we would also conclude that we could not issue a permit for the tower under Article XVI, Section 2(m) of the Ordinance, since the character of the district could not be protected by any conditions attached to such a permit.

"The board is of the opinion that the tower proposed by the applicant is clearly not an aerial as that term is used in Article IV Section 2(d). The proposed tower is an independent structure and

services of the public utility were necessary for, and were being used by the community whose zoning board of appeals ruled upon the application for the special permit requested. In the Michaelis case, electric distribution station was involved; in the Horn case, an electric high tension overhead transmission line. The court held in the Village of Old Brookville case that gas storage facilities cannot be absolutely prohibited within a municipality whose citizens used the gas. In the Nolan case, the court held a community's citizenry cannot be deprived of an adequate water supply because the zoning ordinance made no provision for a district in which to locate a water tower.

It should be noted that in all of the aforementioned cases, the public utility at the time of the application was serving an essential need of the community for gas, electric power or water, and the utility project or improvement permitted was necessary for the continuation of one of these vital and necessary services.

Such is not the fact in the case at bar. Here, the service which Video seeks to supply is primarily a service which allegedly will benefit (and only indirectly) the residents of New England. The benefits, if any, to the people in Lewisboro will be of minor significance. This is made clear by petitioners' own application to the Zoning Board of Appeals. Under the heading "COMMENTS ON PUBLIC INTEREST, CONVENIENCE AND NECESSITY", sub-heading "INTRODUCTION" forming part of the aforesaid application, Video stated as follows:

"The microwave system proposed by the applicant has been designed especially to meet the commercial and public television communication needs of New England."

Under the subheading "PUBLIC SERVICE CHARACTERISTICS" Video stated:

"New England has long been an important area for manufacturing, commerce, banking, higher education and scientific and medical research. Its population is approximately 12,000,000 which is about 6% of the national total. It has 3% of the nation's commercial television stations (26) (plus two satellite stations) and 10% of the educational stations (18). Over 80% of its population, (10,000,000) is concentrated in the three-state southern tier bordering New York State, which is served by seventeen commercial television stations and five educational television stations."

Under the subheading "PUBLIC SERVICE SURVEY" it was stated:

"There is a well defined need to provide more flexibility and improve quality of television communications in New England."

Under the subheading "EXISTING FACILITIES" it was stated: "Television transmission service into New England is currently provided by the Bell Telephone System. Best available information indicates that six two-way microwave channels form the backbone system. The proposed system is designed and routed to best meet the regional television needs. Frequency congestion limits expansion of existing routes which can use existing common facilities, but a new route for television which can avoid frequency interference problems and free existing circuits now dedicated to television for new applications."

Under the subheading "SATELLITE COMMUNICATIONS" it was stated:

"As discussed in previous sections, the needs for television transmission in New England are local, regional, and national."

"The New England study also showed that it is important to provide low cost circuits from Boston to Springfield, Hartford, New York, New Bedford, etc., and vice versa, as well as to provide low cost local television service by microwave."

A careful reading of "Application To The FEDERAL COMMUNICATIONS COMMISSION, Washington, D. C. 20554, For Video Common Carrier Microwave Station Construction Permit Under Part 21 Of the Commission's Rules, Zion Hill Station Woburn, Massachusetts" submitted by Video in connection with this application fortifies statement of purpose taken from Video's "COMMENTS ON PUBLIC INTEREST, CONVENIENCE AND NECESSITY" aforesaid. Moreover, the record reveals that the television networks already have the necessary facilities for transmission by reason of their contracts with the American Telephone and Telegraph Company.

Video claims that its plan will furnish this transmission service cheaper to the networks than is presently done by American Telephone and Telegraph Company. The principal reason for this reduced cost apparently is that American Telephone and Telegraph Company employs more towers but of lower height than Video's plan proposes. Obviously, the 340-foot tower proposed by Video will have a longer line of sight than the 125-foot tower of American Telephone and Telegraph Company. Moreover, even if Video's lower cost contention be true, there is no proof, nor is it claimed, that there will be any saving to the television audience or the public generally, who at present pay nothing for their television programs which are financed through the advertising of businesses financially big enough to pay for this expensive advertising medium. NBC, CBS, ABC and others may save some money but this is no saving to the average television watcher anywhere as might be the case if certain improvements in the distribution of electrical power reduced the cost of the electric utilities

which, hopefully, might pass some of the savings to the users of electricity.

The court has carefully examined the entire record before the Lewisboro Zoning Board of Appeals, including all exhibits submitted. The court holds that all findings of fact made by the Zoning Board are supported by the record, as are all of its conclusions with the possible exception of the conclusion that Video is not a public utility.

On the other hand, there is no question that a 340-foot orange and white tower with three or four supporting cables with flashing or revolving lights would be detrimental to the character of the area in a high-class, residential district in a quiet, rural town such as Lewisboro, and would interfere with the quiet enjoyment of their homes by the residents thereof and would seriously reduce the property value of said homes.

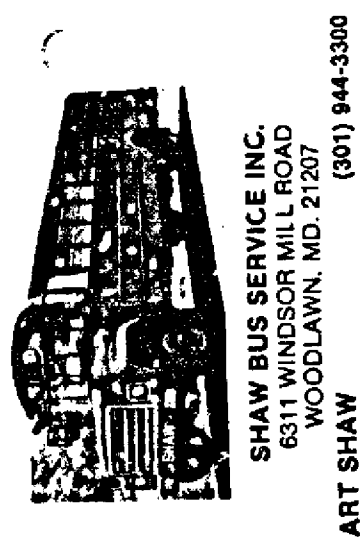
The testimony of affected property owners and the admissions of Mr. Carson, representative of Video, established the adverse effect of petitioners' proposal if, indeed, the 340-foot tower does not prove the prospective damage to the neighborhood. For example, at page 8 of the minutes:

"Arthur Voute: Considering the close proximity to the school, if one of the children did get over the fence, what would be the danger? Mr. Carson: Electrically, nothing. They could attempt to climb the tower."

At page 9: "Mr. Rowedder: Will there be flashing lights? Mr. Carson: Rather than flashing they are in a cycle. There are lights at one-third and two-thirds and they are fixed."

At page 11: "Paul Zill: I live about 600 feet South of the proposed structure. As a pilot I know you see these from 20 miles at night. A lot of other places in the area will see it. If we set a precedent in allowing this area to go commercial I have been told by one of the owners of the Vista View Farms that they will also make an application to go commercial."

At page 16: "Mr. Rowedder: Do you feel if there are homes in the vicinity a location which is less densely populated would be more appropriate? Mr. Carson: With regard to the concern for the general locale."



Mr. Rowedder: You do feel there is an element of danger?

Mr. Carson: I am talking about my concern and applying for something and taking into account the general locale.

Mr. Raynor: What effect would it have on the value of real estate in the area?

Mr. Carson: The initial impact is a negative one."

At pages 17 and 18: "Jay Kornfeld: It would be a detriment to my house to see a blinking light."

Mr. Dick Mead: I am opposed to it on the basis of commercializing 123. I think just adding this here is making it worse further down the line.

Mr. Rowedder: You oppose to it on the commercial basis.

M. Primarle: I think the Master Plan pointed it out.

Mrs. Hunger: Naturally none of us would like to have the tower, but if you begin taking snatches of residential areas—we spent so much time on the Master Plan I would strongly advise the Board to consider the importance of preserving the area. I am opposing the tower because it is detrimental to the area."

At page 21: "Mr. Carson: I think the trends that run through the letters and comments from the audience are all similar to other hearings. Possibly this is a commercial venture. The Town plan was planning for this kind of thing. On property value, if people don't like it then I guess it will affect property value."

The court finds further that it would have been a useless gesture for the Board to try to prescribe any conditions to the granting of the special permit requested because no conditions could ameliorate the harmful effects to this residential community of a 340-foot tower with three revolving lights and three or four supporting cables or wires.

In conclusion, the court finds it hard to accept petitioners' contention that one two-acre plot of land in an R-2 high-class residential district in the Town of Lewisboro is the only feasible spot in an area of 125 square miles in which Video could erect a 340-foot tower allegedly necessary for its purpose. It is hard to accept even that the tower had to be located in the Town of Lewisboro. In fact, Video conceded there was at least one other feasible location. Mr. Carson said the owner of this location would not lease it (page 16 of minutes)—he did not say the owner would not sell it. In any event, to grant petitioners the relief which they seek would be to destroy every vestige of home rule given to a township. In this case, it would destroy the careful planning prescribed for the Town of Lewisboro under its Master Plan.

It is unnecessary to consider the Board's decision in denying the variances requested by the petitioners inasmuch as those questions are not pertinent since the court has upheld the determination of the Board in denying a special permit for the 340-foot tower.

Petitioners' application for an order annulling and setting aside the determination of the Zoning Board of Appeals of the Town of Lewisboro which had denied petitioners' application for a zoning variance and a special permit to permit the construction, maintenance and operation of a building and tower as described in the petition is in all respects denied.

Submit judgment on notice.



77 Misc.2d 643 The PEOPLE of the State of New York, v. Kenneth GUENTHER, Defendant. Monroe County Court. April 9, 1974.

Defendant in a prosecution for promotion of gambling moved for suppression of evidence, and, following an order that any and all motions regarding an eavesdropping warrant be heard by the issuing magistrate, the motion was brought before the County Court, Eugene W. Bergin, J., for hearing. It was held that under present statutory law, there is no procedural distinction between a motion to contravene issuance of search warrant and a motion to suppress evidence, and it is clearly the legislative intent that all issues and motions be determined in a single proceeding. Accordingly the trial court had jurisdiction under the statutes to hear all motions for suppression of evidence, including evidence seized pursuant to the issuance of an eavesdropping order and warrant.

Motions referred to trial judge for such action as deemed appropriate.

1. Criminal Law § 87.1(1) Searches and Seizures § 29

Under present statutory law, there is no procedural distinction between motion to contravene issuance of search warrant and motion to suppress evidence, and it is clearly legislative intent that all issues and motions be determined in single proceeding. Code Cr. Proc. § 807; CPL 710.10 et seq., 710.20, 710.50.

180-263-X

17 Granite Rd. Woodstock, Md. April 2, 1980

Mr. William E. Hammond, Zoning Commissioner, 179 County Office Building Towson, Maryland 21204

Dear Mr. Hammond: Re: Case 80-203-X, 500 Ft Tower ACTHUR R. SHAW, Sr., et al

We, the undersigned, have spent much time and money in the restoration of an 18th century house, built in 1753 and occupied by the Griffith and Worthington families, and marked by the Colonial Dames XVIIIth Century. If the proposed 500 foot tower is allowed to be constructed, the entire landscape will suffer, and the value of our property will decrease.

This community - entirely non-commercial - is disturbed by the threat of devaluation of their property and the marring of the landscape.

The Shaw Bus Service, Inc., has operated for many years at 6211 Windsor Hill Road, Woodlawn, as shown on their business card, enclosed. What is here their business is and that is where the tower should be.

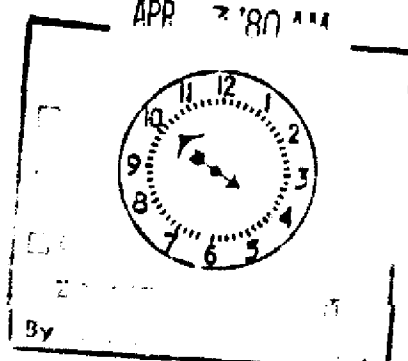
It is my feeling the business is being created by the young man, Art Shaw, who approached me while I read the zoning notice. He tries around the name of his lawyer, which I felt was intimidation. Apparently the young man wishes to operate his business in the luxury of his home instead of at the commercial site. Many, doubtless, would enjoy working in such a way, but, I dare say, few would be so indifferent to the welfare of all.

The proposed tower would be constructed just west of Herwood Elementary School. The fierce winds which we experience in this area, blow from the west, and any accident to the tower would find the school in its path.

It being so unfair for all to suffer for one, I feel sure you will be good and kind enough to permit us to continue to live here in peace and harmony without a high dark tower darkening our sky.

Most sincerely,

Ellen Doherty Helton (720-218) Charles D. Walter



Mr. William E. Hammond Zoning Commissioner Rm. # 109 111 W. Chesapeake Ave. Towson, Md. 21204

Dear Mr. Hammond:

We, the residents of Herwood Heights and Gran-Mar Village communities, offer this formal petition, in protest of zoning case # 80-203-X as evidenced by the following list of names and respective signatures affixed hereto. The aforementioned case involves a zoning application, whereby, a Mr. Arthur Shaw authorized agent for Shaw Bus Service, Inc., requests approval to erect a wireless transmitting tower; measuring 55.5 feet at its base and 500 feet in height, with an appertenant receiving and control house measuring approximately 30 feet by 60 feet. The proposed location of this tower is at longitudinal coordinates 39°, 22', 25 sec. and latitudinal coordinates 76°, 50', 06 sec.

Our reasons for protest are as follows:

- 1. The appearance of this tower will present a detriment to the aesthetic surroundings of our residential community.
2. It's existence, causes a potential devaluation of property values which may also hinder future efforts of resale.
3. The construction of this tower presents a potential public nuisance through increased traffic delivering materials to the construction site, and heavy construction equipment to erect the tower.
4. The existence of this tower presents a potential hazard to the public safety and welfare of the community residents, in the event of faulty workmanship, substandard materials, or negligence.

We, the undersigned, wish to be recognized as having filed this formal protest to zoning case # 80-203-X, as we ascertain only negative attributes to such a project.

With This Signature I Certify The Witnessing Of the Above Signatures.

Handwritten signatures and dates: Charles M. Scherker 4/9/80, etc.

PROTEST TO ZONING CASE # 80-203-X

Table with columns: NAME (please print), STREET ADDRESS, SIGNATURE. Lists names and addresses of protesters.

Table with columns: NAME (please print), STREET ADDRESS, SIGNATURE. Lists names and addresses of protesters.

HERWOOD HEIGHTS COMMUNITY ASSOCIATION, INC. RANDALLSTOWN, MARYLAND 21133

22 October 1980

Board of Appeals Room 219 Old Court House Towson, Maryland 21204

Re: #80-203-X 146

To Whom It May Concern:

As president of the Herwood Heights Community Association, Inc., I wish to be notified as to the hearing date of the above appeal. This Association would like to be heard in opposition to the petitioner and in support of the zoning Commissioner.

Please send notification to the following address:

3717 Lanamer Road Randallstown, Maryland 21133

Thank you.

Sincerely,

Handwritten signature: Arnold Jablon

Vertical stamp: BALTIMORE COUNTY OFFICIALS

80-203-X
 ARTHUR R. SHAW, JR., et ux
 10016 Marriottsville Rd.
 Randallstown, Md. 21133
 March 17 1981
 MAR 19 '81 AM
 Zoning Department

Dear Commissioners:
 As residents of Marriottsville home we strongly object to the construction of a 500-foot free standing transmitting and receiving tower by Mr. Becker. We feel that any structure the height of the Washington Monument has no place in a fine residential area. In fact, we would like the area to remain strictly residential. Allowing this tower to be built would just open the door to other commercial enterprises. Perhaps Mr. Shaw could find another way to keep in touch with his buses. A way that may

not be as costly to him and also to the neighborhood in the way of property values. Marriottsville Road is heavily traveled and could not tolerate the additional burden of school buses being housed in the area. We feel this situation would surely follow the creation of a tower. We plan to attend the appeal hearing on April 14, 1981 at 10 am. Yours truly,
 Richard M. Beckett
 Richard M. Beckett

81-580
 Board of Appeals
 80-203-X
 3/17/81
 Please be advised that we are opposed to the construction of a transmitting & receiving tower proposed to be built on Marriottsville Road. Please help us protect the safety, beauty, & quiet of our neighborhood. Thank you —
 Marilyn & Alan Brown
 3714 Suzanne Rd
 Randallstown, Md. 21133

LAW OFFICES OF
 GEORGE W. LIEBMAN
 THE KEYSER BUILDING
 207 EAST REDWOOD STREET
 BALTIMORE, MARYLAND 21202
 101 752 0897
 April 14, 1981
 County Board of Appeals
 Court House, Room 219
 Towson, Maryland 21204
 Re: Arthur R. Shaw, Jr.
 et ux
 Case No. 80-203-X
 Gentlemen:
 Please enter my appearance in this matter as attorney for the Village of Kings Park Community Association, the Hernwood Heights Community Association, Michael Dean, Lawrence Phipps, and Jane Phipps, protestants.
 Yours sincerely,
 George W. Liebman
 GWL/ir

WRIGHT & PARKS
 ATTORNEYS AT LAW
 MERCANTILE TOWSON BUILDING
 SUITE 102
 408 WASHINGTON AVENUE
 TOWSON, MARYLAND 21204
 TELEPHONE
 301-821-6350
 MAY 1, 1981
 Baltimore County Board of Appeals
 Room 219, Court House
 Towson, Md. 21204
 Re: Case No. 80-203-X
 In Re: Petition for Special Exception
 Eastside of Granite Road, 330 feet south of
 Marriottsville Road, Second District
 Arthur R. Shaw, Jr., et ux, Petitioners
 Dear Members of the Board:
 Protestants have submitted a reply memorandum which cites the case of B.P. Oil v. County Board of Appeals, 42 App. 576 (1979), as being in support of the Protestants' position. I trust that this letter will be accepted in lieu of a rebuttal memorandum.
 The B.P. Oil case was decided under a statute which required that the Board find that "for the public convenience and service a need exists for the proposed use for service of the population in the general neighborhood considering the present availability of such uses to the neighborhood." 42 Md. App. at 578. As was pointed out in the Petitioners' Memorandum, no such requirement is present in the Baltimore County Zoning Regulations.
 It was the requirement of showing special need which the petitioner in B.P. Oil was found not to have met. The long quotation from the B.P. Oil case included at pages 8 and 9 of the Protestants' Memorandum omits language in the middle of the quotation which clearly demonstrates that the burden which B.P. failed to meet is one which does not exist in the present case. That language, which should appear where the quotation in Protestants' Memorandum shows an omission on page 9, is as follows:

WRIGHT & PARKS
 PAGE NO. 2
 DATE: May 1, 1981
 TO: Baltimore County Board of Appeals
 "Its own market survey showed some public support for its proposed facility but no strong or unambiguous cry for such services. The evidence as to what was the appropriate neighborhood was also ambiguous at best -- one version arguably showing need; the other, significantly dispelling it. The need was, in short, fairly debatable."
 Protestants have failed to cite a single case in which the denial of a special exception under the Baltimore County Zoning Regulations or under regulations involving a comparable standard of proof has ever been affirmed by the Maryland appellate courts. The reason is that such regulations involve a presumption that the proposed use is in the public interest.
 Thank you very much for your consideration of this matter.
 Very truly yours,
 Leland S. Van Koten
 LSV:ce
 BALTIMORE COUNTY BOARD OF APPEALS
 MAY 1 11 00 AM '81

494-3180
 County Board of Appeals
 Room 219, Court House
 Towson, Maryland 21204
 June 16, 1981
 H. Emslie Parks, Esquire
 Suite 402
 305 W. Chesapeake Avenue
 Towson, Maryland 21204
 Re: Case No. 80-203-X
 Arthur R. Shaw, Jr., et ux
 Dear Mr. Parks:
 Enclosed herewith is a copy of the Opinion and Order passed today by the County Board of Appeals in the above entitled case.
 Very truly yours,
 Edith T. Eisenhart
 Edith T. Eisenhart, Adm. Secretary
 Encl.
 cc: Mr. and Mrs. Arthur R. Shaw, Jr.
 George W. Liebman, Esquire
 Mr. Charles M. Schevker
 Mr. Homer Seidel, Jr.
 Mr. Michael S. Dean
 Mr. Barry Smith
 Mr. Charles Walter
 Ms. Jane Phipps
 Mr. Arnold Jablon
 John W. Hession, III, Esquire
 Mr. W. E. Hammond
 Mr. J. E. Dyer
 Mr. N. E. Gerber
 Mr. J. Hoswell

494-3180
 County Board of Appeals
 Room 219, Court House
 Towson, Maryland 21204
 July 7, 1981
 George W. Liebman, Esq.
 The Keyser Bldg.
 207 E. Redwood St.
 Baltimore, Md. 21202
 Re: Case No. 80-203-X
 Arthur R. Shaw, Jr., et ux
 Dear Mr. Liebman:
 Notice is hereby given, in accordance with the Rules of Procedure of the Court of Appeals of Maryland, that an appeal has been taken to the Circuit Court for Baltimore County from the decision of the County Board of Appeals rendered in the above matter.
 Enclosed is a copy of the Certificate of Notice.
 Very truly yours,
 June Holmen, Secretary
 Encl.
 cc: Charles M. Schevker
 Homer Seidel, Jr.
 Michael S. Dean
 Barry Smith
 J. W. Hession, III, Esq.
 Charles Walter
 Jane Phipps
 Arnold Jablon
 J. E. Dyer
 W. Hammond

July 7, 1981

BILLED TO: H. Emslie Parks, Esq.
409 Washington Ave.
Towson, Md. 21204

Cost of certified documents filed
in Case No. 80-203-X \$20.00

Arthur R. Shaw, Jr., et ux
E/S of Granite Rd., 330' S of Marriottsville Rd.
2nd District

MAKE CHECKS PAYABLE TO: Baltimore County, Md.

REMIT TO: County Board of Appeals
Rm. 219, Court House
Towson, Md. 21204

494-3180

County Board of Appeals

Room 219, Court House
Towson, Maryland 21204

July 7, 1981

H. Emslie Parks, Esq.
409 Washington Ave.
Towson, Md. 21204

Re: Case No. 80-203-X
Arthur R. Shaw, Jr., et ux

Dear Mr. Parks:

In accordance with Rule B-7 (a) of the Rules of Procedure of the Court of Appeals of Maryland, the County Board of Appeals is required to submit the record of proceedings of the zoning appeal which you have taken to the Circuit Court for Baltimore County in the above matter within thirty days.

The cost of the transcript of the record must be paid by you. Certified copies of any other documents necessary for the completion of the record must also be at your expense.

The cost of the transcript, plus any other documents, must be paid in time to transmit the same to the Circuit Court not later than thirty days from the date of any petition you might file in court, in accordance with Rule B-7 (a).

Enclosed is a copy of the Certificate of Notice; also invoice covering the cost of certified copies of necessary documents.

Very truly yours,

June Holmen
June Holmen, Secretary

Encls.
cc: Mr. and Mrs. Arthur R. Shaw, Jr.

COLUMBIA OFFICE
WALTER PARK
Registered Surveyor
PHONE 730-9060

TOWSON OFFICE
HUDKINS ASSOCIATES, INC.
Engineers, Surveyors and
Landscape Architects

200 EAST JOPPA ROAD
ROOM 101, SHELL BUILDING
TOWSON, MARYLAND 21204
PHONE 829-9000

BEL AIR OFFICE
L. GERALD WOLFF
Landscape Architect
PHONE 838-0888

July 2, 1979

DESCRIPTION TO ACCOMPANY APPLICATION FOR SPECIAL EXCEPTION:

Beginning for the same at a point in the center of Granite Road, said point being distant southerly 330 feet measured along the centerline of said Granite Road from its intersection with the center of Marriottsville Road thence leaving said Granite Road (1) South 72 degrees 41 minutes 30 seconds East 240 feet (2) North 17 degrees 18 minutes 30 seconds East 219.0 feet (3) North 77 degrees 53 minutes East 170.50 feet (4) North 12 degrees 07 minutes West 50 feet (5) North 77 degrees 53 minutes East 200 feet (6) North 12 degrees 07 minutes West 225 feet to the center of said Marriottsville Road thence binding thereon North 77 degrees 53 minutes East 50 feet thence leaving the center of said Marriottsville Road (1) South 12 degrees 07 minutes East 225 feet (2) North 77 degrees 53 minutes East 395.30 feet (3) South 11 degrees 44 minutes 15 seconds West 646.71 feet (4) South 55 degrees 30 minutes West 968.19 feet (5) North 04 degrees 48 minutes 50 seconds East 716.98 feet (6) North 72 degrees 41 minutes 30 seconds West 240 feet to a point in the center of said Granite Road thence binding thereon North 17 degrees 18 minutes 30 seconds East 50 feet to the place of beginning.

Containing 14.55 Acres of land more or less.

Malcolm E. Hudkins
Malcolm E. Hudkins
Registered Surveyor #5095

*7-2-79
8:59
Shaw et ux
2/2/81
J. R. Shaw
NCE*

Mr. William Hammond
Zoning Commissioner of Baltimore County
Baltimore County Office Building
Towson, Maryland 21204

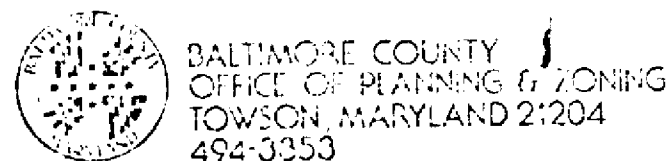
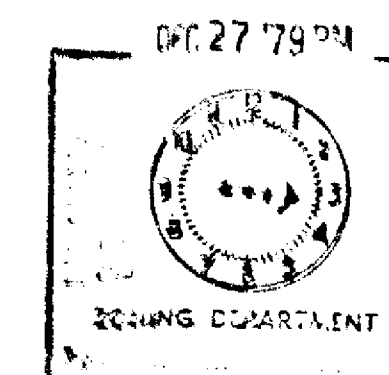
Re: Special Exception
for Transmitting Tower
Marriottsville & Granite Roads
Election District #2

Dear Mr. Hammond:

I am requesting that the subject case be heard as expeditiously as possible. This request is being made because my business, the Shaw Bus Co., located at 6311 Windsor Mill Road is presently experiencing great difficulty with its existing communication system. The communication between buses and the office is essential, in that the safety and convenience of the riders, a large amount of which is school children, many handicapped, is at stake.

Thank you for your cooperation in this matter.

Very truly yours,
Arthur R. Shaw



WILLIAM E. HAMMOND
ZONING COMMISSIONER

July 3, 1980

H. Emslie Parks, Esquire
Suite 402, 305 West Chesapeake Avenue
Towson, Maryland 21204

RE: Petition for Special Exception
E/S of Granite Road, 330' S of
Marriottsville Road - 2nd
Election District
Arthur R. Shaw, Jr., et ux -
Petitioners
NO. 80-203-X (Item No. 146)

Dear Mr. Parks:

I have this date passed my Order in the above referenced matter in accordance with the attached.

Very truly yours,

William E. Hammond
WILLIAM E. HAMMOND
Zoning Commissioner

WEH/esr

Attachments

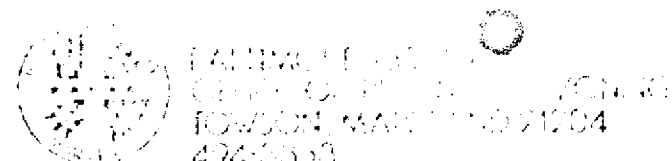
cc: Mr. Charles M. Schevker
10101 Marriottsville Road
Randallstown, Maryland 21133

Mr. Barry Smith
3615 Granite Road
Woodstock, Maryland 21163

Mr. Homer Seidel, Jr.
10012 Marriottsville Road
Randallstown, Maryland 21133

John W. Hessian, III, Esquire
People's Counsel

Mr. Michael S. Dean
10017 Marriottsville Road
Randallstown, Maryland 21133



WILLIAM E. HAMMOND
ZONING COMMISSIONER

March 26, 1980

Mr. & Mrs. Arthur R. Shaw, Jr.
6311 Windsor Mill Road
Baltimore, Maryland 21207

RE: Petition for Special Exception
E/S Granite Rd., 330' S Marriottsville
Road - Case No. 80-203-X

Dear Sirs:

This is to advise you that \$51.00 is due for advertising and posting of the above property.

Please make check payable to Baltimore County, Maryland and remit to Sondra Jones, Room 413, County Office Building, Towson, Maryland 21204, before the hearing.

Very truly yours,

William E. Hammond
WILLIAM E. HAMMOND
Zoning Commissioner

WEH:ej

3/5/80

Mr. & Mrs. Arthur R. Shaw, Jr.
6311 Windsor Mill Road
Baltimore, Maryland 21207

NOTICE OF HEARING

RE: Petition for Special Exception - E/S Granite Road, 330 feet S of
Marriottsville Road - Case No. 80-203-X

TIME: 1:30 P.M.

DATE: Tuesday, April 1, 1980

PLACE: ROOM 106 COUNTY OFFICE BUILDING, 111 W. CHESAPEAKE AVENUE,
TOWSON, MARYLAND

John D. Seyfert
ZONING COMMISSIONER OF
BALTIMORE COUNTY

BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

Mr. W. E. Hammond
Zoning Commissioner
John D. Seyfert, Director
Office of Planning and Zoning
TO: _____ Date: March 11, 1980
FROM: _____
SUBJECT: Petition No. 80-203-X Item 146

Petition for Special Exception
East side of Granite Road, 330 feet South of Marriottsville Road
Petitioner- Arthur R. Shaw, Jr., et ux

Second District

HEARING: Tuesday, April 1, 1980 (1:30 P.M.)

It is the office's opinion that the proposed 500 foot tower would not be in keeping with the residential character of the area.

John D. Seyfert
John D. Seyfert, Director
Office of Planning and Zoning

JDS:JGH:ab

RE: PETITION FOR SPECIAL EXCEPTION
E/S of Granite Rd., 330' * BEFORE THE
S of Marriottsville Rd., * COUNTY BOARD OF
2d District * APPEALS OF
ARTHUR R. SHAW, JR., et ux * BALTIMORE COUNTY
Petitioners * Case No. 80-203-X

PETITIONERS' MEMORANDUM OF LAW
STATEMENT OF FACTS

This matter is before the Board upon a Petition for a Special Exception to permit the construction of a wireless transmitting and receiving tower at a location southeast of the intersection of Granite and Marriottsville Roads. The subject property is zoned R.C. 3, the zoning having been changed from D.R. 2 by the County Council subsequent to the hearing before the Zoning Commissioner. Wireless transmitting and receiving towers are permitted by special exception in both R.C. 3 and D.R. 2 zones.

The property which is the subject of this Petition is the residence of Petitioners and has been for a number of years. Petitioners testified that they intend to continue living on the property regardless of the decision on this Petition. The Petitioners' daughter, son-in-law and grandchildren live directly across Granite Road from their property. The closest residence to the site of the proposed tower is that of the Petitioners. The photographs which were introduced into evidence, both as Petitioners' exhibits and as Peoples Counsel's exhibits, indicate that the Petitioners' residence is at least as large and well maintained as the others in the neighborhood and shown on the photographs.

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BALTIMORE COUNTY
APPEALS BOARD
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would actually reduce the possibility of lightning striking any nearby structures. He further testified that construction of the tower would require only six to ten men working over a period of six to eight weeks. Mr. Vlissides stated that the proposed tower would not, in his opinion, pose any threat to the health or safety of residents of the surrounding community.

Mr. Charles Suit, the radio technician whose testimony was previously mentioned, stated that transmissions from the tower would not cause interference with radio or television reception by the residents of neighboring properties.

Mr. Brian McGraw, a real estate appraiser, testified that in his opinion the construction of the tower would not have an adverse effect on the value of neighboring properties. He indicated that the sales price of property in the vicinity of similar towers in western Baltimore County had not been affected by the proximity of such towers. Although counsel for protestants cross-examined Mr. McGraw concerning the extent of his research into the effect of towers upon the assessed valuations and subsequent sales prices of properties which were near towers, it is important to note that the protestants did not produce any affirmative evidence that the proximity to a tower had ever caused a reduction in assessed valuation or a reduction in the sales price of any property either in Baltimore County or elsewhere.

Mr. Holt, a resident of the neighborhood, testified that although he would have a clear view of the tower from his house, he did not think that it would reduce the value of his property and that he had no objection to the construction of the tower. Mr. Holt further testified that he had worked for WBAL in the vicinity of that station's tower for a number of years and confirmed that there was no danger posed by ice blowing from a tower.

Petitioner Arthur R. Shaw, Jr., is the President of Shaw Bus Company, which operates a fleet of 38 school buses. The services provided by Shaw Bus Company include transportation of children who attend the School for the Deaf in Frederick, children who attend the Rosewood State School for the retarded, pregnant girls in Baltimore City, and other students with health problems, as well as students without medical problems.

Arthur R. Shaw, III, the son of Petitioners and the Vice President of Shaw Bus Company, testified concerning the importance of two-way radio communications to his company and the history of problems in achieving adequate communications from existing tower locations. Shaw Bus Company has used antennas atop the downtown Baltimore Hilton Hotel, on Windsor Mill Road, and most recently has used an antenna on a tower at the University of Maryland Baltimore County campus. Although the latter antenna location has resulted in improved communications, the Shaw Bus Company's use of the tower may be terminated by the University at any time on 30 days' notice.

The history of antenna problems was confirmed by Mr. Charles Suit, an electronics technician who has serviced the radio system operated by the bus company and who is familiar with these problems. Mr. Ronald Sisk, an official of the School for the Deaf, testified that while two-way radio communications are not a legal requirement for the school buses transporting children who attend that institution, he considers such communications to be "essential."

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No representative of any governmental agency appeared to testify that there was anything about the proposed tower which would be contrary to the public interest.

The only testimony in opposition to the special exception came from residents of the area, who testified that they thought the tower would be an eyesore, that they were concerned about the possibility of their children climbing on the tower, that they were concerned about the safety of the tower, that they considered it to be unjustified to place a "commercial use" such as the proposed tower in a residential area and that they thought the presence of the tower would cause a reduction in the value of their property. One neighboring resident, who holds a 2d class FCC license and had some military experience in radio communication testified that he was concerned that the tower structure might interfere with radio and television reception in the neighborhood. This witness conceded, however, that he had no actual experience with tower structures and their effect upon radio and television reception and further testified that he had not used his FCC license in connection with his employment.

ARGUMENT

THE PETITION FOR A SPECIAL EXCEPTION SHOULD BE GRANTED

Wireless transmitting and receiving structures are permitted by special exception in R.C. 3 zones pursuant to the provisions of Section 1A02.2.B.31 of the Zoning Regulations. Section 502 of the Zoning Regulations clearly states that all of the uses permitted by special exception "are proper uses of land," but further provides that since "under certain conditions they could be detrimental to the health, safety

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Mr. Matthew Vlissides, a licensed professional engineer with many years of experience in tower construction, testified that he had reviewed the plans for the tower and that the plans meet all applicable engineering standards and all of the requirements of the BOCA Basic Building Code which is in effect in Baltimore County.

The proposed tower is manufactured by Unarco-Rohn, Inc., one of the largest tower manufacturers in the United States. The witness testified that he had personal experience with hundreds of identical towers in the United States and abroad and that, to the best of his knowledge, such a tower had never failed. In fact, Mr. Vlissides testified that he had heard of only one failure of a self-supporting tower of any type anywhere in the world and that this resulted from a direct hit by a tornado.

Mr. Vlissides testified that before the tower was in districts, winds would have to average for a one-hour period 112 miles per hour up to 300 feet and 122 miles per hour from 300 to 500 feet. Also, before being in distress, the tower could withstand gusts of up to 135 miles per hour up to 300 feet and 146 miles per hour from 300 to 500 feet. As an added safety factor, the tower is designed to withstand these wind loads with a 1/2 inch coating of heavy glaze ice on every exposed surface.

Mr. Sol Hirsch, an experienced meteorologist, testified that the highest gusts which have ever been measured at the weather monitoring station at Baltimore-Washington International Airport were 80 miles per hour on two occasions in the early 1950s. At 33 feet above ground level, these would be equivalent to 67 miles per hour. Mr. Hirsch testified that winds at the site of the proposed tower would

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or general welfare of the public," they are to be permitted only pursuant to special exception. (Emphasis supplied.)

Wireless transmitting and receiving towers are not permitted as a matter of right, except as an accessory use, in any zone. By the same token, however, such towers are permitted by special exception in rural conservation, density residential, business and manufacturing zones. See, e.g., Baltimore County Zoning Regulations, Sec. 1A01.2.C.30 (R.C. 2 zones); Sec. 1A02.2.B.31 (R.C. 3 zones); Sec. 1A03.3.B.14 (R.C. 4 zones); Sec. 1A04.2.E.21 (R.C. 5 zones); Sec. 1B01.1.C.20 (all D.R. zones); Sec. 230.13 (B.L. zones); Sec. 233.4 (B.M. zones); Sec. 236.4 (B.R. zones); Sec. 245.4.a (M.L.R. zones); Sec. 253.2.D (M.L. zones); and Sec. 256.4 (M.H. zones).

The standards for determining whether to grant a special exception are set forth in Sec. 502.1 of the Zoning Regulations and are the same whether the zone involved is a rural conservation or a heavy manufacturing zone. The County Council, in permitting wireless transmitting and receiving towers to be constructed in residential and rural conservation zones, has determined that as a general matter there is nothing about such towers which is inconsistent with the welfare of the residents of residential or rural areas. The proper standards for consideration of special exception applications have been considered in numerous cases decided by the Maryland appellate courts.

In Turner v. Hammond, 270 Md. 41, 54, 310 A. 2d 543 (1973) the Court of Appeals pointed out that special exception uses are provided for as part of the comprehensive zoning

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probably be slightly less than at EWI and that the tower site would certainly not be subject to any higher winds than EWI. Mr. Hirsch testified that according to estimates prepared by the National Bureau of Standards, the expected 100 year maximum winds are gusts of 74 miles per hour at 33 feet and 119 miles per hour at 500 feet, with the maximum expected one hour sustained winds being 63 miles per hour at 33 feet and 88 miles per hour at 500 feet. The comparable maximums expected in the next 300 years are gusts of 85 miles per hour at 33 feet and 128 miles per hour at 500 feet, with maximum sustained winds of 66 miles per hour at 33 feet and 97 miles per hour at 500 feet.

Mr. Hirsch testified that heavy ice normally does not form during periods of high winds and that it would be virtually impossible for heavy glaze ice to form in winds which approached the maximum expected velocities since the water would blow off the tower before it had a chance to freeze. Mr. Hirsch further testified that a tornado would do more damage to an enclosed structure such as a house than to an open structure such as the proposed tower.

The combination of the engineering and meteorological testimony thus indicates that the proposed tower is designed to withstand conditions which are much more severe than any which will likely exist in the Baltimore area in the next 300 years.

Mr. Vlissides testified that any heavy ice which formed on the tower would either slide down the tower itself or fall directly underneath the tower. He testified that the tower would be equipped with devices to prevent climbing on the tower, and Mr. Shaw testified that he intended to install fencing around the tower and would be willing to have the special exception conditioned upon the provision of such fencing. Mr. Vlissides testified that the tower

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plan and that such a use shares "the presumption that...it is in the interest of the general welfare and, therefore, valid." The Court pointed out that such uses are to be permitted "absent any fact or circumstance negating the presumption." The Court further stated that while an applicant for a special exception has the burden of adducing testimony to show that the proposed use meets the standards prescribed by the zoning ordinance, "he does not have the burden of showing affirmatively that his proposed use accords with the general welfare." 270 Md. at 55. The Court held that the Salisbury Board of Zoning Appeals had improperly denied a special exception for an apartment house in what was essentially a single-family residential zone.

To the same effect is Rockville Fuel and Feed Company v. Board of Appeals, 257 Md. 183, 262 A. 2d 199 (1970), in which the Court of Appeals pointed out that the special exception "is a valid zoning mechanism that delegates to an administrative board a limited authority to permit enumerated uses which the legislative body has determined can, prima facie, properly be allowed in a specified use district, absent any fact or circumstance in a particular case which would change this presumptive finding." 257 Md. at 188.

In Rockville Fuel, the Gaithersburg Board of Appeals had denied a special exception for a concrete plant in a heavy industrial zone on the basis of a memorandum from the planning commission opposing the special exception, testimony from the owner of a neighboring apartment building that he feared structural damage to his building from vibrations, and testimony from a resident of the area that dust and heavy trucks associated with the operation would adversely affect the area. The Court of Appeals held that none of this was sufficient to overcome the presumption that the use

was consistent with the public welfare and that the testimony of the protestants "amounted to unsupported dislike and fear of the project." 257 Md. at 193.

The Court of Appeals held in Rockville Fuel that "there is no need...for the applicant to show affirmatively that the granting of his application would be a benefit to the community at large..." 257 Md. at 191. The applicants in the present case, in producing evidence of the services provided and the need for radio communication have thus gone well beyond the requirements of the statute.

The fact that special exception uses are presumptively permissible and that the applicant need not demonstrate hardship or a necessity for the special exception was also the holding in Montgomery County v. Merlands Club, Inc., 202 Md. 279, 96 A. 2d 261 (1953), in which the Court of Appeals held that the Montgomery County Board of Appeals had incorrectly denied a special exception for a swimming and tennis club in a residential zone.

There have been at least two reported cases in recent years involving appeals from decisions of this Board in which the Board had denied applications for special exceptions. In Anderson v. Sawyer, 23 Md. App. 612, 329 A. 2d 716 (1974), cert. denied 274 Md. 725 (1975), there was an application for a special exception for a funeral home in a D. R. 5.5 zone. The Board denied the application on the strength of the testimony of protestants to the effect that the funeral home would create traffic congestion, create a "wedge for future commercialization," have a depressing psychological effect on the residents of neighboring properties, and make those properties less valuable. The protestants' testimony concerning reduction in property values was supported by the testimony of a qualified real estate appraiser. 23 Md. App. at 623. The Court of Special Appeals held, however, that

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special exception use presents a hazard to neighboring properties or a detriment to the health, safety or general welfare of the locality involved are demonstrated by the case of Gowl v. Atlantic Richfield Company, 27 Md. App. 410, 341 A.2d 832 (1975).

The Gowl case involved an application for a special exception to permit above-ground storage of more than 30,000 gallons of petroleum products per 20,000 square feet of lot area. Although the property in question was in a manufacturing zone, it was within 500 feet from a residential district and some of the proposed structures themselves were only 550 feet from a residential district. The Howard County Board of Appeals denied the application, in part because some of the supporting structures for a pipeline to be constructed in connection with the storage facility were to be located within the floodplain. The Board ruled that the presence of such structures in the floodplain "would provide a potential danger to the surrounding properties, as well as menace the general welfare." 27 Md. App. at 413.

The Court of Special Appeals noted, however, that there was expert testimony to the effect that the supporting structures were designed to withstand flood waters of greater strength than any expected in the area. The Court held that the Board had incorrectly denied the special exception. In discussing the Board's finding of a potential danger, the Court quoted with approval the following language from the opinion of the trial court, which had also held that the special exception should have been granted:

"The Board's finding...cannot be faulted as an abstract proposition. There was, however, testimony that the likelihood of such a danger was minimal. It should be borne in mind that

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the special exception should have been granted and therefore reversed the action of the Board.

The Court of Special Appeals conceded that funeral homes had inherent deleterious effects on residential areas and could for that reason be prohibited altogether in such cases if the County Council chose to do so. The Court went on, however, to point out that the County Council, by permitting such a use as a special exception, had determined that as a general matter the use was to be permitted. The following language of the Court is as applicable to the present case as it was to Anderson if one merely substitutes the words "radio tower" for "funeral home":

"[I]n the instant case the legislature of Baltimore County has determined that as part of its comprehensive plan funeral homes are to be allowed in residential zones notwithstanding their inherent deleterious effects. By defining a funeral home as an appropriate use by way of special exception, the legislature of Baltimore County has, in essence, declared that such uses, if they satisfy the other specific requirements of the ordinance, do promote the health, safety and general welfare of the community. As part of the comprehensive zoning plan this legislative declaration shares in a presumption of validity and correctness which the courts will honor. (Citations omitted.)

"The presumption that the general welfare is promoted by allowing funeral homes in a residential use district, notwithstanding their inherent depressing effects, cannot be overcome unless there are strong and substantial existing facts or circumstances showing that the particularized proposed use has detrimental effects above and beyond the inherent ones ordinarily associated with such uses. Consequently, the bald allegation that a funeral home is inherently psychologically depressing and adversely influences adjoining property values, as well as other evidence which confirms that generally accepted conclusion, is insufficient to overcome the presumption that such a use promotes the general welfare of a local community. Because there were neither facts nor valid reasons to support the conclusion that the grant of the requested special exception would adversely affect adjoining and surrounding properties in any way other than would result from the location of any funeral home in any residential zone, the evidence presented by the protestants was, in effect, no evidence at all." 23 Md. App. at 624-625 (Emphasis supplied.)

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all uses of this nature present a 'potential' danger but if the possibilities rather than the probabilities of danger are good grounds for denying permits for such uses, it is difficult to see how these uses could be permitted anywhere, regardless of what steps might be taken to minimize the potential dangers accompanying them." 27 Md. App. at 415.

The suggestion of the People's Counsel that the Board should automatically deny a special exception for a tower which is taller than the distance to neighboring properties is without any support in either the Zoning Regulations or the Maryland cases. There was no evidence whatever before the Board to the effect that any foreseeable conditions would cause the tower to fail. The technical aspects of the construction of the tower, including but not limited to the construction of the foundation, will be subject to inspection and approval by the appropriate Baltimore County authorities. The Petitioners would be willing to have the special exception conditional upon inspection and approval of the construction by an independent engineer experienced in tower construction, such as Mr. Vlissides or a similarly qualified engineer. The Petitioners will be living in closer proximity to the tower than any of their neighbors and may therefore be expected to assure that the tower is constructed in a manner which is as safe as humanly possible.

Many houses are located directly under or in close proximity to large trees which could demolish a house if they fell. There are no engineering studies or inspections to certify that such trees are capable of withstanding anything approaching the conditions which the tower proposed in this application is designed to survive. Yet there is no requirement that an owner of property remove any trees which could conceivably damage neighboring property in the event that they fell.

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The facts in the present case are even stronger than those in Anderson, since the protestants in this case failed to produce any expert testimony to support their assertions as to the adverse effects of the proposed tower. Furthermore, as in Anderson, none of the testimony indicated why any of the adverse effects feared by the protestants would be any worse in the present case than in any other case in which there is an application for a special exception for the same use in any other residential area.

The fact that special exception uses are presumptively permissible was again emphasized by the Court of Special Appeals in Miller v. Kiwanis Club of Loch Raven, Inc., 29 Md. App. 285, 347 A.2d 572 (1975), in which the Court of Special Appeals held that this Board had incorrectly denied an application for a special exception for a swimming club in an R.D.P. zone.

The People's Counsel suggested to the Board that the present application should be denied because the height of the tower is greater than the distance to certain nearby residences and because Petitioners' expert witness would not "guarantee" that it was absolutely impossible for the tower to fall. As was pointed out above, the expert witness did testify that he had never known of a failure of this type of tower in his experience with several hundred such towers, that the tower is designed to withstand conditions much more severe than those which have ever occurred in this area and much more severe than those which may be expected in this area in the next three hundred years, and that he was aware of only one failure of any type of self-supporting tower (which occurred as the result of a direct hit by a tornado). He further testified that the only thing which could make the tower fail at ground level and thus fall its entire

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Man-made structures such as multi-story office and apartment buildings are required to meet only reasonable engineering standards. They are not required to be designed so as to resist every theoretically possible catastrophe including deliberate sabotage, yet there are numerous such structures which are taller than their distance to neighboring properties. There is nothing in the zoning regulations which justifies requiring that radio towers, alone among all tall objects, meet the standard which has been suggested by the People's Counsel.

Had the County Council intended to prohibit towers which are taller than their distance to neighboring property, it could easily have so provided. In fact, there is a requirement that amateur radio antennas, which are permitted as accessory uses as a matter of right, be "no higher than 100 feet or the horizontal distance to the nearest property line, whichever is less..." Zoning Regulations, Sec. 1A02.2.B.31. The fact that the Council elected to apply this height limitation only to accessory use antennas when the limitation could easily have been made applicable to all towers strongly indicates that it did not view such a limitation as being necessary in situations where the safeguards inherent in the special exception procedure would be applicable.

The concerns of the protestants that the tower would be an eyesore and result in general deterioration of the neighborhood similarly furnish no basis for denial of the special exception. The Court of Appeals has held that a zoning ordinance which has as its sole purpose the achievement of an aesthetically pleasing result is not a permissible use of the police power. Mayor and City Council of Baltimore v. Mano Schwartz, Inc., 268 Md. 79, 299 A.2d 828 (1973).

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length would be the dynamiting or similar deliberate sabotage of one or more of the tower legs.

That the fact that a tower is higher than the distance to nearby residences is not by itself sufficient to mandate denial of a special exception is demonstrated by the case of Levy v. Montgomery County, 248 Md. 346, 236 A.2d 737 (1968), cert. denied, 393 U.S. 877, in which the Montgomery County Board of Appeals granted a special exception to permit the construction of a 1219 foot self-supporting tower and a transmitter building on a less than four-acre lot in a residential subdivision. Although the opinion of the Court of Appeals did not discuss the distance to neighboring residences, the transcript of testimony indicated that the base of the tower was within 300 feet from five different houses and was only 180 feet from the nearest house. Levy v. Montgomery County, supra, Appendix for Appellees, at 104-105. Copies of the relevant pages from the transcript are attached hereto. Despite the fact that the protestants in Levy, unlike those in the present case, produced testimony from a qualified real estate appraiser that the tower would cause a decrease in the value of the adjacent properties, the Court of Appeals affirmed the Board's granting of the special exception.

It is respectfully submitted that the Levy case is almost directly controlling upon the present application. The tower proposed in the present application is only 41% of the height of the Levy tower, but is more than 60% farther from the closest neighboring house.

The proper considerations in determining whether a

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Generalized concerns about neighborhood deterioration, such as those expressed by the protestants, have recently been held by the Court of Special Appeals to be an insufficient basis for denying a conditional use permit for outdoor advertising signs under a statute which contains requirements which are quite similar to those which are applicable in the present case. In Mayor and City Council of Baltimore v. Foster & Kleiser, 46 Md. App. 163, 416 A.2d 762 (1980), the Court of Special Appeals reversed a denial of such a permit and stated as follows:

"The City Council, by permitting billboards as a conditional use, has legislatively determined that, as a general rule, they do not menace or endanger the public health, safety, general welfare, or morals within the area of their permitted use. The Board has a limited amount of discretion to deny the use if there is substantial evidence to show that, notwithstanding the underlying legislative conclusion, a particular structure would, in fact, have such an effect. But it may not thwart the legislative will based upon unspecified and unsupported protestations and concerns." 46 Md. App. at 171-172.

The cases cited by protestants in their memorandum are inapplicable to the present case. First, all of those cases are from other jurisdictions and thus do represent interpretations of Maryland law. Furthermore, each of those cases is readily distinguishable from the present application.

In Zoning Board of Adjustment v. Marshall, 387 S.W. 2d 714 (Tex. Civ. App., 1965), the holding was that the proposed tower required a variance for which it was necessary for the property owner to show undue hardship. A requirement that the applicant prove that existing towers are unavailable is obviously relevant to such a requirement. As was pointed out above, however, there is no requirement for a showing of undue hardship or necessity in order to justify the granting of a special exception under Maryland law.

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The case of Rollins Broadcasting of Delaware, Inc. v. Hollingsworth, 248 A.2d 143 (Del., 1968), als. cited by protestants, was decided on procedural grounds. No testimony was taken by the Board, the members of which improperly relied upon facts known to them personally in deciding upon the application.

In United States Transmission Systems, Inc. v. Schoepflin, 63 App. Div. 2d 1970, 405 N.Y. S.2d, 764 (1978), the application was one for a height variance which required a showing of "practical difficulties." Such difficulties need not be shown to justify a special exception under Maryland law. Furthermore, the administrative body was concerned about danger from ice blowing off the tower. There was uncontradicted testimony in the present case that any ice heavy enough to do damage would either slide down the tower or drop directly under the tower.

The case of Video Microwave, Inc. v. Zoning Board of Appeals of the Town of Lewisboro, 77 Misc. 2d 798, 354 N.Y.S. 2d 817 (Sup. Ct., 1974), is a decision of a New York State trial court under a statute which apparently required the applicant to show that the tower was "necessary for the public health, safety or welfare." 354 N.Y.S. 2d at 817. As was pointed out above, the Maryland appellate courts have expressly held that an applicant for a special exception need not satisfy such a requirement. Unlike the situation with respect to the present application, there was no presumption in Video Microwave that the tower was in the public interest and therefore permissible.

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the school for the deaf in Frederick and most of which are utilized for conventional school transportation uses.

The son of petitioners, Arthur R. Shaw, III, the Vice President of the Shaw Bus Company, testified that Shaw Bus Company had utilized various antennas and now utilized an antenna on a tower at the University of Maryland, Baltimore County campus which provided satisfactory transmission. Although a lease was produced showing that use of the tower could be terminated on thirty (30) days notice no evidence was produced concerning the University's intention in that regard nor was it established that other equally satisfactory towers were not available in the Baltimore metropolitan area. Further, Mr. Shaw acknowledged that the rent of the University of Maryland, Baltimore County campus tower was nominal, that the Chesapeake & Potomac Telephone Company made available at low rates leased lines which would permit the use of towers elsewhere in the State should this be necessary at low cost and that even construction of the tower proposed by the application would not necessarily solve transmission and reception problems relating to school buses in the Frederick area since reception could not be assured when school buses were on the "downhill" of hills and mountains between Frederick and Baltimore. There was introduced as a respondent's exhibit a map furnished the applicant by Motorola indicating that Motorola could assure the applicant only of reception within a radius falling well short of the Frederick area.

Ronald Sisk, an official of the Maryland School for the Deaf, testified that the Shaw Bus Company provided only a small portion of the bus transportation services utilized by the School

CONCLUSION

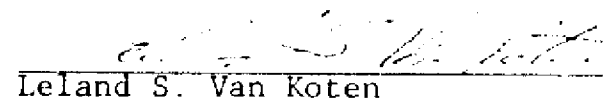
For the reasons set forth above, it is respectfully urged that Petitioners' application for a special exception should be granted.


H. Emslie Parks

Leland S. Van Koten
Wright & Parks
409 Washington Ave.
Suite 1012
Towson, Md. 21204
(301) 821-6350

Attorney for Petitioners

I HEREBY CERTIFY that on this 14th day of April, 1981, I have mailed a copy of the within Memorandum to George W. Liebmann, Esquire, The Keyser Building, 207 E. Redwood Street, Baltimore, Md. 21202, Attorney for the Protestants, and to John W. Hessian, III, Esquire, People's Counsel for Baltimore County, County Office Bldg., Towson, Md. 21204.


Leland S. Van Koten

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for the Deaf; that he was not in a position to verify that the tower would fully provide communications with Shaw Buses in the Frederick area; that there was no legal requirement that radio communication to such buses be provided; and that most of the buses engaged by the School for the Deaf did not have and were not required to have two-way radio communications.

Mr. Matthew Vlissides, a licensed professional engineer, testified that the tower in question was required by federal regulations to be painted in orange and white colors for maximum visibility and was required to have flashing lights at several levels; that the tower was of rigid construction and if the tower were to fall, unlike towers supported by guy wires, it would not fall in place but would at best fall in segments which might be up to 300 feet in length; that at least one such tower (at St. Louis) had fallen when struck by a tornado.

Mr. Sol Hirsch, a meteorologist, testified as to gusts measured at a monitoring station at Baltimore-Washington airport some thirty miles from the tower. His testimony was equivocal as to whether measurements taken there were adequate to include sudden gusts and tornado conditions. Mr. Hirsch acknowledged that the records kept of tornado conditions throughout the State were spotty and imperfect and the statistical compilation he used to describe the highest gusts encountered at BWI airport showed almost equally modest wind conditions at points such as Key West, Florida notorious for hurricane and other high wind conditions.

Mr. Vlissides acknowledged that construction of the tower would require six to ten men working over a period of six to eight weeks together with associated equipment and that demolition of

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Mr. Donovan: They are in 23 foot centers. We have evergreen trees at 10 foot high that will be on roughly I would say 10 foot centers.
Mr. Becker: Mr. Donovan, have you estimated how much landscaping would cost that is proposed?
Mr. Donovan: The only thing I know, the clients have told us they want it done properly. And we, the tree sales that we are providing is a mature size.
Mr. Becker: So all these figures you mention are of mature trees?
Mr. Donovan: When we say 16 foot trees, this is what we will write the specifications for.
Mr. Becker: At the time of planting?
Mr. Donovan: That is right.
Mr. Thomas: How close is the brick wall that you testified to the property line?
Mr. Donovan: Well, it varies from 28 feet to 22 feet at this point 28.
Mr. Thomas: Do you know the total number of shade trees that will be installed on that property?
Mr. Donovan: No, we have not developed that yet.
Mr. Thomas: Do you know the total number of evergreens [OS] that will be planted?
Mr. Donovan: Not at this particular time.
Mr. Thomas: For the record, would you give me the specific distances for each of these five houses located immediately adjacent to the subject property?
Mr. Donovan: From where to what building, then?
Mr. Thomas: First, from the proposed building, then to the tower itself, starting with Lot 15, Block 5?
Mr. Donovan: Lot 15, to the tower, structure is 110 feet. To the base of the tower, 220 feet.

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Mr. Thomas: Lot 14, Block 5?
Mr. Donovan: Lot 14, the nearest structure is 95 feet. To the nearest leg of the tower, 180 feet.
Mr. Thomas: Lot 13, Block 5?
Mr. Donovan: The nearest structure, will be 110 feet. To the tower would be 200 feet.
Mr. Thomas: Lot 12, Block 5?
Mr. Donovan: 84 feet and the nearest tower, leg, 205 feet.
Mr. Thomas: Let's try that same measurement again coming straight this way.
Mr. Donovan: To this tower leg, this is farther away.
Mr. Becker: Why don't you try it?
Mr. Thomas: Give me the measurement again, the closest to the area?
[109] Mr. Donovan: 82 feet.
Mr. Thomas: That is Lot 12, Block 5, The fifth house, Lot 26, Block 2?
Mr. Donovan: 100 feet, and to the nearest tower leg, 300 feet.
Mr. Thomas: Directing your attention to the last house, you just mentioned, Lot 26, Block 2, there would be no intervening building between it and the tower?
Mr. Donovan: That is right. As this section shows, flying that this 120 foot tower is not going to be clearly visible to each of these residents, are you?
Mr. Donovan: If this thing is planted properly, and there are adequate shade trees around, adequate canopy, I don't very seriously that the tower, itself, in the immediately adjacent houses is going to be that visible.
Chairman Sanders: Going to be that visible. In other words, not going to be standing out there in its own form.

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Proceedings

the tower should it become technologically obsolete would cost at least fifty thousand dollars.

Mr. Charles Suit, a radio technician called by applicant stated that transmissions from the tower would not cause interference with radio or television reception by neighboring properties but was unable to express an opinion as to whether the physical presence of the tower itself would cause such interference.

Mr. Brian McGraw, a real estate appraiser, called by the applicant indicated that he had conducted no examination of the resale value of prices surrounding the two other radio towers about which he testified or the tax assessments of such properties and that his testimony related solely to the sale of undeveloped tracts between developers. Protestants introduced an exhibit showing a tax assessment for one property described by Mr. McGraw which was substantially less than the price earlier paid as between developers for the property in question, which property was located in close proximity to a radio tower.

The only testimony of a neighbor presented by the applicant was testimony of a neighborhood resident who worked for a radio station and was particularly accustomed to towers in his vicinity.

Although the applicant claimed that the tower was necessary for his school bus business he acknowledged that other bus operators such as Harrelson Transportation Company functioned with much smaller towers. Uncontradicted testimony introduced by the applicant indicated that the cost of the tower was in excess of One Hundred and Fifty Thousand Dollars, an amount far in excess of the sums currently paid for the existing transmission facilities of applicant. Applicant did not deny the possibility of further commercial use of the tower alleging only that the tower was

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In Re: Petition for Special Exception
Eastside of Granite Road, 330 feet south of
Marriottsville Road, Second District

ARTHUR R. SHAW, JR., ET LX * BEFORE THE
Petitioners * COUNTY BOARD OF APPEALS
* OF BALTIMORE COUNTY
* Case No. 80-203-X

PROTESTANTS' REPLY MEMORANDUM OF LAW

Statement of Facts

This matter is before the Board upon appeal from denial by the Zoning Commissioner of an application for special exception to permit the construction of a radio tower in a residential zone, the tower to be 500 feet in height (a height closely approximating that of the District of Columbia Washington monument). Under the terms of Section 502.1 of the County's zoning regulations:

"Before any special exception shall be granted, it must appear that the use for which the special exception is requested will not: (a) be detrimental to the health, safety or general welfare of the locality involved, (b) tend to create congestion in roads, streets, and alleys therein, (c) create a potential hazard and cause undue concentration of population, (e) interfere with adequate provisions for schools, parks, water, sewerage, transportation or other public requirements, conveniences, or improvements, (f) interfere with adequate light and air."

The Zoning Commissioner finding that the first of these standards had not been met denied the special exception.

On appeal the evidence adduced showed the following:

The petitioner, Arthur R. Shaw, Jr., is the President of a school bus company operating a fleet of thirty-eight school buses, two or three of which are utilized to transport children attending

"primarily" for its own benefit. Although applicant was invited by a member of the Board to modify his application for an unusually large building at the base of the tower no such modification was tendered at the close of testimony nor was any explanation tendered of the dimensions of the building.

Testimony adduced by Peoples' Counsel showed that the tower, if it fell, would fall on a possible radius including a portion of the neighboring street and several neighboring properties at least one of which was located as close to the tower as the residence of the applicant.

Numerous residents of the neighborhood testified as to its peculiarly rural character also evidenced by its recent rezoning as RC3 from DR2 and as to the fact that the unobstructed nature of views was a major inducement to property owners to purchase in the neighborhood. Each property owner testified that the 500 foot orange and white tower would have a detrimental effect upon the value of his property and concern was expressed that the tower would operate as an attractive nuisance and that it would endanger properties if it fell. Several property owners testified as to the presence of small children in the area. One property owner testified as to his ownership nearby of a historical home which would undergo special depreciation in consequence of a view such as the tower. One resident holding an FCC license whose testimony was accepted by the Board as expert testimony testified that the tower structure as distinct from transmission iron it would interfere with radio and television reception in the neighborhood. No contrary testimony was adduced on behalf of the applicant.

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Argument

The petition for special exception must be denied for two reasons: First, the property owner has failed to meet the requirements of Turner v. Hammond and Anderson v. Sawyer establishing that "the applicant has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements." Second, there are demonstrated detrimental effects from the proposed tower not present with respect to all radio towers in residential areas.

In the present case, there was a total failure of proof on the part of the applicant with respect to at least three issues:

- 1. A special impact upon neighboring properties in consequence of their rural, residential and historic character.
2. Interference by the tower structure itself with radio reception of the neighboring residential properties.
3. The hazard presented by the tower were it to fall.

While it is true, as applicant points out, that where a special exception is authorized, its denial requires evidence of "facts or circumstances showing the particularized proposed use has detrimental effects above and beyond the inherent ones ordinarily associated with such uses," in the present case, there was abundant evidence, some adduced by the developer himself, as to such peculiar, detrimental effects. First, the tower in question was far higher than most radio towers - ten times as high as the fifty foot limit for accessory uses and several times as high as other towers in the vicinity evidence as to which was adduced by the applicant. Second, there was evidence of the peculiarly rural residential character of the area in question. The evidence was clear that this was no ordinary area and that it differed from most portions of the RC2, RC3, RC4, RC5, DR, BL, BR, MLR, ML and

Certificate of Service

I HEREBY CERTIFY that on this 29th day of April, 1981, a copy of the foregoing Protestants' Reply Memorandum of Law was mailed to:

H. Emslie Parks, Esquire, 409 Washington Avenue, Suite 1012, Towson, Maryland 21204
John W. Hessian, 3rd, Esq., People's Counsel for Baltimore County, County Office Building, Towson, Maryland 21204

Handwritten signature of H. Emslie Parks

RECEIVED BALTIMORE COUNTY CLERK OF COURTS

MH zones in which radio towers are also permitted by special exceptions. In this vicinity, there were vistas surrounding residences and historic homes, rendering a radio tower, particularly one of this extraordinary height a peculiarly discordant use, supplying "probative evidence of harm or disturbance in light of the nature of the zone involved" of the type referred to in Anderson v. Sawyer, 23 Md. App. 612. The complete collapse of the applicant's appraisal testimony and the additional and contradicted testimony as to possible interference by the physical structure itself with radio reception clearly demonstrated the applicant's failure to meet the first standard for grant of a special exception.

Finally, there is a second peculiar feature of the tower which rendered it objectionable in this location, in a sense that it would not be objectionable in other locations of the same zones within which it is a permitted special exception: the fact that the tower, if it fell, would extend beyond the boundaries of the property on which it was located. The past practice of the Board has refused to approve rigid towers where the height of the tower is greater than the distance to the nearest lot line. Even with respect to towers which are permitted accessory uses and which are barely 100 feet in height, the zoning regulations would bar erection if the tower is higher than "the horizontal distance to the nearest property line." Zoning Regulations, §1A02.2.b.31. Applicant's assertion on page 15 of its memorandum that "the fact the Council elected to apply this height limitation only to accessory use antennas when the limitations could have easily have been made applicable to all towers" proves the opposite of what

IN THE MATTER OF ARTHUR R. SHAW, JR., ET UX * BEFORE THE * COUNTY BOARD OF APPEALS * OF * BALTIMORE COUNTY * CASE NO. 80-203-X

MEMORANDUM OF PROTESTANTS

The protestants herein direct the attention of the Board to the following decided cases relating to the appropriateness of denying special exceptions to radio and television transmitting towers in residential districts:

- United States Transit Systems v. Schoepflin, 63 App.Div. 2d 970, 405 N.Y.S. 2d 764 (1978) in which the Court stressed that the tower in question was 280 feet high, was not applied for by a public utility, was situated within seven hundred feet of a residential area, and was near highways and high voltage lines.
- Video Microwave, Inc. v. Zoning Board of Appeals, 77 Misc. 2d, 798, 354 N.Y.S. 2d 817 (1974) in which the Court stressed that the applicant was not a public utility, that there were feasible sites for the facility in question, and that the facility in question would be painted in bright colors and have flashing lights disruptive of a residential district and suitable "in Times Square, not in Lewisburg."
- Pollins Broadcasting of Delaware v. Hollingsworth, 248 A.2d 143 (Delaware 1968).

the applicant wishes it to prove. The fact that the Council felt it necessary to apply this limitation even to towers that were less than 100 feet in height demonstrates a fortiori that the Board is justified in applying such a limitation to towers of greater height and in considering the hazards presented by such towers in determining whether an applicant has met the burden of showing that a tower does not "create a potential hazard" within the meaning of §502.1(c). It is thus clear that the cases from other jurisdictions cited in the initial memorandum of protestants made clear that the present application is one which at the least, is fairly debatable. It presents a case in which the Board is free to deny a special exception without any fear of a court reversal. The blunt fact is that the applicant here has not sustained its burden. As stated in BP Oil v. County Board of Appeals, 42 Md. App. 576, 579, a case more recent than any cited by the appellant:

"The proponent always has the burden of proof (pertinently, here, the production burden) and must introduce enough to generate a fairly debatable question in order to sustain a zoning decision in his favor. The thrust of these principles cannot, however, be reversed and turned upon a negative decision where a board is not persuaded to act. They do not impose upon an opponent of zoning change some corresponding burden to generate a fairly debatable doubt. By a sleight of hand, BP flashes a legitimate burden upon a proponent to sustain an action and tries to palm it off as a transferred burden upon the opponent to sustain a non-action. Though it may work with rabbits, the sleight of hand won't work with the allocation of the burden of proof. Where BP seeks, as here, to say that the Board was compelled as a matter of law to rule in its favor, BP assumes not merely the lesser burden of generating a fairly debatable issue so as to permit a ruling in its favor but the significantly greater burden of actually dispelling fair debate by proof so clear and decisive as legally to compel

Zoning Board of Appeals v. Marshall, 387 S.W. 2d 714 (Texas Civ. App.) in which the Court stressed, among other things, that there was no prohibition against the applicant renting lines permitting him to make use of an already existing tower for his transmissions. It is submitted that the factors stressed in these cases are all present here and that the special exception must be denied.

Handwritten signature of George W. Liebmann
George W. Liebmann, The Keyser Building, 207 E. Redwood Street, Baltimore, Maryland 21202, 752-5887

Certificate of Service

I HEREBY CERTIFY that on this 14th day of April, 1981, a copy of the foregoing Memorandum of Protestants was delivered to: H. Emslie Parks, Esquire, Suite 1012, 409 Washington Avenue, Towson, Maryland 21204.

Handwritten signature of George W. Liebmann
George W. Liebmann

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a ruling in its favor. In this case, BP's own evidence, though adequate, was equivocal... there is frequently such a middle ground wherein it is neither arbitrary, capricious or illegal to say yes, nor arbitrary, capricious or illegal to say no. The decision was in that discretionary range of the Board and was not compelled either way as a matter of law. BP amply met its burden of production. It did not, however, meet its burden of persuasion for the obvious reason that it failed to persuade those whom it needed to persuade. It lost a fair judgment call and from that there can be no successful appeal. Those who would use precedent carefully must learn to distinguish between that minimal quantity of evidence permitting fair debate, looking in one direction, and the massively greater quantity and quality of evidence necessary to foreclose fair debate, looking in the other direction."

It is only necessary to recall the ridiculous appraisal evidence tendered on behalf of the applicant as his sole evidence relating to the effect upon the surrounding neighborhood to perceive the absence in this case of "the massively greater quantity and quality of evidence necessary to foreclose fair debate." The erection of this Washington Monument in the vicinity of a historic home and in a neighborhood known for its bucolic vistas is peculiarly objectionable given the availability of sites in residential, conservation, industrial and business zones in which radio towers are also permitted as special exceptions in which a tower would raise none of the problems it raises here. The application for special exception can be and should be denied.

Handwritten signature of George W. Liebmann
George W. Liebmann, The Keyser Building, 207 E. Redwood Street, Baltimore, Maryland 21202, 752-5887

RE: PETITION FOR SPECIAL EXCEPTION : BEFORE
for a wireless transmitting tower and receiving structure 500' in height including a control house : COUNTY BOARD OF APPEALS
E/S of Granite Road, 330' S. of : OF
Marriottsville Road : BALTIMORE COUNTY
2nd District :
Arthur R. Shaw, Jr., et ux : No. 80-203-X
Petitioners :

OPINION

This case comes before the Board on an appeal from a decision by the Zoning Commissioner which denied a special exception for a transmitting tower project to be erected on the Petitioner's property. This tower project would consist of a 480 foot self supporting tower, a 20 foot antenna and a building for transmitting equipment which is to be located at the base of the tower. The subject property is located on the east side of Granite Road 330 feet south of Marriottsville Road in the Second Election District of Baltimore County, and is zoned R.C. 3. A transmitting tower is a permitted use in an R.C. 3 zone if it meets the requirements as set out in Section 502.1 of the Baltimore County Zoning Regulations, which states as follows:

"Before any Special Exception shall be granted, it must appear that the use for which the Special Exception is requested will not:

- a. Be detrimental to the health, safety, or general welfare of the locality involved;
b. Tend to create congestion in roads, streets or alleys therein;
c. Create a potential hazard from fire, panic or other dangers;
d. Tend to overcrowd land and cause undue concentration of population;
e. Interfere with adequate provisions for schools, parks, water, sewerage, transportation or other public requirements, conveniences, or improvements;
f. Interfere with adequate light and air."

The Petitioner testified that his purpose in requesting the special exception was to provide communication with his fleet of buses now being used to transport school children, some with disabilities, so that should a bus break down on the road help could be dispatched quickly. This service is now being provided on a short term basis (30 day cancellation clause in lease) by equipment installed on the U.M.B.C. tower on Wilkens Avenue. The Petitioner presented evidence of his desire to provide coverage out to the vicinity of Frederick, Maryland, and also to avoid the very crowded commercial transmitting frequencies now in general use. This means transmitting at very high

frequencies, which in turn dictates a 500 foot height for the antenna since at these frequencies straight line communications only are possible. If the Petitioner had opted for lower frequencies the height of the tower would have been greatly reduced, but the Board must take the proposal as presented.

The Petitioner addressed the issue of safety for the nearby residences as the principal issue of the case. Mr. Matthew Vlissides, a licensed professional engineer, reviewed the tower design and declared it safe barring a direct hit by a tornado or deliberate sabotage. Mr. Sol Hirsch, a professional meteorologist, confirmed that the wind speed expected in the area was well within the design limits of the tower as described by Mr. Vlissides.

Protest of this project comes from the People's Counsel and adjacent property owners, however, neither the County nor the Protestants provided expert testimony to counter this evidence, and the Board is generally satisfied that the 480 foot tower would meet the requirements of the Baltimore County Zoning Regulations with the exception that the soil upon which the tower would be built was not examined to see what, if any, modifications would be needed to the design of the tower standard base.

The Board notes that the project consists of more components than the tower only. Testimony concerning the 20 foot antenna mounted on the top of the tower and on the equipment building at the tower base was very slight. Regarding the antenna, Mr. Vlissides stated that he had not reviewed the design and the Board is left with the question of whether the antenna would pose a safety problem for nearby residences under severe weather conditions when mounted 480 feet high on the tower. Similarly, we know little of the equipment building, the need for the size proposed, the threat, if any, to the surrounding neighborhood, particularly from high voltage transmitting equipment. We know little of the means of connecting the transmitting equipment to the tower and its safety aspects.

The Petitioner also attempted to address the adjacent property owners' concern that the tower project would significantly decrease property values in the neighborhood. The Board finds the testimony and report by Mr. Brian McGraw, a real estate appraiser, incredible. The study by Mr. McGraw attempted to show that similar

properties near towers in the County were not affected in resale value. However, the premise that Mr. McGraw proposed of excluding improved properties because differences in the improvements were too great to be compared was so faulty that the Board rejects his conclusions. The Board notes that the entire property assessment and property tax system in this State is based on comparing improved properties on exactly the basis that Mr. McGraw's is impossible. Many other difficulties were similarly found in Mr. McGraw's testimony, but the Board will not belabor this matter.

Again, however, neither the County nor the Protestants presented credible expert testimony that property values would in fact be adversely affected. The Board is left with only the neighbors' feelings on the matter, one neighbor (a former tower technical) feeling no detrimental effect by the tower and the great majority of the remaining neighbors feeling severely aggrieved by the proposal as likely reducing the value of their property. One neighboring Protestant, who holds a 2nd class FCC license and related military experience in radio communications, testified that he was concerned that the tower structure might interfere with radio and television reception in the neighborhood. The Board, however, does not find great weight with his testimony in that we are not convinced that sufficient factual data was presented as a basis for his conclusion.

The question before the Board then turns on the legal maxim as to which party has the burden of proving its case. The Petitioner's lengthy argument, after reviewing Maryland cases, concludes with the proposition that the Board should grant the special exception unless the opponents present sufficient contrary evidence because the County Council decreed that transmitting towers are "proper uses of land" in R.C. zones. See Sections 1A02.2.B.31 and 502 of the Baltimore County Zoning Regulations. The Petitioner cites Turner v. Hammond, 270 Md. 41, 54, 310 A, 2d 543 (1973), and many similar cases for the proposition that special exception uses are provided for as part of the comprehensive zoning plan and that such uses share "the presumption that... it is in the interest of the general welfare and, therefore, valid." The Court pointed out that such uses are to be permitted "absent any fact or circumstance negating the presumption."

Taken by itself, this indicates that the burden falls on the Protestants to provide sound evidence of harm to the community, which the Board, in this case, has found not to have been given. The Board, however, believes that the burden falls on the Protestants only after the Petitioner has adduced testimony to show that the proposed use meets the standards prescribed by the zoning ordinance. Section 502.1 of the Baltimore County Zoning Regulations makes this clear. It states that "Before any Special Exception shall be granted, it must appear that the use for which the Special Exception is requested will not: a) Be detrimental to the health, safety, or general welfare of the locality involved; etc." [Emphasis added] A special exception need not benefit the community at large, although the applicant for such use must show that it would not harm or disturb neighboring uses. Rockville Fuel and Feed v. Bd. of Appeals of City of Gaithersburg, 257 Md. 183 (1970). As stated in B. P. Oil Co. v. County Bd. of Appeals of Montgomery County, 42 Md. App. 576 (1979): "An applicant must meet both the production burden (producing legally sufficient evidence to satisfy required criteria) and the persuasion burden (convincing the Board to so find in the applicant's favor)". This the Petitioner has failed to do.

The Board finds that the Petitioner did not provide sufficient credible evidence on the safety aspects of the 20 foot antenna, the tower base design as applied to this site, the equipment building, and the connecting waveguide or cable. Nor was any credible evidence received regarding real property values near the proposed use. Again, Section 502.1 states very clearly that "Before any Special Exception shall be granted, it must appear that the use for which the Special Exception is requested will not: a) Be detrimental to the health, safety, or general welfare of the locality involved;" [Emphasis added] Testimony of Mr. McGraw, Petitioner's real estate appraiser, in no way addressed the effect of such a large structure, located amid a group of individual homes, upon their before and after value, or their general welfare. Lacking any direct factual testimony otherwise, the Board finds it inconceivable that the erection of such a large structure in close proximity to these homes could be anything except a detriment to

the general welfare of these homes.

The Board is quite mindful of the high cost to any party appearing before it of retaining expert witnesses. We do not expect that separate experts should be retained to testify on every design detail. We are also aware that the County technical staff will review the detailed design before a building permit is issued. The Board, however, feels that it cannot transfer its responsibility to review the application and be satisfied that the proposal meets the Baltimore County Zoning Regulations merely by saying that the building permit process would likely catch deficiencies the Board finds in testimony presented. Perhaps an example would illustrate this point. The Board asked Mr. Vlissides, the Petitioner's tower expert, whether soil samples were taken at the site and whether he could testify that the "standard" base design presented for the tower would, in fact, apply. He testified that he had not reviewed soil samples and after some discussion, it was pointed out that this design "detail" would be accomplished, after the special exception was granted, in conjunction with Baltimore County's building permit review. If the samples showed rock (for which the area is widely noted; hence, the name Granite), the Petitioner would design a new and different base to accommodate the requirement, submit same to the County technical staff and presumably erect a safe tower. The Board, however, is left with little or nothing on which to base its legislatively mandated decision that the special exception will not be detrimental to health, safety and welfare, etc., as required by Section 502.1 of the Baltimore County Zoning Regulations, as obviously, if the base presented is insufficient, the Board cannot find the structure built upon it will be safe. Where the adequacy of important components of a proposal are called into question before the Board or where major components of a proposal inherently cry for explanation, the Board must be presented with sufficient credible evidence upon which it can base its findings. It is not sufficient that the County's technical staff will review the proposal at a later time. We gratefully leave, however, to the County staff its review of details of the proposal prior to issuing a building permit. For these reasons, the Board will deny the special exception and affirm the finding of the Zoning Commissioner.

ORDER

For the reasons set forth in the foregoing Opinion, it is this 16th day of June, 1981, by the County Board of Appeals, ORDERED that the special exception petitioned for, be and the same is hereby DENIED.

Any appeal from this decision must be in accordance with Rules B-1 thru B-12 of the Maryland Rules of Procedure.

COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY

John V. Murphy

John A. Miller

William T. Hackett

RE: PETITION FOR SPECIAL EXCEPTION for a wireless transmitting tower and receiving structure 500' feet in height including a control house E/S of Granite Road, 330' S. of Marriottsville Road 2nd District Arthur R. Shaw, Jr., et ux Petitioners IN THE CIRCUIT COURT FOR BALTIMORE COUNTY AT LAW

PETITION FOR APPEAL

Arthur R. Shaw, Jr., and Dorothy B. Shaw, Appellants, by H. Emslie Parks and Leland S. Van Koten, their attorneys, respectfully represent unto Your Honor:

- 1. That the Appellants filed on this date an Order of Appeal from the decision of the County Board of Appeals of Baltimore County dated June 16, 1981, under Appeal No. 80-203-X, wherein the Board disapproved Appellants' application to erect a wireless transmitting tower and receiving structure 500' in height including a control house on the east side of Granite Road, 330' south of Marriottsville Road in the 2nd District, Baltimore County, Maryland.
2. That the decision of the Board was arbitrary, capricious and unreasonable.
3. That the decision was contrary to the weight of evidence before the Board.
4. That the decision was not supported by substantial evidence.
5. That the decision was based upon errors of law.
6. And for such other and further reasons as will be presented at the hearing of this Appeal.

WHEREFORE, Appellants pray that this Honorable Court issue an Order reversing the decision of the County Board of Appeals of Baltimore County.

H. Emslie Parks
Leland S. Van Koten
409 Washington Ave.
Towson, Md. 21204
(301) 821-6350

I HEREBY CERTIFY that on this 17th day of June, 1981 I have mailed a copy of the within Petition for Appeal to County Board of Appeals of Baltimore County, Room 219, Court House, Towson, Md., 21204, John W. Hessian, III, Esquire, People's Counsel for Baltimore County, County Office Bldg., Towson, Md. 21204, and to George W. Liebmann, Esquire, The Keyser Bldg., 207 E. Redwood St., Baltimore, Md. 21202, Attorney for the Protestants.

Leland S. Van Koten

RE: PETITION FOR SPECIAL EXCEPTION for a wireless transmitting tower and receiving structure 500' in height including a control house E/S of Granite Road, 330' S. of Marriottsville Road 2nd District Arthur R. Shaw, Jr., et ux Petitioners IN THE CIRCUIT COURT FOR BALTIMORE COUNTY AT LAW

ORDER OF APPEAL

MR. CLERK:

Please enter an appeal on behalf of Arthur R. Shaw, Jr. and Dorothy B. Shaw, applicants, from the decision of the County Board of Appeals of Baltimore County dated June 16, 1981, in the matter of Appeal No. 80-203-X.

H. Emslie Parks

Leland S. Van Koten
Wright & Parks
409 Washington Avenue
Towson, Maryland 21204
(301) 821-6350
Attorneys for Petitioners

I HEREBY CERTIFY that on this 17th day of June, 1981, I have mailed a copy of the within Order of Appeal to County Board of Appeals of Baltimore County, Room 219, Court House, Towson, Md. 21204, John W. Hessian, III, Esquire, People's Counsel for Baltimore County, County Office Bldg., Towson, Md. 21204, and to George W. Liebmann, Esquire, The Keyser Bldg., 207 E. Redwood Street, Baltimore, Md. 21202, attorney for the Protestants.

Leland S. Van Koten

RE: PETITION FOR SPECIAL EXCEPTION
for a wireless transmitting
tower and receiving structure
500' in height including a control
house
E/S of Granite Road, 330' S. of
Marriottsville Road
2nd District
Arthur R. Shaw, Jr., et ux,
Petitioners
Zoning File No. 80-203-X

IN THE
CIRCUIT COURT
FOR
BALTIMORE COUNTY
AT LAW
Misc. Docket No. 13
Folio No. 207
File No. M-7557

CERTIFICATE OF NOTICE

Mr. Clerk:
Pursuant to the provisions of Rule B-2(d) of the Maryland Rules of Procedure,
William T. Hackett, John V. Murphy and John A. Miller, constituting the County Board
of Appeals of Baltimore County, have given notice by mail for the filing of the appeal to
to the representative of every party to the proceeding before it; namely, H. Emslie Parks,
Esq., Suite 402, 305 W. Chesapeake Avenue, Towson, Md. 21204, Counsel for the
Petitioners; Mr. and Mrs. Arthur R. Shaw, Jr., 6311 Windsor Mill Rd., Baltimore, Md.
21207, Petitioners; Mr. Charles M. Schevker, 10101 Marriottsville Rd., Randallstown, Md.
21133, Protestant; Mr. Homer Seidel, Jr., 10012 Marriottsville Rd., Randallstown, Md.
21133, Protestant; Mr. Michael S. Dean, 10017 Marriottsville Rd., Randallstown, Md. 21133,
Protestant; Mr. Barry Smith, 3615 Granite Rd., Woodstock, Md. 21163, Protestant;
George W. Liebman, Esq., The Keyser Building, 207 E. Redwood St., Baltimore, Maryland
21202, Counsel for Protestants; Mr. Charles Walter, 3517 Granite Rd., Woodstock, Md.
21163; Ms. Jane Phipps, 3613 Granite Rd., Woodstock, Md. 21163; Mr. Arnold Jablon,
President, Hemwood Heights Comm. Assoc., Inc., 3717 Lanamer Rd., Randallstown, Md.
21133; and John W. Hession, III, Esq., Court House, Towson, Md. 21204, People's Counsel
for Baltimore County, a copy of which Notice is attached hereto and prayed that it may be
made a part thereof.

June Holmen
June Holmen
County Board of Appeals of Baltimore County
Rm. 219, Court House, Towson, Md. 21204

Arthur R. Shaw, Jr., et ux
Case No. 80-203-X

I HEREBY CERTIFY that a copy of the foregoing Certificate of Notice has
been mailed to H. Emslie Parks, Esq., Suite 402, 305 W. Chesapeake Ave., Towson, Md.
21204, Counsel for the Petitioners; Mr. and Mrs. Arthur R. Shaw, Jr., 6311 Windsor Mill
Rd., Baltimore, Md. 21207, Petitioners; Mr. Charles M. Schevker, 10101 Marriottsville
Rd., Randallstown, Md. 21133, Protestant; Mr. Homer Seidel, Jr., 10012 Marriottsville
Rd., Randallstown, Md. 21133, Protestant; Mr. Michael S. Dean, 10017 Marriottsville
Rd., Randallstown, Md. 21133, Protestant; Mr. Barry Smith, 3615 Granite Rd., Woodstock,
Md. 21163, Protestant; George W. Liebman, Esq., The Keyser Building, 207 E. Redwood
St., Baltimore, Md. 21202, Counsel for Protestants; Mr. Charles Walter, 3517 Granite Rd.,
Woodstock, Md. 21163; Ms. Jane Phipps, 3613 Granite Rd., Woodstock, Md. 21163;
Mr. Arnold Jablon, President, Hemwood Heights Comm. Assoc., Inc., 3717 Lanamer Rd.,
Randallstown, Md. 21133; and John W. Hession, III, Esq., Court House, Towson, Md. 21204,
People's Counsel for Baltimore County, on this 7th day of July, 1981.

June Holmen
June Holmen
County Board of Appeals of Baltimore County

cc: J. Howell
K. Reigel
Files

RE: PETITION FOR SPECIAL EXCEPTION * IN THE
Arthur R. Shaw, Jr., et ux * CIRCUIT COURT
Zoning Case No. 80-203-X * FOR
* BALTIMORE COUNTY
* AT LAW
* Misc. Docket No. 13
* Folio No. 207
* File No. M7557

ANSWER TO PETITION FOR APPEAL

Michael Dean, Lawrence Phipps, Jane Phipps, The Village of
Kings Park Community Association, and The Hemwood Heights
Community Association, Protestants below and Appellees herein,
answer the Petition for Appeal heretofore filed by the Appellant
viz:

1. That the Appellees admit the allegations made and
contained in the first paragraph of said Petition.
2. That the Appellees deny the allegations made and
contained in the second through sixth paragraphs of said Petition
and state affirmatively that the decision of the County Board of
Appeals of Baltimore County herein was proper and justified by
the evidence before it and that the decision of the Board should
therefore be sustained as being lawfully and properly made.

George W. Liebman
George W. Liebman
The Keyser Building
207 E. Redwood Street
Baltimore, Maryland 21202
752-5887

7/10/81

Certificate of Service

I HEREBY CERTIFY that on this 10th day of July, 1981, a
copy of the foregoing Answer to Petition for Appeal was mailed
to H. Emslie Parks, Esquire, 409 Washington Avenue, Towson,
Maryland 21204, John W. Hession, III, Esquire, Room 223 Court
House, Towson, Maryland 21204, and the Administrative Secretary,
County Board of Appeals of Baltimore County, Room 219 Court House,
Towson, Maryland 21204.

RECEIVED
BALTIMORE COUNTY
JUL 13 1981
COUNTY BOARD
OFFICE

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 45,
September Term, 1980

EASTERN OUTDOOR ADVERTISING CO.

MAYOR & CITY COUNCIL OF BALTIMORE

Gilbert, C.J.
Wilner,
Weant,
JJ.

PER CURIAM

Filed: September 25, 1980

Seeking to erect a 14 foot by 48 foot single-faced,
illuminated signboard at 6811 Harford Road in Baltimore City,
the appellant, Eastern Outdoor Advertising Company (Eastern),
applied to the Board of Municipal and Zoning Appeals for the
appropriate permit. Because the property upon which Eastern
proposed to erect the signboard is zoned B-2-2,¹ a classifica-
tion that allows a wide variety of business and commercial
uses, the signboard is permitted as a conditional use if ap-
proved by the Board.² The Board, however, disapproved
Eastern's application, having found that "the proposed use
would menace and endanger the public health, security, general
welfare and morals of the Community." Thereafter, Eastern
noted a timely appeal to the Baltimore City Court, which af-
firmed the Board's decision in an oral opinion rendered on 11
December 1979. It is from this affirmation that the instant
appeal has been taken.

For the reasons explained herein, we agree with
Eastern that "[t]he decision of the Board of Municipal and
Zoning Appeals was arbitrary and capricious in that it was un-
supported by substantial evidence"; therefore, the judgment
of the Baltimore City Court will be reversed. In the light
of this conclusion, we find it unnecessary to discuss the
merits of Eastern's accompanying argument, i.e., "[t]he de-
cision of the Board . . . was based upon errors of law."

¹ See Baltimore City Code art. 30, § 6.2-1.

² See Baltimore City Code art. 30, § 10.0-3c.

-2-

As recently as 10 July 1980, this Court resolved
two cases which are very similar to the one now before us,
i.e., *Mayor of Baltimore v. Foster & Kleiser*, ___ Md. App.
___, 416 A.2d 762 (1979). In *Foster*, we adopted the opinion
of the trial judge (Wilner, J.), who cogently summarized cer-
tain principles relevant to the cases before him, as well as
to the case at bar. These principles are as follows. First,

"[i]t is well settled by many decisions in
this State that the court will not substi-
tute its discretion for that of the Board
in zoning cases. The duty of the Board is
to exercise the discretion of experts.
The court, although it may not arrive at
the same conclusion, will not disturb a
decision of the Board on review, if the
Board has complied with all legal require-
ments of notice and hearing and the record
shows substantial evidence to sustain the
finding."

Foster, 416 A.2d at 764 (quoting *Aaron v. Mayor of Baltimore*,
207 Md. 401, 406 (1955)). Second,

"an applicant for a billboard in a first or
second commercial use district, or indus-
trial use district, is entitled to a permit
unless the Board finds from the evidence
produced before it, or on investigation,
that the proposed use would endanger the
public health, safety, security or morals;
and, . . . the action of the Board, af-
firmative or negative, is entitled to such
respect by the courts that it will be set
aside only if the attacker meets 'the
heavy burden of overcoming the presumption
of constitutionality of legislative action'
by showing that the action of the Board in
the exercise of its original jurisdiction
was arbitrary, capricious or illegal."

Foster, 416 A.2d at 764-65 (quoting *Gilman v. Mayor of Balti-
more*, 205 Md. 557, 564-65 (1954)) (footnote omitted). Third,

-3-

"[i]t is arbitrary and unlawful for the Board to make an es-
sential finding without supporting evidence"; and that, of
course, makes the question of evidentiary sufficiency a proper
one for judicial review." *Foster*, 416 A.2d at 765 n. 1
(quoting *Aaron*, 207 Md. at 406).

Judge Wilner then examined the evidence upon which
the Board had based its decision. Coincidentally, the evi-
dence before the Board in *Foster* is very similar, both in form
and in substance, to the evidence that was before the Board in
the case *sub judice*; the evidence in the latter instance being:
(1) Memoranda from the City Fire Department and the Depart-
ment of Transit and Traffic expressing no objection to the
proposed signboard. (2) A memorandum from the Division of
Industrial Hygiene Investigations stating that the proposed
signboard "apparently, will pose no public health hazard . . ."
(3) A memorandum from the Bureau of Community Hygiene Balti-
more City Health Department stating that "there would appear
to be no health hazard involved in the [erection of the pro-
posed signboard] provided the area under and around [it] is
kept clean and free of nuisances to the neighborhood." (4)
A letter from the City Department of Planning asserting that
the sign would be "visible from the houses facing Woodring
Avenue and Northway Drive to the south." It opposed the
erection of the signboard because of what it considered to
be its excessive height and because of its "proximity to the
dwellings to the east." (5) Letters from various local

OCT 21 1980

EXHIBIT A

politicians requesting that the Board disapprove Eastern's application because the authors supported the community's opposition to the signboard. (6) A letter from the Harford Road-Belair Road Community Organization expressing opposition to the signboard because signs of this type are "aesthetically offensive and a detracting factor to the value of the nearby residential area." (7) The testimony of the President of the Woodring Improvement Association wherein opposition to the proposed signboard was voiced because the Association did not "want any more signs especially in that location."

As Judge Wilner concluded in Foster,

[n]one of this, separately or cumulatively, suffices to support or justify a finding that the sign would "menace and endanger the public health, security, general welfare and morals." There is not a shred of credible evidence to that effect. That a sign will be visible is hardly a reason to ban it; visibility, indeed, is the whole purpose of the sign.

416 A.2d at 766, and,

[t]he City Council, by permitting billboards as a conditional use, has legislatively determined that, as a general rule, they do not menace or endanger the public health, safety, general welfare, or morals within the area of their permitted use. The Board has a limited amount of discretion to deny the use if there is substantial evidence to show that, notwithstanding the underlying legislative conclusion, a particular structure would, in fact, have such an effect. But it may not thwart the legislative will based upon unspecific and unsupported protestations and concerns.

Id. at 767.

the retarded, pregnant girls in Baltimore City, and other students with health problems, as well as students without medical problems (T. 5-9).

Arthur R. Shaw, III, the son of Appellants and the Vice President of Shaw Bus Company, testified concerning the importance of two-way radio communications to his company and the history of problems in achieving adequate communications from existing tower locations. Shaw Bus Company has used antennas atop the downtown Baltimore Hilton Hotel, on Windsor Mill Road, and most recently has used an antenna on a tower at the University of Maryland Baltimore County campus. Although the latter antenna location has resulted in improved communications, the Shaw Bus Company's use of the tower may be terminated by the University at any time on 30 days' notice (T. 9-13).

The history of antenna problems was confirmed by Mr. Charles Suit, an electronics technician who has serviced the radio system operated by the bus company and who is familiar with these problems (T. 72-77). Mr. Ronald Sisk, an official of the School for the Deaf, testified that while two-way radio communications are not a legal requirement for the school buses transporting children who attend that institution, he considers such communications to be "essential" (T. 62-72).

Mr. Matthew Vlissides, a licensed professional engineer with many years of experience in tower construction, testified that he had reviewed the plans for the tower and that the plans meet all applicable engineering standards and all of the requirements of the BOCA Basic Building Code which is in effect in Baltimore County (T. 86-125F).

The proposed tower is manufactured by Unarco-Rohn, Inc., one of the largest tower manufacturers in the United States. The witness testified that he had personal experience with hundreds of identical towers in the United States and abroad and that, to the best of his knowledge, such a tower had never failed (T. 89, 1188). In fact, Mr. Vlissides testified that he had heard of only one failure of a self-supporting tower of any type anywhere in the world and that this resulted from a direct hit by a tornado (T. 104).

RE: PETITION FOR SPECIAL EXCEPTION : IN THE CIRCUIT COURT
for a wireless transmitting tower and receiving structure 500' in height including a control house : FOR BALTIMORE COUNTY
E/S of Granite Road, 330' S. of : AT LAW
Marriottsville Road :
2nd District : Misc. Docket No. 13
Arthur R. Shaw, Jr., et ux, : Folio No. 207
Petitioners- Appellants :
Zoning Case No. 80-203-X : File No. M-7557

ANSWER TO PETITION FOR APPEAL

The People's Counsel for Baltimore County, Protestant below and Appellee herein, answers the Petition for Appeal heretofore filed by the Appellant, viz:

1. That the Appellee admits the allegations made and contained in the first paragraph of said Petition.
2. That the Appellee denies the allegations made and contained in the second through sixth paragraphs of said Petition and states affirmatively that the decision of the County Board of Appeals of Baltimore County herein was proper and justified by the evidence before it and that the decision of the Board should therefore be sustained as being properly and legally made.

AND AS IN DUTY BOUND, etc.,

John W. Hession, III
People's Counsel for Baltimore County
Peter Max Zimmerman
Deputy People's Counsel
Rm. 223, Court House
Towson, Maryland 21204
494-2188

I HEREBY CERTIFY that on this 8th day of April, 1981, a copy of the foregoing Answer to Petition for Appeal was mailed to H. Emslie Parks, Esquire, and Leland S. Van Koten, Wright & Parks, 409 Washington Avenue, Towson, Maryland 21204;

Mr. Vlissides testified that before the tower was in distress, winds would have to average for a one-hour period 112 miles per hour up to 300 feet and 122 miles per hour from 300 to 500 feet. Also, before being in distress, the tower could withstand gusts of up to 135 miles per hour up to 300 feet and 146 miles per hour from 300 to 500 feet. As an added safety factor, the tower is designed to withstand these wind loads with a 1/4 inch coating of heavy glaze ice on every exposed surface (T. 91-95).

Mr. Sol Hirsch, an experienced meteorologist, testified that the highest gusts which have ever been measured at the weather monitoring station at Baltimore-Washington International Airport were 80 miles per hour on two occasions in the early 1950's. At 33 feet above ground level, these would be equivalent to 67 miles per hour. Mr. Hirsch testified that winds at the site of the proposed tower would probably be slightly less than at BWI and that the tower site would certainly not be subject to any higher winds than BWI. Mr. Hirsch testified that according to estimates prepared by the National Bureau of Standards, the expected 100 year maximum winds are gusts of 74 miles per hour at 33 feet and 119 miles per hour at 500 feet, with the maximum expected one hour sustained winds being 63 miles per hour at 33 feet and 88 miles per hour at 500 feet. The comparable maximums expected in the next 300 years are gusts of 85 miles per hour at 33 feet and 128 miles per hour at 500 feet, with maximum sustained winds of 66 miles per hour at 33 feet and 97 miles per hour at 500 feet (T. 126-137).

Mr. Hirsch testified that heavy ice normally does not form during periods of high winds and that it would be virtually impossible for heavy glaze ice to form in winds which approached the maximum expected velocities since the water would blow off the tower before it had a chance to freeze (T. 154-5). Mr. Hirsch further testified that a tornado would do more damage to an enclosed structure such as a house than to an open structure such as the proposed tower (T. 158-9).

The combination of the engineering and meteorological testimony thus indicates that the proposed tower is designed to withstand conditions which

and to George W. Liebmann, Esquire, The Keyser Building, 207 E. Redwood Street, Baltimore, Maryland 21202, with a copy delivered to the Administrative Secretary, County Board of Appeals of Baltimore County, Rm. 219, Court House, Towson, Maryland 21204.

Peter Max Zimmerman
Peter Max Zimmerman

RE: PETITION FOR SPECIAL EXCEPTION * IN THE
for a wireless transmitting tower and receiving structure * CIRCUIT COURT
500' in height including a * FOR
control house * BALTIMORE COUNTY
E/S of Granite Road, 330' S. of *
Marriottsville Road * AT LAW
2nd District *
Arthur R. Shaw, Jr., et ux, * Misc. Docket No. 13
Petitioners * Folio No. 207
Zoning File No. 80-203-X * File No. M-7557

APPELLANTS' MEMORANDUM OF LAW

STATEMENT OF FACTS

This matter is before the Court on an appeal from a denial by the County Board of Appeals of Baltimore County (hereinafter the "Board"), of Appellants' application for a Special Exception to permit the construction of a wireless transmitting and receiving tower at a location southeast of the intersection of Granite and Marriottsville Roads. The subject property is zoned R.C. 3, the zoning having been changed from D.R. 2 by the County Council subsequent to the hearing before the Zoning Commissioner but prior to the hearing before the Board. Wireless transmitting and receiving towers are permitted by special exception in both R.C. 3 and D.R. 2 zones.

The property which is the subject of this appeal is the residence of Appellants and has been for eighteen years (T. 191-192). Appellants testified that they intend to continue living on the property regardless of the decision on this case (T. 192, 194-5). The closest residence to the site of the proposed tower is that of the Appellants. The photographs which were introduced into evidence, both as Petitioners' exhibits and as People's Counsel's exhibits, indicate that the Appellants' residence is at least as large and well maintained as the others in the neighborhood and shown on the photographs.

Appellant Arthur R. Shaw, Jr., is the President of Shaw Bus Company, which operates a fleet of 38 school buses. The services provided by Shaw Bus Company include transportation of children who attend the School for the Deaf in Frederick, children who attend the Rosewood State School for

are much more severe than any which will likely exist in the Baltimore area in the next 300 years.

Mr. Vlissides testified that any heavy ice which formed on the tower would either slide down the tower itself or fall directly underneath the tower (T. 95-96). He testified that the tower would be equipped with devices to prevent climbing on the tower, and Mr. Shaw stipulated that he intended to install fencing around the tower and would be willing to have the special exception conditioned upon the provision of such fencing (T.120-121). Mr. Vlissides testified that the tower would actually reduce the possibility of lightning striking any nearby structures (T. 96). Mr. Vlissides stated that the proposed tower would not, in his opinion, pose any threat to the health or safety of residents of the surrounding community (T. 119).

Mr. Charles Suit, the radio technician whose testimony was previously mentioned, stated that transmissions from the tower would not cause interference with radio or television reception by the residents of neighboring properties (T. 76-77).

Mr. Brian McGraw, a real estate appraiser, testified that in his opinion the construction of the tower would not have an adverse effect on the value of neighboring properties. He indicated that the sales price of property in the vicinity of similar towers in western Baltimore County had not been affected by the proximity of such towers. Although counsel for protestants cross-examined Mr. McGraw concerning the extent of his research into the effect of towers upon the assessed valuations and subsequent sales prices of properties which were near towers, it is important to note that the protestants did not produce any affirmative evidence that the proximity to a tower had ever caused a reduction in assessed valuation or a reduction in the sales price of any property either in Baltimore County or elsewhere (T. 159-183).

Mr. Earl Holt, a resident of the neighborhood, testified that although he would have a clear view of the tower from his house, he did not think that it would reduce the value of his property and that he had no objection to the construction of the tower. Mr. Holt further testified that he had

worked for WBAL in the vicinity of that station's tower for a number of years and confirmed that there was no danger posed by ice blowing from a tower (T. 186-190).

No representative of any governmental agency appeared to testify that there was anything about the proposed tower which would be contrary to the public interest. A representative of the Office of Planning and Zoning did testify as a witness for the People's Counsel, but confined his testimony to the identification of various photographs.

The only testimony in opposition to the special exception came from residents of the area, who testified that they thought the tower would be an eyesore, that they were concerned about the possibility of their children climbing on the tower, that they were concerned about the safety of the tower, that they considered it to be unjustified to place a "commercial use" such as the proposed tower in a residential area and that they thought the presence of the tower would cause a reduction in the value of their property (T. 197-212, 218-231). One neighboring resident, who holds a 2d class FCC license and had some military experience in radio communication testified that he was concerned that the tower structure might interfere with radio and television reception in the neighborhood. This witness conceded, however, that he had no actual experience with tower structures and their effect upon radio and television reception and further testified that he had not used his FCC license in connection with his employment (T. 197-212).

With respect to the testimony of the Protestants, the Board found as follows:

"[N]either the County nor the Protestants presented credible expert testimony that property values would in fact be adversely affected. The Board is left with only the neighbors' feelings on the matter, one neighbor (a former tower technician) feeling no detrimental effect by the tower and the great majority of the remaining neighbors feeling severely aggrieved by the proposal as likely reducing the value of their property. One neighboring Protestant, who holds a 2nd class FCC license and related military experience in radio communications, testified that he was concerned that the tower structure might interfere with radio and television reception in the neighborhood. The Board, however, does not find great weight with his testimony in that we are not convinced that sufficient factual data was presented as a basis for his conclusion." Opinion of the Board, 3.

PETITION FOR SPECIAL EXCEPTION

TO THE ZONING COMMISSIONER OF BALTIMORE COUNTY:

The undersigned, legal owner(s) of the property situate in Baltimore County and which is described in the description and plat attached hereto and made a part hereof, hereby petition for a Special Exception under the Zoning Law and Zoning Regulations of Baltimore County, to use the herein described property for a wireless transmitting tower and receiving structure 500' in height, including a control house.

Property is to be posted and advertised as prescribed by Zoning Regulations.

I, or we, agree to pay expenses of above Special Exception advertising, posting, etc., upon filing of this petition, and further agree to and are to be bound by the zoning regulations and restrictions of Baltimore County adopted pursuant to the Zoning Law for Baltimore County.

I/We do solemnly declare and affirm, under the penalties of perjury, that I/we are the legal owner(s) of the property which is the subject of this Petition.

Contract Purchaser: (Type or Print Name) Signature Address City and State	Legal Owner(s): (Type or Print Name) Signature Address City and State Name and telephone number of legal owner, contract purchaser or representative to be contacted Name Telephone No.
H. Willie Parks 6311 Windsor Mill Road Baltimore, Maryland 21207 944-3346	Dorothy B. Shaw Arthur R. Shaw, Jr. 6311 Windsor Mill Road Baltimore, Maryland 21207 David W. Billingsley 826-9060

ORDERED By The Zoning Commissioner of Baltimore County, this 22nd day of January, 1980, that the subject matter of this petition be advertised, as required by the Zoning Law of Baltimore County, in two newspapers of general circulation throughout Baltimore County, that property be posted, and that the public hearing be had before the Zoning Commissioner of Baltimore County in Room 106, County Office Building in Towson, Baltimore County, on the 1st day of April, 1980, at 1:30 o'clock P.M.

William E. Hammond
Zoning Commissioner of Baltimore County.

**BALTIMORE COUNTY
ZONING PLANS
ADVISORY COMMITTEE**



**PETITION AND SITE PLAN
EVALUATION COMMENTS**

Mr. & Mrs. Arthur R. Shaw, Jr.
6311 Windsor Mill Road
Baltimore, Maryland 21207

cc: Hudkins Associates, Inc.
200 East Joppa Road
Room 101, Shell Building
Towson, Maryland 21204

BALTIMORE COUNTY OFFICE OF PLANNING & ZONING
County Office Building
111 W. Chesapeake Avenue
Towson, Maryland 21204

Your Petition has been received and accepted for filing this 22nd day of January, 1980.

Petitioner: Arthur R. Shaw, Jr., et ux
Petitioner's Attorney: _____

Reviewed by: *Nicholas B. Commodari*
NICHOLAS B. COMMODARI
Chairman, Zoning Plans
Advisory Committee

BALTIMORE COUNTY ZONING PLANS ADVISORY COMMITTEE

March 25, 1980

COUNTY OFFICE BLDG.
111 W. Chesapeake Ave.
Towson, Maryland 21204

cc: Nicholas B. Commodari
Chairman

- MEMBERS
- Bureau of Engineering
 - Department of Traffic Engineering
 - State Roads Commission
 - Bureau of Fire Prevention
 - Health Department
 - Project Planning
 - Building Department
 - Board of Education
 - Zoning Administration
 - Industrial Development

Mr. & Mrs. Arthur R. Shaw, Jr.
6311 Windsor Mill Road
Baltimore, Maryland 21207

RE: Item No. 146
Petitioner - Shaw
Special Exception Petition

Dear Mr. & Mrs. Shaw:

The Zoning Plans Advisory Committee has reviewed the plans submitted with the above referenced petition and has made an on-site field inspection of the property. The following comments are not intended to indicate the appropriateness of the zoning action requested, but to assure that all parties are made aware of plans or problems with regard to the development plans that may have a bearing on this case. The Director of Planning may file a written report with the Zoning Commissioner with recommendations as to the suitability of the requested zoning.

This Special Exception is required as a result of your proposal to construct a wireless transmitting and receiving structure of 500 feet in height and an accompanying control house on the subject property. As shown on the submitted site plan, the location of this structure is greater than 300 feet from any existing single family dwelling which fronts on Granite and Marriottsville Roads.

Particular attention should be afforded to the comments of the Bureau of Engineering as well as those of the Department of Permits and Licenses.

Enclosed are all comments submitted to this office from the Committee members at this time. The remaining members felt that no comment was warranted. This petition was accepted for filing on the date of the enclosed certificate and a hearing scheduled accordingly.

Very truly yours,

Nicholas B. Commodari
NICHOLAS B. COMMODARI, Chairman
Zoning Plans Advisory Committee

NBC/sf
Enclosures

cc: Hudkins Associates, Inc.
200 East Joppa Road
Room 101, Shell Building
Towson, Maryland 21204

ORDER RECEIVED FOR FILING
DATE 4/10/80

RECORDED
4/10/80
1:30 P.M.

BALTIMORE COUNTY
DEPARTMENT OF PUBLIC WORKS
TOWSON, MARYLAND 21204

HARRY J. PISTEL, P.E.
DIRECTOR
February 27, 1980

Mr. William E. Hammond
Zoning Commissioner
County Office Building
Towson, Maryland 21204

Re: Item #146 (1979-1980)
Property Owner: Arthur R. & Dorothy B. Shaw
E/S Granite Rd. 330' S. Marriottsville Rd.
Existing Zoning: DR 2
Proposed Zoning: Special Exception for a wireless transmitting and receiving structure 500' in height.
Acres: 14.55 District: 2nd

Dear Mr. Hammond:
The following comments are furnished in regard to the plat submitted to this office for review by the Zoning Advisory Committee in connection with the subject item.

Highways:

Marriottsville Road and Granite Road, existing public roads, are proposed to be improved in the future as 50 and 40-foot closed section roadways on 70 and 60-foot rights-of-way, respectively. Highway rights-of-way, widenings, including any necessary reversible easements for slopes, will be required in connection with any grading or building permit application.

Soil Control:

Development of this property through stripping, grading and stabilization could result in a sediment pollution problem, damaging private and public holdings downstream of the property. A grading permit is, therefore, necessary for all grading, including the stripping of top soil.

Storm Drains:

Provisions for accommodating storm water or drainage have not been indicated on the submitted plan.

Future drainage and utility easements are required through this property.

Open stream drainage requires a drainage reservation or easement of sufficient width to cover the flood plain of a 100-year design storm.

The Petitioner must provide necessary drainage facilities (temporary or permanent) to prevent creating any nuisances or damages to adjacent properties, especially by the concentration of surface waters. Correction of any problem which may result, due to improper grading or improper installation of drainage facilities, would be the full responsibility of the Petitioner.

Item #146 (1979-1980)
Property Owner: Arthur R. & Dorothy B. Shaw
Page 2
February 27, 1980

Water and Sanitary Sewer:

Public water supply and sanitary sewerage are not available to serve this property, which is utilizing private onsite water supply and sewage disposal facilities. This property is beyond the Baltimore County Metropolitan District and within the Urban-Rural Designation Line. Baltimore County Water and Sewerage Plans W and S-15B and 16A, respectively, indicate "Planned Service" in 6 to 10 years in this vicinity.

Very truly yours,

Ellsworth N. Diver, P.E.
ELLSWORTH N. DIVER, P.E.
Chief, Bureau of Engineering

END:EAM:PWR:ss

cc: J. Somers

FP-SE Key Sheet
28 & 29 SW 42 Pos. Sheets
NE 7 & 8 K Topo
76 Tax Map

BALTIMORE COUNTY
OFFICE OF PLANNING & ZONING
TOWSON, MARYLAND 21204
494-3211

JOHN D. SEYFFERT
DIRECTOR

February 5, 1980

Mr. William Hammond, Zoning Commissioner
Zoning Advisory Committee
Office of Planning and Zoning
Baltimore County Office Building
Towson, Maryland 21204

Dear Mr. Hammond:

Comments on Item #146, Zoning Advisory Committee Meeting, January 22, 1980, are as follows:

Property Owner: Arthur R and Dorothy B. Shaw
Location: E/S Granite Road 330' S. Marriottsville Road
Existing Zoning: D.R.2
Proposed Zoning: Special Exception for a wireless transmitting and receiving structure 500' in height.
Acres: 14.55
District: 2nd

This office has reviewed the subject petition and offers the following comments. These comments are not intended to indicate the appropriateness of the zoning in question, but are to assure that all parties are made aware of plans or problems with regard to development plans that may have a bearing on this petition.

This plan has been reviewed and there are no site-planning factors requiring comment.

Very truly yours,

John L. Wimbley
John L. Wimbley
Planner III
Current Planning and Development

BALTIMORE COUNTY
DEPARTMENT OF HEALTH
TOWSON, MARYLAND 21204

DONALD I. ROOP, M.D., M.P.H.
DEPUTY STATE & COUNTY HEALTH OFFICER

February 11, 1980

Mr. William E. Hammond, Zoning Commissioner
Office of Planning and Zoning
County Office Building
Towson, Maryland 21204

Dear Mr. Hammond:

Comments on Item #146, Zoning Advisory Committee Meeting of January 22, 1980, are as follows:

Property Owner: Arthur R. & Dorothy B. Shaw
Location: E/S Granite Rd. 330' S Marriottsville Rd.
Existing Zoning: D.R. 2
Proposed Zoning: Special Exception for a wireless transmitting and receiving structure 500' in height.
Acres: 14.55
District: 2nd

The existing dwelling on the property is served by a well and sewage disposal system, both of which appear to be functioning properly. The proposed wireless transmitting and receiving structure should not pose any health hazards.

Very truly yours,

Jan J. Kujest
Jan J. Kujest, Director
BUREAU OF ENVIRONMENTAL SERVICES

LJP/rth

ARGUMENT

THE DECISION OF THE BOARD OF APPEALS WAS ARBITRARY AND CAPRICIOUS IN THAT IT WAS UNSUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS BASED UPON ERRORS OF LAW

Wireless transmitting and receiving structures are permitted by special exception in R.C. 3 zones pursuant to the provisions of Section 1A02.2.B.3 of the Zoning Regulations. Section 502 of the Zoning Regulations clearly states that all of the uses permitted by special exception "are proper uses of land, but further provides that since "under certain conditions they could be detrimental to the health, safety or general welfare of the public," they are to be permitted only pursuant to special exception. (Emphasis supplied.)

Wireless transmitting and receiving towers are not permitted as a matter of right, except as an accessory use, in any zone. By the same token, however, such towers are permitted by special exception in rural conservation, density residential, business and manufacturing zones. See e.g., Baltimore County Zoning Regulations, Sec. 1A01.2.C.30 (R.I.C. 2 zones); Sec. 1A02.2.B.31 (R.C. 3 zones); Sec. 1A03.3.B.14 (R.C. 4 zones); Sec. 1A04.2.B.21 (R.C. 5 zones); Sec. 1B01.1.C.20 (all D.I.R. zones); Sec. 230.13 (B.L. zones); Sec. 233.4 (B.M. zones); Sec. 236.4 (B.R. zones); Sec. 248.4.a (M.L.R. zones); Sec. 253.2.D (M.L. zones); and Sec. 256.4 (M.H. zones).

The standards for determining whether to grant a special exception are set forth in Sec. 502.1 of the Zoning Regulations and are the same whether the zone involved is a rural conservation or a heavy manufacturing zone. The County Council, in permitting wireless transmitting and receiving towers to be constructed in residential and rural conservation zones, has determined that, as a general matter, there is nothing about such towers which is inconsistent with the welfare of the residents of residential or rural areas. The proper standards for consideration of special exception applications have been considered in numerous cases decided by the Maryland appellate courts.

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Club, Inc., 202 Md. 279, 96 A.2d 261 (1953), in which the Court of Appeals held that the Montgomery County Board of Appeals had incorrectly denied a special exception for a swimming and tennis club in a residential zone.

The concerns of the protestants that the tower would be an eyesore and result in general deterioration of the neighborhood furnish no basis for denial of the special exception. The Court of Appeals has held that a zoning ordinance which has as its sole purpose the achievement of an aesthetically pleasing result is not a permissible use of the police power. Mayor and City Council of Baltimore v. Mano Schwartz, Inc., 268 Md. 79, 299 A.2d 828 (1973).

Generalized concerns about neighborhood deterioration, such as those expressed by the Protestants, have recently been held by the Court of Special Appeals to be an insufficient basis for denying a conditional use permit for outdoor advertising signs under a statute which contains requirements which are quite similar to those which are applicable in the present case. Under that statute, Baltimore City Code, Art. 30, sec. 11.0-5(a), a conditional use is not to be granted "unless the Board finds in each specific case that the establishment, maintenance, or operation of the conditional use will not be detrimental to or endanger the public health, security, general welfare, or morals...."

In Mayor and City Council of Baltimore v. Foster & Kleiser, 46 Md. App. 163, 416 A2d 762 (1980), the Court of Special Appeals reversed a denial of such a permit and stated as follows:

"The City Council, by permitting billboards as a conditional use, has legislatively determined that, as a general rule, they do not menace or endanger the public health, safety, general welfare, or morals within the area of their permitted use. The Board has a limited amount of discretion to deny the use if there is substantial evidence to show that, notwithstanding the underlying legislative conclusion, a particular structure would, in fact, have such an effect. But it may not thwart the legislative will based upon unspecified and unsupported protestations and concerns." 46 Md. App. at 171-172.

In the present case, the Board conceded that the Protestants had failed to provide "sound evidence of harm to the community...." Opinion of the Board, 4. The Board held, however, that the burden was upon the Appellants to prove that there were no potential detrimental effects upon the community which might arise from the requested use. The Board expressed

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There have been at least two reported cases in recent years involving appeals from the decisions of the Baltimore County Board of Appeals in which the Board had denied applications for special exceptions. In Anderson v. Sawyer, 23 Md. App. 612, 329 A. 2d 716 (1974), cert. denied 274 Md. 725 (1/75), there was an application for a special exception for a funeral home in a D.R.5.5 zone. The Board denied the application on the strength of the testimony of protestants to the effect that the funeral home would create traffic congestion, create a "wedge for future commercialization," have a depressing psychological effect on the residents of neighboring properties, and make those properties less valuable. The protestants' testimony concerning reduction in property values, unlike that in the present case, was supported by the testimony of a qualified real estate appraiser. 23 Md. App. at 623. The Court of Special Appeals held, however, that the special exception should have been granted and therefore reversed the action of the Board.

The Court of Special Appeals conceded that funeral homes had inherent deleterious effects on residential areas and could for that reason be prohibited altogether in such cases if the County Council chose to do so. The Court went on, however, to point out that the County Council, by permitting such a use as a special exception, had determined that as a general matter the use was to be permitted. The following language of the Court is as applicable to the present case as it was to Anderson if one merely substitutes the words "radio tower" for "funeral home":

"[I]n the instant case the legislature of Baltimore County has determined that as part of its comprehensive plan funeral homes are to be allowed in residential zones notwithstanding their inherent deleterious effects. By defining a funeral home as an appropriate use by way of special exception, the legislature of Baltimore County has, in essence, declared that such uses, if they satisfy the other specific requirements of the ordinance, do promote the health, safety and general welfare of the community. As part of the comprehensive zoning plan this legislative declaration shares in a presumption of validity and correctness which the courts will honor. (Citations omitted.)

"The presumption that the general welfare is promoted by allowing funeral homes in a residential use district, notwithstanding their inherent depressing effects, cannot be overcome unless there are strong and substantial existing facts or circumstances showing that the particularized proposed use has detrimental effects above and beyond the inherent ones

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concerns about the lack of evidence as to the specific type of base which might be required and as to other specific aspects of the proposal, including the 20 foot antenna at the top of the tower, the equipment building and the connecting waveguide or cable. With the exception of the issue concerning the base, none of these concerns was even addressed at the hearing. Similarly, although the Board found that the Protestants had not produced credible evidence that their property values would in fact be adversely affected by the tower, it chose to disbelieve the expert testimony produced by Appellants and stated as follows: "Lacking any direct factual testimony otherwise, the Board finds it inconceivable that the erection of such a large structure in close proximity to these homes could be anything except a detriment to the general welfare of these homes." Opinion of the Board, 4-5.

The Board, in making the foregoing factual finding in the admitted absence of any persuasive evidence to support it, has done precisely what the appellate courts of this State have repeatedly held is impermissible. In ruling that the applicant for a special exception has the burden of negating the possibility of every conceivable adverse effect of that exception—even in the absence of credible evidence that any adverse effects might in fact occur—the Board has imposed a requirement which is both logically impossible to meet and which is inconsistent with the decisions of the highest court of this State.

There appear to be no reported Maryland cases in which a denial of a special exception or conditional use permit has been affirmed which did not involve at least one of the following two factors—either a statutory requirement that the applicant prove a public need for the use or credible expert testimony that the use would in fact produce substantial adverse effects of a nature beyond that inherently presented by the proposed use in the zone in which it is being proposed. Neither of these factors is present in this case.

The proper allocation of the burden of proof is perhaps nowhere better illustrated than in Eastern Outdoor Advertising Company v. Mayor and City

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ordinarily associated with such uses. Consequently, the bald allegation that a funeral home is inherently psychologically depressing and adversely influences adjoining property values, as well as other evidence which confirms that generally accepted conclusion, is insufficient to overcome the presumption that such a use promotes the general welfare of a local community. Because there were neither facts nor valid reasons to support the conclusion that the grant of the requested special exception would adversely affect adjoining and surrounding properties in any way other than would result from the location of any funeral home in any residential zone, the evidence presented by the protestants was, in effect, no evidence at all." 23 Md. App. at 624-625 (Emphasis supplied.)

The facts in the present case are even stronger than those in Anderson, since the protestants in this case failed to produce any expert testimony to support their assertions as to the adverse effects of the proposed tower. Furthermore, as in Anderson, none of the testimony indicated why any of the adverse effects feared by the protestants would be any worse in the present case than in any other case in which there is an application for a special exception for the same use in any other residential area.

The fact that special exception uses are presumptively permissible was again emphasized by the Court of Special Appeals in Miller v. Kiwanis Club of Loch Raven, Inc., 29 Md. App. 285, 347 A.2d 572 (1975), in which the Court of Special Appeals held that the Board had incorrectly denied an application for a special exception for a swimming club in an R.D.P. zone, and affirmed this Court's reversal of the Board's denial of the special exception.

There have been a number of similar decisions reversing denials of special exceptions in other counties under statutes which are virtually identical to the one in this case.

In Turner v. Hammond, 270 Md. 41, 310 A.2d 543 (1973) the Court of Appeals pointed out that special exception uses are provided for as part of the comprehensive zoning plan and that such a use shares "the presumption that....it is in the interest of the general welfare and, therefore, valid." 270 Md. at 54 (emphasis supplied.) The Court pointed out that such uses are to be permitted "absent any fact or circumstance negating the presumption." Id. (Emphasis supplied.) The Court further stated that while an applicant for a special exception has the burden of adducing testimony to show that the proposed use meets the standards prescribed by

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Council of Baltimore, No. 45, September Term 1980 (Court of Special Appeals, filed September 25, 1980). A copy of the opinion in that case and of the complete testimony before the administrative board in that case is attached hereto as Exhibit A. In the Eastern Outdoor case, which involved the Baltimore City Code provision discussed above, no expert testimony and only minimal lay testimony was presented by the applicant, but the Court of Special Appeals held that "the decision of the Board of Municipal and Zoning Appeals was arbitrary and capricious in that it was unsupported by substantial evidence...."

A substantial amount of testimony at the hearing below centered upon the fact that the height of the proposed tower would be greater than the distance to certain nearby houses and the People's Counsel suggested to the Board that the application should be denied on that basis alone. (It bears repeating that the closest residence to the proposed tower is that owned and occupied by the Appellants and in which they intend to continue living after construction of the tower.)

That the fact that a tower is higher than the distance to nearby residences is not by itself sufficient to mandate denial of a special exception is demonstrated by the case of Levy v. Montgomery County, 248 Md. 346, 236 A.2d 737 (1968), cert. denied, 393 U.S. 877, in which the Montgomery County Board of Appeals granted a special exception to permit the construction of a 1219 foot self-supporting tower and a transmitter building on a less than four-acre lot in a residential subdivision. Although the opinion of the Court of Appeals did not discuss the distance to neighboring residences, the transcript of testimony indicated that the base of the tower was within 300 feet from five different houses and was only 180 feet from the nearest house. Levy v. Montgomery County, supra, Appendix for Appellees, at 104-105. Copies of the relevant pages from the transcripts are attached hereto as Exhibit B. Despite the fact that the protestants in Levy, unlike those in the present case, produced testimony from a qualified real estate appraiser that the tower would cause a decrease in the value of the adjacent properties, the Court of Appeals affirmed the Board's granting of the special exception.

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the zoning ordinance, "he does not have the burden of showing affirmatively that his proposed use accords with the general welfare." 270 Md. at 55. The Court held that the Salisbury Board of Zoning Appeals had improperly denied a special exception for an apartment house in what was essentially a single-family residential zone.

To the same effect is Rockville Fuel and Feed Company v. Board of Appeals, 257 Md. 183, 262 A.2d 199 (1970), in which the Court of Appeals pointed out that the special exception "is a valid zoning mechanism that delegates to an administrative board a limited authority to permit enumerated uses which the legislative body has determined can, prima facie, properly be allowed in a specified use district, absent any fact or circumstance in a particular case which would change this presumptive finding." 257 Md. at 188. (Emphasis supplied.)

In Rockville Fuel, the Gaithersburg Board of Appeals had denied a special exception for a concrete plant in a heavy industrial zone on the basis of a memorandum from the planning commission opposing the special exception, testimony from the owner of a neighboring apartment building that he feared structural damage to his building from vibrations, and testimony from a resident of the area that dust and heavy trucks associated with the operation would adversely affect the area. The Court of Appeals held that none of this was sufficient to overcome the presumption that the use was consistent with the public welfare and that the testimony of the protestants "amounted to unsupported dislike and fear of the project." 257 Md. at 193.

The Court of Appeals held in Rockville Fuel that "there is no need...for the applicant to show affirmatively that the granting of his application would be a benefit to the community at large...." 257 Md. at 191. The applicants in the present case, in producing evidence of the services provided and the need for two-way radio communication have thus gone well beyond the requirements of the statute.

The fact that special exception uses are presumptively permissible and that the applicant need not demonstrate hardship or a necessity for the special exception was also the holding in Montgomery County v. Merlands

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The tower proposed in the present application is only 41% of the height of the Levy tower, but is more than 60% farther from the closest neighboring house.

The Board stated in the present case that one of its reasons for disapproving the application was that soil studies had not been performed, so that it could not be determined with certainty what type of a foundation would be required for the tower. Appellants indicated that the foundation design was subject to approval in conjunction with building permit review and that they would be willing to have the special exception expressly conditioned upon approval of the safety of construction by any County officials or other professional personnel whom the Board desired to name—even if those requirements went beyond the normal ones of the building permit review process.

The Board recognized that, if said samples showed rock, "the Petitioner would design a new and different base to accommodate the requirement, submit same to the County technical staff and presumably erect a safe tower." Opinion of the Board, 5.

The Board stated, however, that "it is not sufficient that the County's technical staff will review the proposal at a later time." Opinion of the Board, 5. The Board cited no authority for this statement, and there appears to be no Maryland case in which a special exception has been denied because of a comparable detail.

The Board's role is to approve or disapprove the proposed use—not to specify construction details. That authority has been delegated to other County agencies. Although the Board in its opinion indicated that it did not expect "that separate experts should be returned to testify on every design detail," Opinion of the Board, 5, it is imposing precisely such a requirement when it bases its denial of a special exception upon the absence of such testimony.

The presumption that a special exception use is in the public interest—a presumption which has been repeatedly emphasized in such cases as Anderson v. Sawyer, supra; Turner v. Hammond, supra; Rockville Fuel & Feed Company v. Board of Appeals, supra; Montgomery County v. Merlands

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Club, Inc., supra; and Mayor and City Council of Baltimore v. Foster & Lasser, supra; has no significance if a special exception may be denied because the applicant has not produced expert testimony concerning every design detail which could possibly affect the safety of the project.

It is impossible for an applicant for a special exception to anticipate every conceivable detriment which an administrative body may think might be presented by the requested use, let alone to present expert testimony to negate the possibility of each such imaginable problem. To permit a special exception to be denied upon such a basis, in the absence of any persuasive evidence that such a detriment would in fact be present, is essentially to permit the Board of Appeals to exercise an unreviewable discretion.

The impermissibility of an administrative board denying a special exception upon the basis of the mere possibility of an adverse impact upon the public welfare is illustrated by the case of Gowl v. Atlantic Richfield Company, 27 Md. App. 410, 341 A.2d 632 (1975).

The Gowl case involved an application for a special exception to permit above-ground storage of more than 30,000 gallons of petroleum products per 20,000 square feet of lot area. Although the property in question was in a manufacturing zone, it was within 500 feet from a residential district and none of the proposed structures themselves were only 550 feet from a residential district. The Howard County Board of Appeals denied the application, in part because some of the supporting structures for a pipeline to be constructed in connection with the storage facility were to be located within the floodplain. The Board ruled that the presence of such structures in the floodplain "would provide a potential danger to the surrounding properties, as well as menace the general welfare." 27 Md. App. at 413.

The Court of Special Appeals noted, however, that there was expert testimony to the effect that the supporting structures were designed to withstand flood waters of greater strength than any expected in the area. The Court held that the Board had incorrectly denied the special exception. In discussing the Board's finding of a potential danger, the Court quoted

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with approval the following language from the opinion of the trial court, which had also held that the special exception should have been granted:

"The Board's finding...cannot be faulted as an abstract proposition. The...was, however, testimony that the likelihood of such a danger was minimal. It should be borne in mind that all uses of this nature present a 'potential' danger but if the possibilities rather than the probabilities of danger are good grounds for denying permits for such uses, it is difficult to see how these uses could be permitted anywhere, regardless of what steps might be taken to minimize the potential dangers accompanying them." 27 Md. App. at 415. (Emphasis supplied.)

Although another portion of the Gowl holding has recently been overruled in the case of Schultz v. Pritts, ___ Md. ___, ___ A.2d ___ (1981), the above portion of the holding was unaffected. Moreover, the Court of Appeals in the Schultz case again reiterated that the special exception "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 the presumption." (Slip opinion, 11) (Emphasis in original).

The Court of Appeals again stated the rule that "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." (Slip Opinion, 11-12)

In the present case, the Board of Appeals conceded that there was no probative evidence of harm or disturbance which would be caused by the proposed use.

CONCLUSION

In the present case, there was substantial evidence that the requested use would not be contrary to the public welfare. In view of the absence of any specific probative evidence to the contrary, the decision of the Board of Appeals should be reversed.

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H. Enslie Parks
H. Enslie Parks
Leland S. Van Koten
Leland S. Van Koten
Wright & Parks
409 Washington Ave.
Suite 1012
Towson, Md. 21204
Attorneys for Appellants

I HEREBY CERTIFY that on this 30th day of October, 1981 I have mailed a copy of the within Memorandum of Law to John W. Hessian, III, Esquire, People's Counsel for Baltimore County, Peter Max Zimmerman, Esquire, Deputy People's Counsel, Room 223, Court House, Towson, Md., 21204, and George W. Lietman, Esquire, The Keyser Bldg., 207 E. Redwood Street, Baltimore, Md., 21202, Attorney for Protestants, and to Arnold Jablon, Esq., 109 Old Padonia Road, Cockeysville, Md. 21030, and to County Board of Appeals of Baltimore County, Room 219, Court House, Towson, Md., 21204.

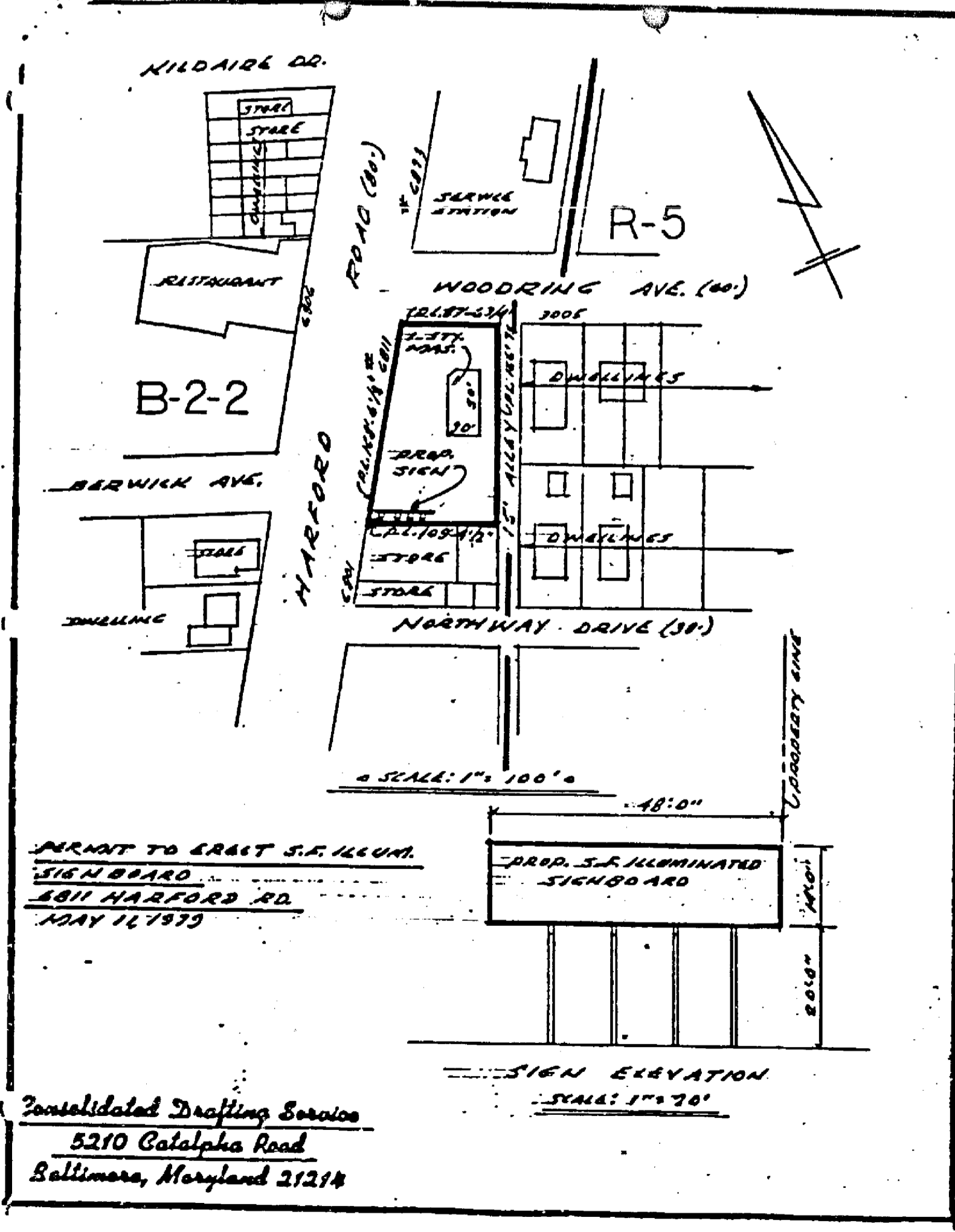
Leland S. Van Koten
Leland S. Van Koten

BALTIMORE COUNTY
CITY CLERK
OFFICE
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B-2

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-5-
While the Board in the instant case did have before it a letter from the City Department of Planning in which the Department claimed that Eastern's signboard would be visible from houses facing Woodring Avenue and Northway Drive, examination of the plat that was also before the Board reveals that the Department's very general statement expressing concern about its "proximity to the dwellings to the east" more accurately describes its objection to Eastern's plans to erect the signboard in question, rather than its claim as to visibility. Accordingly, the Board's disapproval of Eastern's application is without merit and is therefore, by law, arbitrary and capricious.
JUDGMENT OF THE BALTIMORE CITY COURT REVERSED. CASE REMANDED TO THAT COURT WITH THE DIRECTION THAT IT REMAND TO THE BOARD WITH INSTRUCTION TO APPROVE THE APPLICATION.
COSTS TO BE PAID BY THE APPELLEE.

3 See appendix.



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185-57457
Appeal No. 339-79X
TRANSCRIPT OF TESTIMONY
Before the
BOARD OF MUNICIPAL AND ZONING APPEALS
on
July 17, 1979
Philip Heller Sachs, Chairman
R. Dennis Garman
Mrs. Courtney J. McKeldin
John H. Michener
Mrs. Ethel P. Rich
Gilbert V. Rubin, Executive Secretary

APPEARANCE
For the Permit
Eastern Outdoor Advertising Co.
6811 Harford Road
Protesting
Robert L. ...
3211 Chesley Lane

E. 9

MR. SACHS: Appeal 339, 6811 Harford Road.
This is an appeal to erect a single illuminated sign board 14 feet by 48 feet. This conditional use requires this Board's approval in a B-2-2 zoning district.
Raise your right hands, please.
(Witnesses sworn.)
MR. SACHS: Who is the applicant, name and address, please.
MR. SMITH: Clarence L. Smith President of Eastern Outdoor Advertising at 7115 Rock Ridge Road, 21207.
MR. SACHS: And who owns the property?
MR. SMITH: The property is owned by Mr. & Mrs. Krasfle, K-r-e-a-f-l-e.
MR. SACHS: And their address is the same?
MR. SMITH: Their address is the same.
They operate a business of producing picture frames and fitting them to pictures.
MR. SACHS: All right. Is this a replacement of any sign or what?
MR. SMITH: This is a new location at the south end of what is now used for a parking area for the business.

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E. 10

MR. RUBIN: All right. We have several letters.
The first one is from the Department of Planning and they state that, "The proposed billboard would be erected on a larger property which is presently occupied by a custom framing company. There is a bank on the west side of Harford Road and a gas station at the northeast corner of the intersection of Harford Road and Woodring Avenue. Across a 15 foot alley to the east, an R-5 district contains well maintained detached homes.
The applicant proposes a 34 foot overall height for the sign board. At such a height, it would be clearly visible from the houses facing Woodring Avenue and Northway Drive to the south.
Because of the height, which is considered to be excessive, and because of the proximity to the dwellings to the east, the Department of Planning recommends disapproval of the application." The fire department indicates they have no objection. There is also a letter from Councilman Michael Curran, Frank Gallegher and Carroll Fitzgerald, all of whom are responding for the Woodring Improvement Association that, in various forms, that they oppose this, that they support

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E. 11

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the opposition and sympathize for what they state.

There is also a letter here from a Joseph -- Joseph Curran. He is an elected official from this district.

MR. TASSI: State Senator.

MR. RUBIN: He states that he is not in favor of the sign because of the neighborhood lights. There is a letter here from Harbell's saying that they support the Woodring Association in their opposition to this appeal. The erection of this sign will have a negative impact. There are many billboard type signs here and in other areas that are offensive and a detrimental factor to the residential neighborhood. We respectfully request the Board to disapprove this appeal.

MR. SACHS: All right. Do you want to tell us something?

MR. TASSI: Well, this property that the custom picture frames occupies at one time was a filling station, then a repair garage then a filling station, then it was abandoned and then Mr. Kreafile came up with this custom picture frame and he done a beautiful job with that property. As a matter of fact, about two years ago he was on television showing what people can do with abandoned, derelict property. It is a

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E. 12

beautiful set-up. Now he is starting to put automobiles in there and trailers. He has got a trailer sitting there now for a couple of months and cars parked all over it and by putting a sign up, I think it is just going to tear the -- the whole area down.

MR. SACHS: Well --

MR. TASSI: And it is a beautiful place.

MR. SACHS: That's been approved, the storage of cars and buses?

MR. TASSI: It has been approved.

MR. SACHS: This was approved in 1966 to park and store buses. This Board approved that.

MR. TASSI: 1966. Mr. Kreafile hasn't been there that long.

MR. SACHS: John E. Banks applied at that time, so I assumed that continued to the present time.

MR. RUBIN: You said Mr. Kreafile?

MR. TASSI: Kreafile.

MR. RUBIN: Is he parking buses there now?

MR. TASSI: Not buses.

MR. RUBIN: What?

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MR. SMITH: We feel this way about the area that the Harford Road is a business corridor from North Avenue to the -- to and beyond the county line. As the City planned it, the zoning of the business is incorporated in the business zoning and being in the business zoning we feel that we have justification in placing the board there and it will not create unsightly condition. Secondly, it is very difficult --

MR. SACHS: It is a conditional use which gives this Board the opportunity to approve it or disapprove it. It is not a permitted use.

MR. SMITH: It is very difficult to oppose the planning commission, but as I see it, that board will not be able to be seen from any residential areas. There is a possibility of one house adjacent to the lot that would come into view, but the other properties are so far away and they are more or less in a row or semi-detached area that this board will not be seen from that.

Secondly, if I may, directly across Rock Ridge is a large service station and it has its sign there in the evening and 50 yards to the southwest across Harford Road is the Crown Station which constitutes a very generalized business

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MR. TASSI: He has got a trailer there, van like, and a couple of cars.

MR. RUBIN: Is it his personal van?

MR. TASSI: He doesn't have seven or eight cars. I can't prove it but, as far as trucks or buses there, I don't think it was Kreafile that had it.

MR. SACHS: No, it was someone named Banks.

MR. TASSI: Banks?

MR. SACHS: I am trying to get the history of the property.

MR. TASSI: It was not nice enough Kreafile took it over.

MR. MICHENER: Are you familiar with the area?

MR. TASSI: I have lived there.

MR. MICHENER: There is a Foster & Kleiser sign across the street.

MR. TASSI: Yes.

MR. MICHENER: Is that the only sign around?

MR. TASSI: There are a few of them. One was further up the street that the Board approved illuminating last week.

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entity in that area.

MR. SACHS: All right.

MR. SMITH: Have you anything to add?

MR. SACHS: Your name and address.

MRS. SMITH: Mrs. Jean Smith, executive vice president of Eastern Outdoor Advertising, 7115 Rock Ridge Road.

MR. SACHS: What do you want to tell us?

MRS. SMITH: I want to tell you, Mr. Tassi has mentioned there are other signs in the area about which he can do nothing about, but I would also like to stress that Eastern Outdoor is a small business and a family owned business and over all these years they have not erected a single sign board along Harford Road or Belair Road or anywhere else in the northeast part of the City, and it only seems fair that, in fact mandatory, if a small business is to compete with a large business, which do get the signs approved, and in fact to survive, that we must have at least one sign in an area here and there. We are not asking, I feel, for very much.

MR. SACHS: Well, as I have said before in the cases today, we have to apply the provisions of the ordinance

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MR. RUBIN: This is a 14 by 48 sign?

MR. SMITH: A 14 by 48 with a 20 foot elevation.

MR. RUBIN: Illuminated?

MR. SMITH: Yes. Shows to traffic going in a southerly direction.

MR. RUBIN: Shows to southbound traffic?

MR. SMITH: Yes.

MR. RUBIN: The area presently is a parking lot?

MR. SMITH: Correct.

MR. SACHS: How late at night will that illumination be on?

MR. SMITH: That illumination, according to National contracts, is a half hour before dusk until midnight, which is customary in the industry.

MR. SACHS: Is that what it is going to be? You say it is customary.

MR. SMITH: Right.

MR. RUBIN: I have a few letters I would like to get on the record. We can take your name and address.

MR. TASSI: Vincent Tassi, 3211 Chesley. I am the President of the Woodring Improvement Association.

SAPPERSTEIN & ASSOCIATES
SERVING THE ENTIRE STATE OF MARYLAND
PROMPT, RELIABLE SERVICE
480-3085 833-0928 833-8200

and the ordinance isn't written to vapor or not vapor a small or a large business and we try to do that very conscientiously.

All right, you will hear from us in a few days.

SAPPERSTEIN & ASSOCIATES
SERVING THE ENTIRE STATE OF MARYLAND
PROMPT, RELIABLE SERVICE
480-3085 833-0928 833-8200

E. 19

MR. MICHENER: That is several blocks?
MR. TASSI: Yes. The ones that are there, we have no objection to, but there is nothing we can do about it. We don't want any more signs especially in that location. I don't know if you live in that area or are familiar with that area or not.

MR. RUBIN: This sign -- I will show you a photograph that we have showing the picture framing establishment. Where in reference to this picture would the sign be placed?

MR. SMITH: This would be placed at this end.

MR. SACHS: Identify that.

MR. RUBIN: This is a photograph that the Board took.

MR. SMITH: It doesn't show on the photograph.

MR. RUBIN: Adjoining the subject building is a parking lot and the building would be at the end of the parking area.

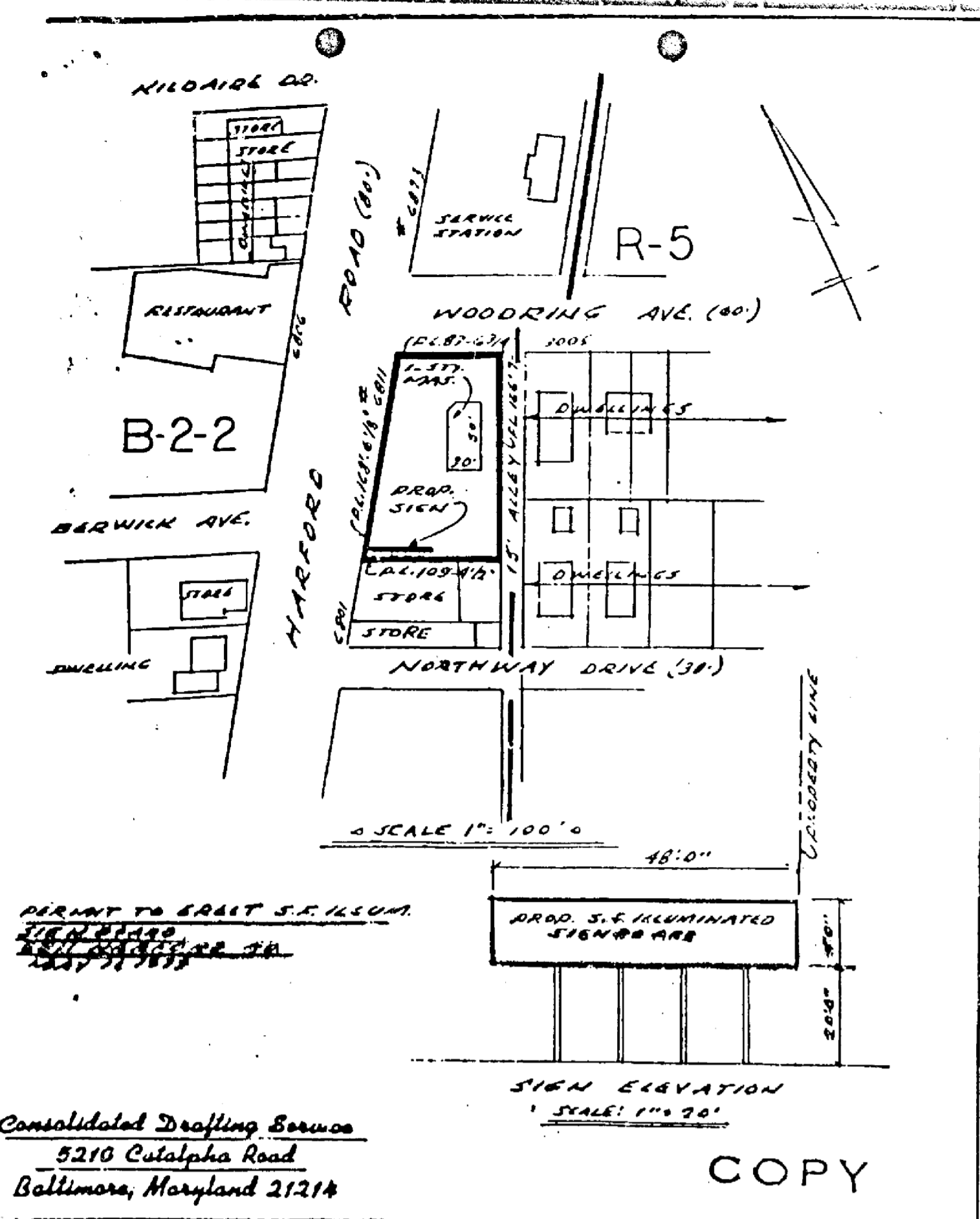
Anything else sir?

MR. SMITH: May I make a statement?

MR. SACHS: This gentleman wants to say something.

SAPPERSTEIN & ASSOCIATES
SERVING THE ENTIRE STATE OF MARYLAND
PROMPT, RELIABLE SERVICE
480-3085 833-0928 833-8200

E. 16



Apx. 104
Proceedings

Mr. Donovan: They are in 20 foot centers. We have evergreen trees at 16 feet high that will be on roughly I would say 10 foot centers.

Mr. Bucher: Mr. Donovan, have you estimated how much landscaping would cost that is proposed?

Mr. Donovan: The only thing I know, the clients have told us they want it done properly. And we, the tree sizes that we are providing is a mature size.

Mr. Bucher: So all those figures you mention are of mature trees?

Mr. Donovan: When we say 16 foot trees, this is what we will write the specifications for.

Mr. Bucher: At the time of planting?

Mr. Donovan: That is right.

Mr. Thomas: How close is the brick wall that you testified to the property line?

Mr. Donovan: Well, it varies from 28 feet to 22 feet, at this point 28.

Mr. Thomas: Do you know the total number of shade trees that will be installed on that property?

Mr. Donovan: No, we have not developed that yet. This is a preliminary plan.

Mr. Thomas: Do you know the total number of evergreens [108] that will be planted?

Mr. Donovan: Not at this particular time.

Mr. Thomas: For the record, would you give me the specific distances for each of these five homes located immediately adjacent to the subject property?

Mr. Donovan: From where to what?

Mr. Thomas: First, from the proposed building, then to the tower, itself, starting with Lot 15, Block 5?

Mr. Donovan: Lot 15, to the nearest structure is 110 feet. To the base of the tower, 220 feet.

Apx. 105
Proceedings

Mr. Thomas: Lot 14, Block 5?

Mr. Donovan: Lot 14, the nearest structure is 95 feet. To the nearest leg of the tower, 180 feet.

Mr. Thomas: Lot 13, Block 5?

Mr. Donovan: The nearest structure, will be 110 feet. To the tower would be 200 feet.

Mr. Thomas: Lot 12, Block 5?

Mr. Donovan: 84 feet and the nearest tower leg, 205 feet.

Mr. Thomas: Let's try that same measurement again coming straight this way.

Mr. Donovan: To this tower leg, this is farther away.

Mr. Linowes: Why don't you try it?

Mr. Thomas: Give me the measurement again, the closest to the area?

[109] Mr. Donovan: 82 feet.

Mr. Thomas: That is Lot 12, Block 5. The fifth house, Lot 26, Block 2?

Mr. Donovan: 160 feet, and to the nearest tower leg, 300 feet.

Mr. Thomas: Directing your attention to the last house, you just mentioned, Lot 26, Block 2 there would be no intervening building between it and the tower?

Mr. Donovan: That is right. As this section shows.

Mr. Thomas: You are in no way suggesting or testifying that this 1,219 foot tower is not going to be clearly visible to each of those residents, are you?

Mr. Donovan: If this thing is planted properly, and there are adequate shade trees around, adequate canopy, I doubt very seriously that the tower, itself, in the immediately adjacent houses, is going to be that visible.

Chairman Sanders: Going to be?

Mr. Donovan: Will not be that visible. In other words, not going to be standing out there in its raw form.

EXHIBIT B

RE: PETITION FOR SPECIAL EXCEPTION : IN THE
for a wireless transmitting tower and receiving structure 500' in height including a control house : CIRCUIT COURT
E/S of Granite Road, 330' S. of Marriottsville Road : FOR
2nd District : BALTIMORE COUNTY
Arthur R. Shaw, Jr., et ux, : AT LAW
Petitioners : Misc. Docket No. 13
Zoning File No. 80-203-X : Folio No. 207
: File No. M-7557

CERTIFIED COPIES OF PROCEEDINGS BEFORE THE ZONING COMMISSIONER AND THE BOARD OF APPEALS OF BALTIMORE COUNTY

TO THE HONORABLE, THE JUDGE OF SAID COURT:

And now come William T. Hackett, John V. Murphy and John A. Miller, constituting the County Board of Appeals of Baltimore County, and in answer to the Order for Appeal directed against them in this case, herewith return the record of proceedings had in the above entitled matter, consisting of the following certified copies or original papers on file in the office of the Zoning Department of Baltimore County:

ZONING ENTRIES FROM DOCKET OF ZONING COMMISSIONER OF BALTIMORE COUNTY

- No. 80-203-X
- January 22, 1980 Petition of Arthur R. Shaw, Jr., et ux, for a special exception for a wireless transmitting tower and receiving structure 500' in height including a control house, on property located on the east side of Granite Road, 330' south of Marriottsville Road, 2nd District - filed
- January 22, 1980 Order of Zoning Commissioner directing advertisement and posting of property - date of hearing set for April 1, 1980, at 1:30 p.m.
- March 11, " Comments of Baltimore County Director of Planning - filed
- March 24, " Certificate of Posting of property - filed
- March 20, " Certificate of Publication in newspaper - filed

E. 20

- Arthur R. Shaw, Jr., et ux
Case No. 80-203-X 2.
- March 25, 1980 Comments of Baltimore County Zoning Plans Advisory Committee - filed
- April 1, 1980 At 1:30 p.m. hearing held on petition by Zoning Commissioner
- July 3, 1980 Order of Zoning Commissioner denying special exception
- July 23, 1980 Order of Appeal to County Board of Appeals from Order of Zoning Commissioner
- April 14, 1981 Hearing on appeal before County Board of Appeals
- June 16, 1981 Order of County Board of Appeals denying special exception
- June 23, 1981 Order of Appeal filed in the Circuit Court for Baltimore County by H. Emslie Parks, Esq., Counsel for the Petitioners
- June 23, 1981 Petition to accompany Order for Appeal filed in the Circuit Court for Baltimore County
- July 7, 1981 Certificate of Notice sent to all interested parties
- July 13, 1981 Transcript of testimony filed - 1 volume
- People's Counsel Exhibit No. a - Plat of property
- " " " No. b - Series of photos of area - a thru j (plus 1 extra photo - 2 h's)
- Protestant's Exhibit No. 1 - Study by Motorola dated 8/23/78
- " " " 2 - Telephone Co. price for lease line
- " " " 3 - Work sheet from Tax Assessors office
- Petitioners' Exhibit No. 1 - Lease between U.M.B.C. & Shaw Bus Service, Inc.
- " " " 2 - Topo Map
- " " " 3 - Plat of proposed use - 4/18/79, revised 2/20/80
- " " " 4 - Series of 3 photos-4 a,b,c,-subj. site
- " " " 5 - Photos, 1, 2, 3, 4
- " " " 6 - Photo of transmission tower - 1 mi. away
- " " " 7 - Approval from F.A.A. -for antenna tower- expired 10/17/80

Arthur R. Shaw, Jr., et ux
Case No. 80-203-X 3.

Petitioners' Exhibit No. 8 - UNARCO-ROHN, foundation-elevation drawing

" " " 9 - UNARCO-ROHN-side elevation

" " " 10 - Photo of Westinghouse Transmission Tower

" " " 11 - Report to Shaw Bus, April 9, 1980, by Mr. McGraw

July 16, 1981 Record of proceedings filed in the Circuit Court for Baltimore County

Record of proceedings pursuant to which said Order was entered and said Board acted are permanent records of the Zoning Department of Baltimore County, and your respondents respectively suggest that it would be inconvenient and inappropriate to file the same in this proceeding, but your respondents will produce any and all such rules and regulations whenever directed to do so by this Court.

Respectfully submitted,

June Holmen
June Holmen
County Board of Appeals of Baltimore County

cc: H. Emslie Parks, Esq.
George W. Liebman, Esq.
John W. Hessian, Esq.

Re: PETITION FOR SPECIAL *
EXCEPTION * IN THE CIRCUIT COURT
Arthur R. Shaw, Jr., et ux, * For Baltimore County
Petitioners * At Law
Zoning File No 80-203-X * Misc Docket No: 13
* Folio: 207
* File No: M-7557

Answer to Petition for Appeal

Arnold Jablon, Protestant below and Appellee herein, answers the Petition for Appeal heretofore filed by the Appellant, and for cause prays:

1. That the Appellee admits the allegations made and contained in the first paragraph of said Petition.

2. That the Appellee denies the allegations made and contained in the second through sixth paragraphs of said Petition and states affirmatively that the decision of the County Board of Appeals of Baltimore County herein was proper and justified by the evidence before it and that the decision of the Board should therefore be sustained as being properly and legally made.

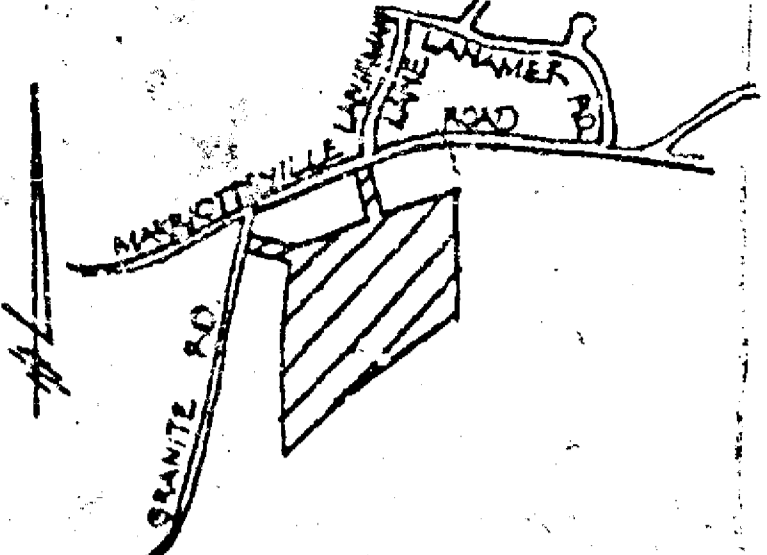
Arnold Jablon
Arnold Jablon
109 Old Padonia Road
Cockeysville, Maryland 21030
561-1930

RECEIVED
BALTIMORE COUNTY
Aug 11 9 34 AM '80
CITY CLERK
BY

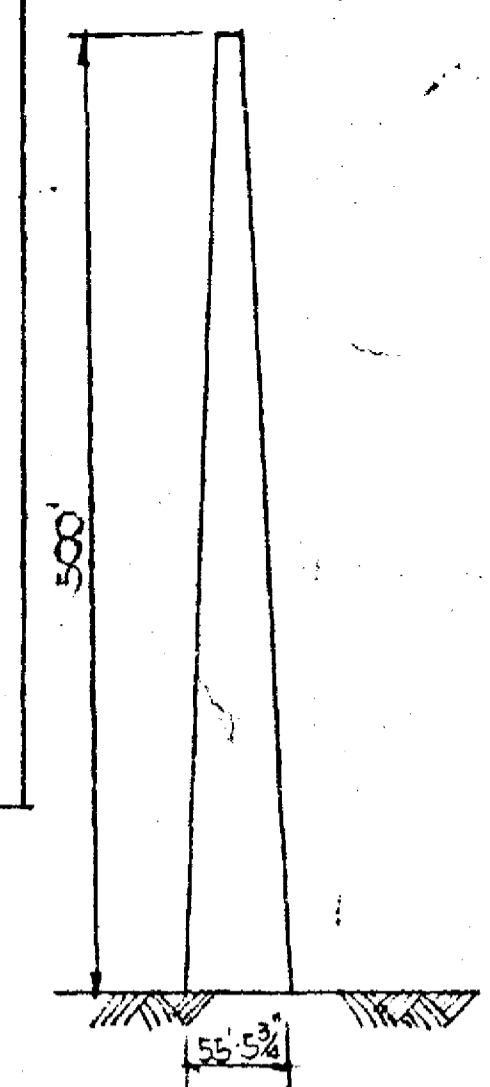
CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on this 4th day of August, 1981, a copy of the foregoing Answer was mailed, postage prepaid, by first class delivery to H. Emslie Parks, Esq., 409 Washington Ave., Towson, Maryland 21204, John W. Hessian, III, Esq., Room 223 Court House, Towson, Maryland 21204, George W. Liebmann, Esq., The Keyser Bldg, 207 E. Redwood St., Baltimore, Maryland 21202.

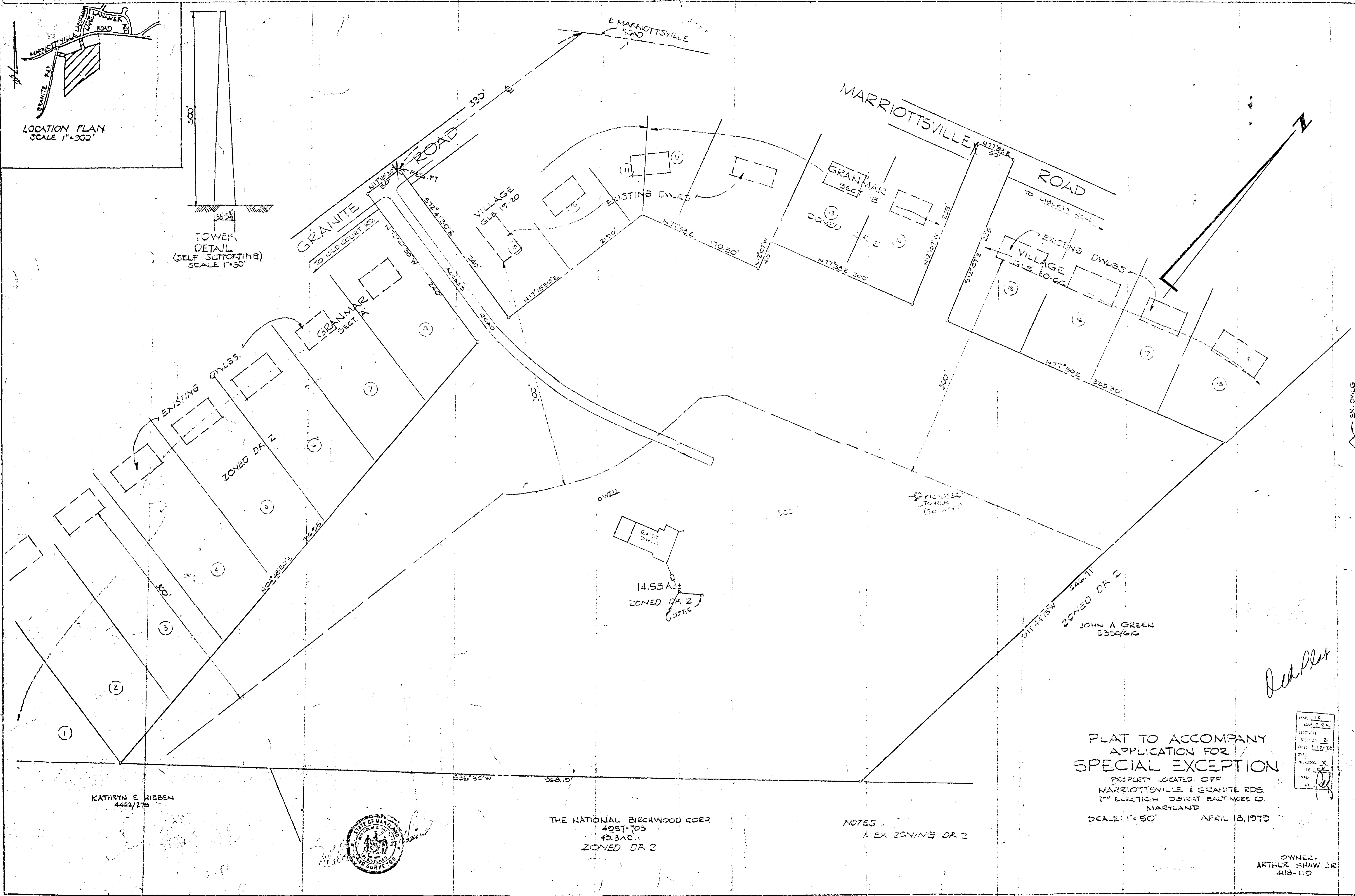
Arnold Jablon
Arnold Jablon



LOCATION PLAN
SCALE 1"=300'



TOWER
DETAIL
(SELF SUPPORTING)
SCALE 1"=50'



KATHRYN E. RIEBEN
4462/275



THE NATIONAL BIRCHWOOD CORP
4957-703
49.3 AC.
ZONED DR 2

NOTES:
1. EX. ZONING DR 2

PLAT TO ACCOMPANY
APPLICATION FOR
SPECIAL EXCEPTION
PROPERTY LOCATED OFF
MARIOTTSVILLE & GRANITE RDS.
2ND ELECTION DISTRICT BALTIMORE CO.
MARYLAND
SCALE 1"=50' APRIL 8, 1979

MAP	16
SECTION	2
DISTRICT	2
DATE	1-17-80
BY	AK
FOR	AK

Red Plot

OWNER:
ARTHUR SHAW JR.
418-110

RE: PETITION FOR SPECIAL EXCEPTION * IN THE
 Arthur R. Shaw, Jr., et ux * CIRCUIT COURT
 Zoning Case No. 80-203-X * FOR
 * BALTIMORE COUNTY
 * At Law
 * Misc. Docket No. 13
 * Folio No. 207
 * File No. M7557

MOTION TO WITHDRAW APPEARANCE

George W. Liebmann, counsel for protestants, hereby moves to withdraw his appearance on behalf of protestants and states as follows:

1. Counsel for protestants has appeared on their behalf for the limited purpose of filing a response to the petition for appeal. Protestants will be represented at the hearing before this court by Arnold Jablon, Esquire, a protestant herein who has entered his appearance herein.
2. George W. Liebmann, counsel for protestants, hereby certifies that at least five days prior to the filing of this motion he sent to Ms. Jane Phipps, William Hughes and Mary Basso, officers of the Village of Kings Park Community Association notice of his intention to file a motion for leave to withdraw appearance and that the community associations concerned have been advised of counsel's intention to withdraw.
3. Withdrawal of the appearance of counsel for protestants will not unduly delay the trial of this case or be prejudicial to any of the parties or otherwise not in the interests of

- 2 -

- c. Create a potential hazard from fire, panic or other dangers;
- d. Tend to overcrowd land and cause undue concentration of population;
- e. Interfere with adequate provisions for schools, parks, water, sewerage, transportation or other public requirements, conveniences, or improvements;
- f. Interfere with adequate light and air."

The discretion vested in this Court in review of a zoning appeal is limited. The reviewing court is generally confined to a determination of whether sufficient evidence has been presented at the zoning hearing to make the issues fairly debatable and may only consider for that purpose evidence which is on the record. Pattev v. Board of County Commissioners, 271 Md. 352, 360 (1974). "Fairly debatable" has been described as "very much akin, if not identical to, the 'clearly erroneous rule'". Largo Civic Association v. Prince George's County, 21 Md.App. 76, 90 (1974). When the evidence presented is fairly debatable, i.e., one may draw one of several rational inferences therefrom, courts should not substitute their judgment for that of the agency. Largo Civic Association v. Prince George's County, ibid. at 90.

The Opinion issues by the County Board of Appeals emphasize the safety standards to be met by Petitioners, and the effect the tower would have on property values. Reviewing the transcript of the hearing before the County Board of Appeals, this Court does not find that the issues of safety and property values are fairly debatable from the evidence presented.

On the safety issue, the testimony of Mr. Matthew Vlissides,

justice since Mr. Jablon will fully represent the interests of the protestants.
 WHEREFORE, George W. Liebmann, counsel for protestants move for leave to withdraw his appearance on their behalf.

George W. Liebmann
 George W. Liebmann
 The Keyser Building
 207 E. Redwood Street
 Baltimore, Maryland 21202
 752-5887

Certificate of Service

I HEREBY CERTIFY that on this 3rd day of November, 1981 a copy of the foregoing Motion to Withdraw Appearance was mailed to:

H. Emalie Parks, Esquire
 409 Washington Avenue
 Towson, Maryland 21204

John W. Hessian, III, Esquire
 Room 223 Court House
 Towson, Maryland 21204

Administrative Secretary
 County Board of Appeals
 of Baltimore County
 Room 219 Court House
 Towson, Maryland 21204

George W. Liebmann
 George W. Liebmann

- 3 -

an expert witness in the areas of civil engineering and tower structures, established that the proposed plans and drawings meet the standards of the State of Maryland and the BOCA Code for the construction of a 500' tower. (transcript, p.90) Wind gusts, ice formation, and possible weather conditions had been considered in evaluating the proposal from an engineering standpoint. While some questions remain in the Board's mind as to the safety of the antenna construction and the suitability of the soil for the proposed plan, there is no reason for the Board to assume that these cannot be resolved satisfactorily under the supervision of the appropriate building and permit authorities for Baltimore County.

On the issue of potential property value decrease, the Board may have been skeptical of Mr. Brian McGraw's contention as a real estate appraiser that the proximity of the tower would not adversely affect property values, but no evidence was presented to the contrary. There was no evidence presented before the Board to make this issue fairly debatable. Adjacent property owners expressed their concern over this possibility, but presented no testimony to substantiate their assumptions.

It is therefore ORDERED that the decision of the County Board of Appeals is REVERSED, and that the Special Exception be granted.

Cullen H. Hormes
 CULLEN H. HORMES
 JUDGE

DATE

11/26/81

Re: PETITION FOR SPECIAL EXCEPTION * IN THE
 Arthur R. Shaw, Jr., et ux * CIRCUIT COURT
 Zoning Case No. 80-203-X * FOR
 * BALTIMORE COUNTY
 * At Law
 * Misc. Docket No. 13
 * Folio No. 207
 * File No. M7557

ORDER GRANTING LEAVE TO WITHDRAW

Upon consideration of the motion of George W. Liebmann, counsel for protestants, to withdraw his appearance on behalf of protestants and the certification therein contained and the said motion having been served upon the attorneys for all the parties in this action more than five (5) days ago and not appearing that the withdrawal of the appearance of counsel for protestants will unduly delay the trial of this case, be prejudicial to any of the parties, or otherwise not be in the interests of justice, it is now by the Circuit Court for Baltimore County this day of November, 1981 ORDERED that the appearance of George W. Liebmann on behalf of protestants shall be and hereby is withdrawn.

Judge

DAVED:

CASE No. 7557

H. Emalie Parks,
 Leland S. Van Koten,
 Wright & Parks

PETITION FOR SPECIAL EXCEPTION
 for a wireless transmitting
 tower and receiving structure 500' in
 height including a control house
 E/S of Granite Road, 330' S. of
 Marriottsville Road
 2nd District
 Arthur R. Shaw, Jr., et ux
 Petitioners
 Mrs. Arthur R. Shaw, Jr.

ADVANCE COSTS
 Pet's Atty 5.00
 Clerk 60.00
 Sheriff
 Paid *1/20/82*
 Receipt No. *10001*

ADDITIONAL COSTS
 Def's Atty
 Clerk
 Sheriff

BOARD OF APPEALS OF BALTIMORE COUNTY
 CHARLES M. SCHEVKER,
 HOMER SEIDEL, JR.,
 MICHAEL S. DEAN,
 BARRY SMITH,
 CHARLES WALTON,
 Mr. JAMES PHIPPS,
 ARNOLD JABLON, President
 HERWOOD HEIGHTS COMM. ASSO., INC.,
 PEOPLE'S COUNSEL FOR BALTIMORE COUNTY

- (1) June 19, 1981 Order of Appeal and Petition fd.
- (2) July 7, 1981 Certificate of Notice fd.
- (3) July 8, 1981 - Appellee (People's Counsel for Balt. County) Answer to Petition for Appeal fd.
- (4) July 15, 1981 - Appellee (Michael Dean, Lawrence Phipps, Jane Phipps, The Village of Kings Park Community Assoc. and Herwood Heights Community Assoc.) Answer to Petition fd.
- (5) July 16, 1981 - Certified Copies of Proceedings before the Zoning Commissioner and the Board of Appeals of Baltimore County fd.
- (6) July 16, 1981 - Notice of Filing of Record fd.
- (7) August 6, 1981 Appellee's Answer to Petition for Appeal fd.
- (8) Nov. 2, 1981 - Appellants' Memo of Law & Exhibits fd.
- (9) Nov. 3, 1981 Hon. Cullen H. Hormes. Hearing had. Opinion, and or Order to be filed.
- (10) Nov. 6, 1981 - Motion of George Liebmann to withdraw app., and Order of Court striking app. of Liebmann as atty for protestants fd. (M75)
- (11) May 6, 1981 - Notice to employ new counsel fd. Copies sent.
- (12) May 26, 1982 - Opinion and Order of Court that the decision of County Board of Appeals is REVERSED, and that the Special Exception be granted fd. (CM)

PETITION FOR SPECIAL EXCEPTION * IN THE
 for a wireless transmitting * CIRCUIT COURT
 tower and receiving structure * FOR BALTIMORE COUNTY
 500' in height including a control house
 E/S of Granite Road, 330' S. of Marriottsville Road
 2nd District
 Arthur R. Shaw, Jr., et ux
 Petitioners
 Misc. Docket No. 13
 Folio 207
 File No. M-7557

OPINION and ORDER

The Petitioners have appealed to this Court from a denial by the County Board of Appeals of a Special Exception to permit the construction of a wireless transmitting tower and receiving structure on property owned by Petitioners near the intersection of Granite and Marriottsville Roads. The property is zoned R. C. 3, and transmitting and receiving towers are permitted by Special Exception in R. C. 3 zones.

The Petitioners seek to construct a tower to facilitate communication with their bus company, which transports students with health and other problems. The proposed construction site is Petitioner's property in a residential neighborhood.

A transmitting tower is a permitted use in an R. C. 3 zone if it meets the requirements of Section 502.1 of the Baltimore County Zoning Regulations:

"Before any Special Exception shall be granted, it must appear that the use for which the Special Exception is requested will not:

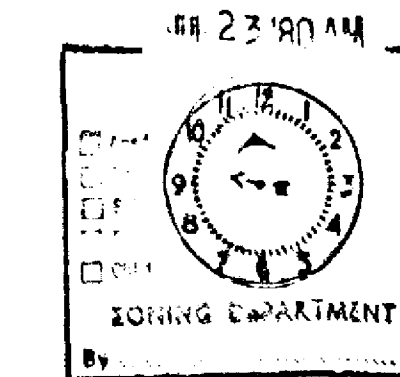
- a. Be detrimental to the health, safety, or general welfare of the locality involved;
- b. Tend to create congestion in roads, streets, or alleys therein;

FILED MAY 26 1982

RE: PETITION FOR SPECIAL EXCEPTION *
 E/S of Granite Road, 330' S. of
 Marriottsville Road - 2nd Election * BEFORE THE
 District * ZONING COMMISSIONER
 Arthur R. Shaw, Jr., et ux * OF
 Petitioners * BALTIMORE COUNTY
 No. 80-203-X (Item No. 406) *

NOTICE OF APPEAL BY ARTHUR R. SHAW, JR. AND DOROTHY B. SHAW

Mr. Commissioner:
 Please enter an appeal by Arthur R. Shaw, Jr. and Dorothy B. Shaw, 6311 Windsor Mill Road, Baltimore, Maryland 21207, to the Board of Appeals of Baltimore County from the order entered in the above matter on July 3, 1980.



H. Emalie Parks

Leland S. Van Koten
 WRIGHT & PARKS
 305 W. Chesapeake Ave.
 Towson, Md. 21204
 (301) 821-6350

Attorneys for Arthur R. Shaw, Jr., and Dorothy B. Shaw

I HEREBY CERTIFY that on this 22 day of July, 1980, I have mailed a copy of the above Notice of Appeal to Mr. Charles M. Schevker, 10101 Marriottsville Rd., Randallstown, Md. 21133, Mr. Homer Seidel, Jr. 10012 Marriottsville Rd., Randallstown, Md. 21133, Mr. Michael S. Dean, 10017 Marriottsville Road, Randallstown, Md. 21133, Mr. Barry Smith, 3615 Granite Road, Randallstown, Md. 21133, John W. Hessian, III, Esquire, People's Counsel, County Courts Bldg., Towson, Md. 21204.

Leland S. Van Koten
 Leland S. Van Koten

RE: PETITION FOR SPECIAL EXCEPTION: BEFORE THE ZONING COMMISSIONER
 N/S of Granite Rd., 330'
 S of Marriottsville Rd., 2nd District
 OF BALTIMORE COUNTY
 Case No. 80-203-X

ARTHUR R. SHAW, JR., et ux,
 Petitioners

APPEARANCE OF COUNSEL

MR. COMMISSIONER:

Please enter my appearance in the above captioned case on

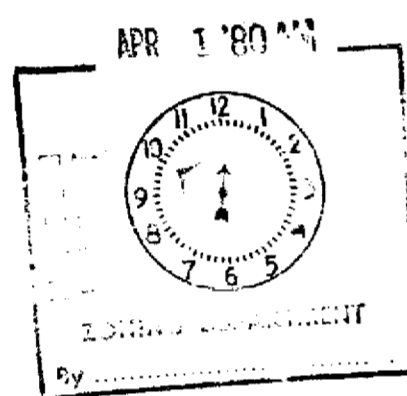
behalf of the Petitioners, Arthur R. Shaw, Jr., et ux.

H. Emslie Parks

H. Emslie Parks
 Suite 402
 305 W. Chesapeake Avenue
 Towson, Maryland 21204
 Telephone: 821-6350

I HEREBY CERTIFY that on this 31st day of March, 1980, a copy of the foregoing Appearance of Counsel was mailed, postage prepaid, to John W. Hessian, III, Esq., People's Counsel for Baltimore County, County Office Building, Towson, Maryland 21204.

H. Emslie Parks
 H. Emslie Parks



80-203-X

CERTIFICATE OF POSTING
 ZONING DEPARTMENT OF BALTIMORE COUNTY
 Towson, Maryland

District: 2nd Date of Posting: MARCH 24, 1980
 Posted for: PETITION FOR SPECIAL EXCEPTION
 Petitioner: ARTHUR R. SHAW, JR., ET UX
 Location of property: E/S GRANITE RD., 330' S. MARIOTTVILLE RD.
 Location of Signs: E/S GRANITE RD. 330' + or - S OF MARIOTTVILLE RD.
2 MARIOTTVILLE RD. OPPOSITE DEAD END OF LABURNUM RD.
 Remarks: ILLUMINATED
 Posted by: THOMAS P. ROLAND Date of return: MARCH 28, 1980

2-SIGNS

FUNCTION	Wall Map		Original		Duplicate		Tracing		200 Sheet	
	date	by	date	by	date	by	date	by	date	by
Descriptions checked and outline plotted on map										
Petition number added to outline										
Denied										
Granted by ZC, BA, CC, CA										
Reviewed by: <i>MA</i>										
Previous case:										
Revised Plans: Change in outline or description									Yes	No
Map #										

RE: PETITION FOR SPECIAL EXCEPTION : BEFORE THE ZONING COMMISSIONER
 E/S Granite Rd., 330'
 S of Marriottsville Rd., 2nd District : OF BALTIMORE COUNTY
 Case No. 80-203-X
 ARTHUR R. SHAW, JR., et ux,
 Petitioners

ORDER TO ENTER APPEARANCE

Mr. Commissioner:

Pursuant to the authority contained in Section 524, I of the Baltimore County

Charter, I hereby enter my appearance in this proceeding. You are requested to notify me of any hearing date or dates which may be now or hereafter designated therefore, and of the passage of any preliminary or final Order in connection therewith.

Peter Max Zimmerman
 Peter Max Zimmerman
 Deputy People's Counsel

John W. Hessian, III
 John W. Hessian, III
 People's Counsel for Baltimore County
 County Office Building
 Towson, Maryland 21204
 494-2188

I HEREBY CERTIFY that on this 19th day of March, 1980, a copy of the foregoing

Order was mailed to Mr. and Mrs. Arthur R. Shaw, 6311 Windsor Mill Road, Baltimore, Maryland 21207, Petitioners.

John W. Hessian, III
 John W. Hessian, III

LEGALS

PETITION FOR SPECIAL EXCEPTION
 LOCATION: East side of Granite Road, 330 feet South of Marriottsville Road
 DATE & TIME: Thursday, April 10, 1980 at 1:30 P.M.
 PUBLIC HEARING: Room 106, County Office Building, 111 W. Chesapeake Avenue, Towson, Maryland
 The Zoning Commissioner of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County, will hold a public hearing.
 Petition for Special Exception for a wireless transmitting tower and receiving structure 300 feet in height including a control house.
 All that parcel of land in the Second District of Baltimore County (2) Beginning for the same at a point in the center of Granite Road, said point being distant southerly 330 feet measured along the centerline of said Granite Road from its intersection with the center of Marriottsville Road (1) South 72 degrees 41' North 17 degrees East 240 feet (2) North 17 degrees East 219.0 feet (3) North 77 degrees 53 minutes East 170.50 feet (4) North 12 degrees 07' minutes East 200 feet (5) North 12 degrees 07' minutes East 225 feet (6) North 77 degrees 53 minutes East 225 feet (7) North 77 degrees 53 minutes East 225 feet (8) South 11 degrees 44' West 80.19 feet (9) North 04 degrees 48 minutes 50 seconds East 716.98 feet (10) North 72 degrees 41' minutes East 240 feet to a point in the center of said Granite Road thence binding thence North 17 degrees 18 minutes 30 seconds East 50 feet to the place of beginning.
 Containing 14.55 acres of land more or less.
 Being the property of Arthur R. Shaw, Jr., et ux, as shown on plat plan filed with the Zoning Department.
 Hearing Date: Thursday, April 10, 1980 at 1:30 P.M.
 Public Hearing: Room 106, County Office Building, 111 W. Chesapeake Avenue, Towson, Maryland
 BY ORDER OF
 WILLIAM E. HAMMOND
 ZONING COMMISSIONER
 OF BALTIMORE COUNTY

CERTIFICATE OF PUBLICATION

Pikesville, Md., March 20th 19 80

THIS IS TO CERTIFY, that the annexed advertisement was published in the NORTHWEST STAR, a weekly newspaper published in Pikesville, Baltimore County, Maryland before the 10th day of April 19 80 the first publication appearing on the 20th day of March, 19 80 the second publication appearing on the day of 19 the third publication appearing on the day of 19

THE NORTHWEST STAR

William E. Hammond
 Manager

Cost of Advertisement \$46.00

PETITION FOR SPECIAL EXCEPTION

LOCATION: East side of Granite Road, 330 feet South of Marriottsville Road
 DATE & TIME: Tuesday, April 1, 1980 at 1:30 P.M.
 PUBLIC HEARING: Room 106, County Office Building, 111 W. Chesapeake Avenue, Towson, Maryland
 The Zoning Commissioner of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County, will hold a public hearing.
 Petition for Special Exception for a wireless transmitting tower and receiving structure 300 feet in height including a control house.
 All that parcel of land in the Second District of Baltimore County (2) Beginning for the same at a point in the center of Granite Road, said point being distant southerly 330 feet measured along the centerline of said Granite Road from its intersection with the center of Marriottsville Road (1) South 72 degrees 41' North 17 degrees East 240 feet (2) North 17 degrees East 219.0 feet (3) North 77 degrees 53 minutes East 170.50 feet (4) North 12 degrees 07' minutes East 200 feet (5) North 12 degrees 07' minutes East 225 feet (6) North 77 degrees 53 minutes East 225 feet (7) North 77 degrees 53 minutes East 225 feet (8) South 11 degrees 44' West 80.19 feet (9) North 04 degrees 48 minutes 50 seconds East 716.98 feet (10) North 72 degrees 41' minutes East 240 feet to a point in the center of said Granite Road thence binding thence North 17 degrees 18 minutes 30 seconds East 50 feet to the place of beginning.
 Containing 14.55 Acres of land, more or less.
 Being the property of Arthur R. Shaw, Jr., et ux, as shown on plat plan filed with the Zoning Department.
 Hearing Date: Tuesday, April 1, 1980 at 1:30 P.M.
 Public Hearing: Room 106, County Office Building, 111 W. Chesapeake Avenue, Towson, Maryland
 BY ORDER OF
 WILLIAM E. HAMMOND
 ZONING COMMISSIONER
 OF BALTIMORE COUNTY

CERTIFICATE OF PUBLICATION

TOWSON, MD., March 13, 1980

THIS IS TO CERTIFY, that the annexed advertisement was published in THE JEFFERSONIAN, a weekly newspaper printed and published in Towson, Baltimore County, Md., on each of the 1st, 8th, 15th, 22nd, 29th, and 5th days of March, 1980, the first publication appearing on the 13th day of March, 1980

L. Leand Johnston
 Manager

Cost of Advertisement, \$ 18.00

CERTIFICATE OF PUBLICATION

TOWSON, MD., March 20, 1980

THIS IS TO CERTIFY, that the annexed advertisement was published in THE JEFFERSONIAN, a weekly newspaper printed and published in Towson, Baltimore County, Md., on each of the 1st, 8th, 15th, 22nd, 29th, and 5th days of March, 1980, the first publication appearing on the 20th day of March, 1980.

THE JEFFERSONIAN

L. Leand Johnston
 Manager

Cost of Advertisement, \$ 18.00

BALTIMORE COUNTY, MARYLAND
 OFFICE OF FINANCE-REVENUE DIVISION
 MISCELLANEOUS CASH RECEIPT
 No. 85078
 DATE July 9, 1981 ACCOUNT 01-712
 AMOUNT \$20.00
 RECEIVED FROM H. Emslie Parks, Esq., 409 Washington Ave., Towson, Md. 21204
 FOR Case No. 80-203-X, Arthur R. Shaw, Jr., et ux - Md. 21204
 B B165*****20D01a 8095F
 VALIDATION OR SIGNATURE OF CASHIER

BALTIMORE COUNTY, MARYLAND
 OFFICE OF FINANCE-REVENUE DIVISION
 MISCELLANEOUS CASH RECEIPT
 No. 86365
 DATE March 28, 1980 ACCOUNT 01-662
 AMOUNT \$31.00 (check)
 RECEIVED FROM Shaw The Service, Inc.
 FOR Posting & Advertising property Case No. 80-203-X
 VALIDATION OR SIGNATURE OF CASHIER

BALTIMORE COUNTY, MARYLAND
 OFFICE OF FINANCE-REVENUE DIVISION
 MISCELLANEOUS CASH RECEIPT
 No. 089638
 DATE July 24, 1980 ACCOUNT 01-662
 AMOUNT \$80.00
 RECEIVED FROM H. Emslie Parks, Esquire
 FOR Filing Fee for Appeal of Case No. 80-203-X
 VALIDATION OR SIGNATURE OF CASHIER

BALTIMORE COUNTY, MARYLAND
 OFFICE OF FINANCE-REVENUE DIVISION
 MISCELLANEOUS CASH RECEIPT
 No. 86323
 DATE March 4, 1980 ACCOUNT 01-662
 AMOUNT \$50.00
 RECEIVED FROM Arthur R. Shaw, Jr.
 FOR Advertising and Posting for Case No. 80-203-X
 VALIDATION OR SIGNATURE OF CASHIER

CERTIFICATE OF POSTING
 ZONING DEPARTMENT OF BALTIMORE COUNTY
 Towson, Maryland

District: 2nd Date of Posting: AUG. 2, 1980
 Posted for: APPEAL
 Petitioner: ARTHUR R. SHAW, JR., ET UX
 Location of property: E/S OF GRANITE RD., 330' S. OF MARIOTTVILLE RD.
 Location of Signs: #1 E/S OF GRANITE RD. 330' + or - S OF MARIOTTVILLE RD. #2 MARIOTTVILLE RD. OPPOSITE DEAD END OF LABURNUM RD.
 Remarks: 2 SIGNS
 Posted by: THOMAS P. ROLAND Date of return: AUG. 9, 1980
 Number of Signs: TWO

80-203-X

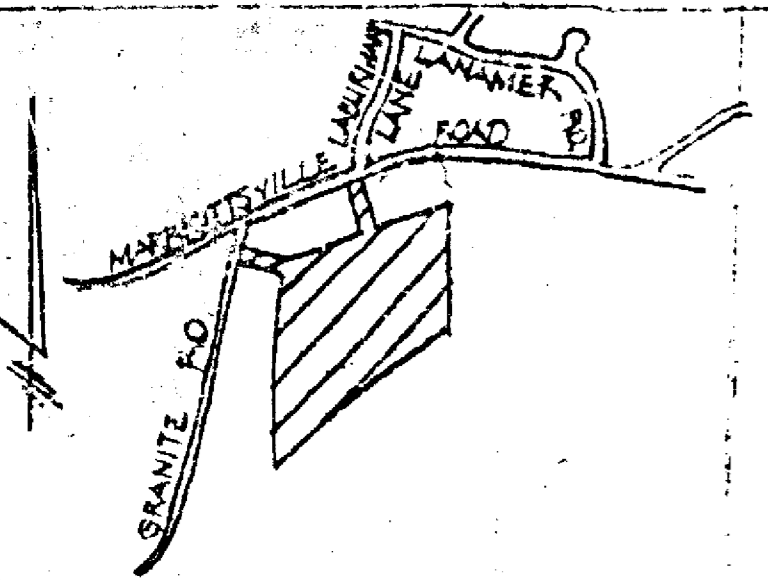
80-203-X (Rev 144)

2nd District

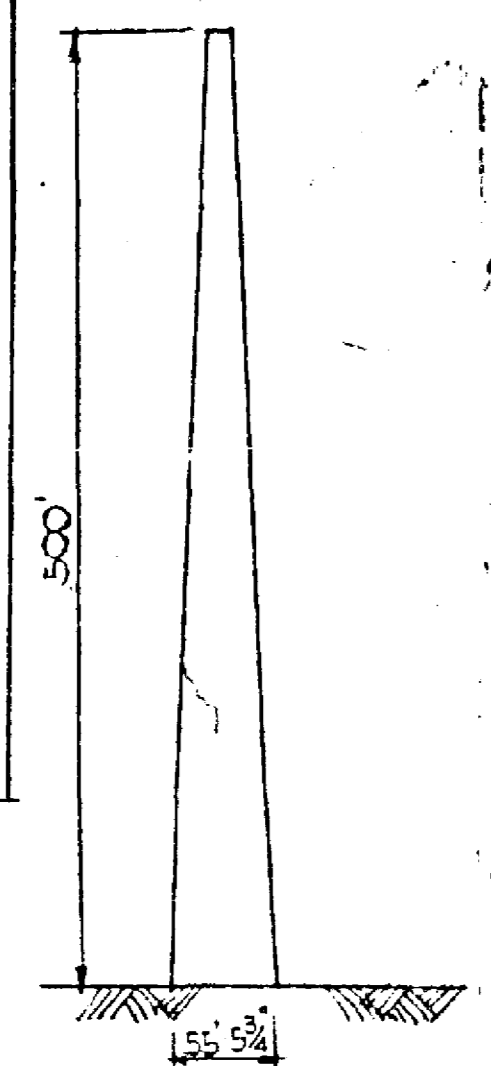
E/S of Granite Rd., 330' S of Marriottsville Rd.

Arthur R. Shaw, Jr., et ux

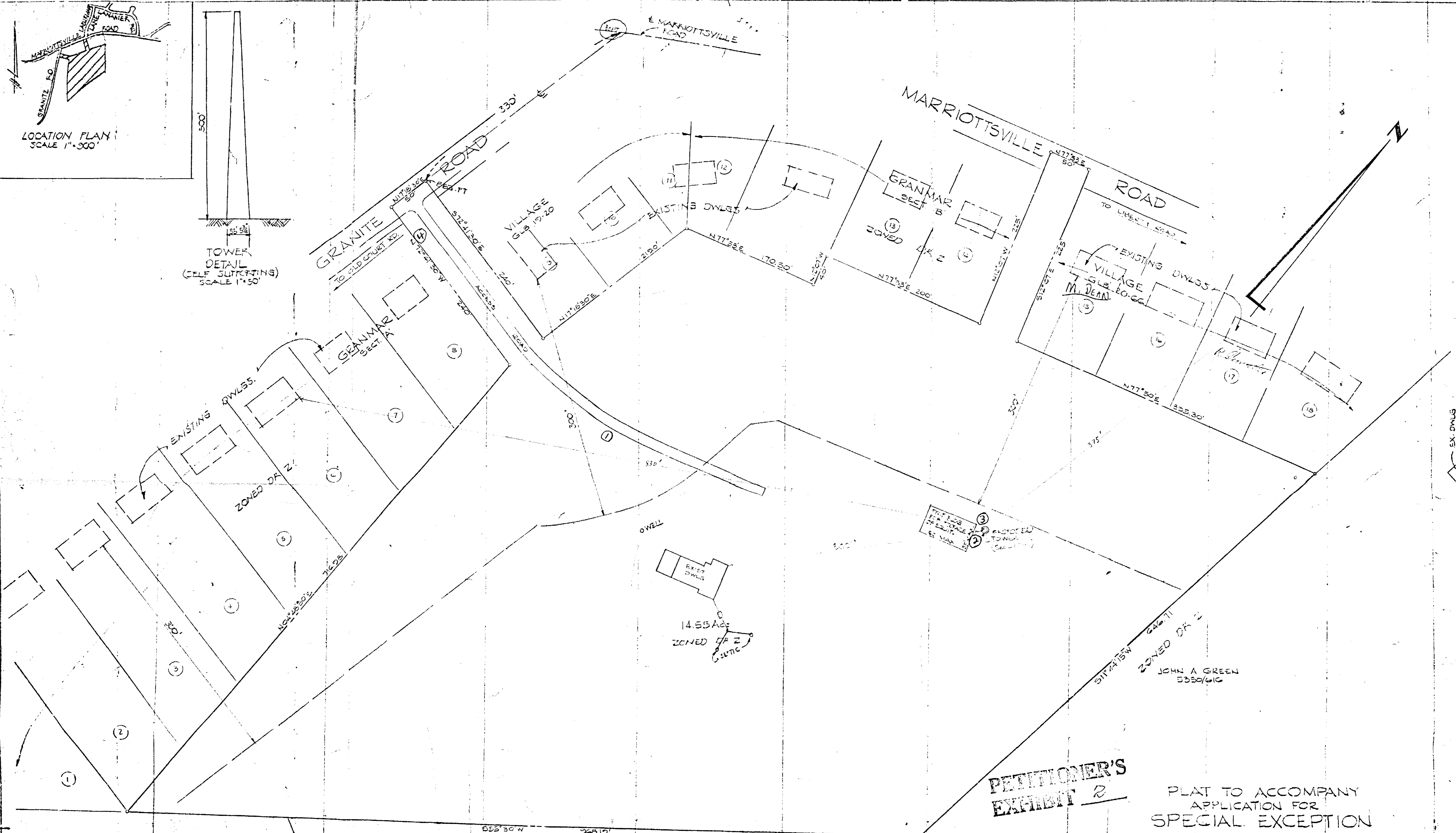
2 SIGNS



LOCATION PLAN
SCALE 1"=300'



TOWER
DETAIL
(SELF-SPLITTING)
SCALE 1"=50'



KATHRYN E. RIEBEN
4462/178



THE NATIONAL BIRCHWOOD CORP
4257-703
49.3 AC.
ZONED DR 2

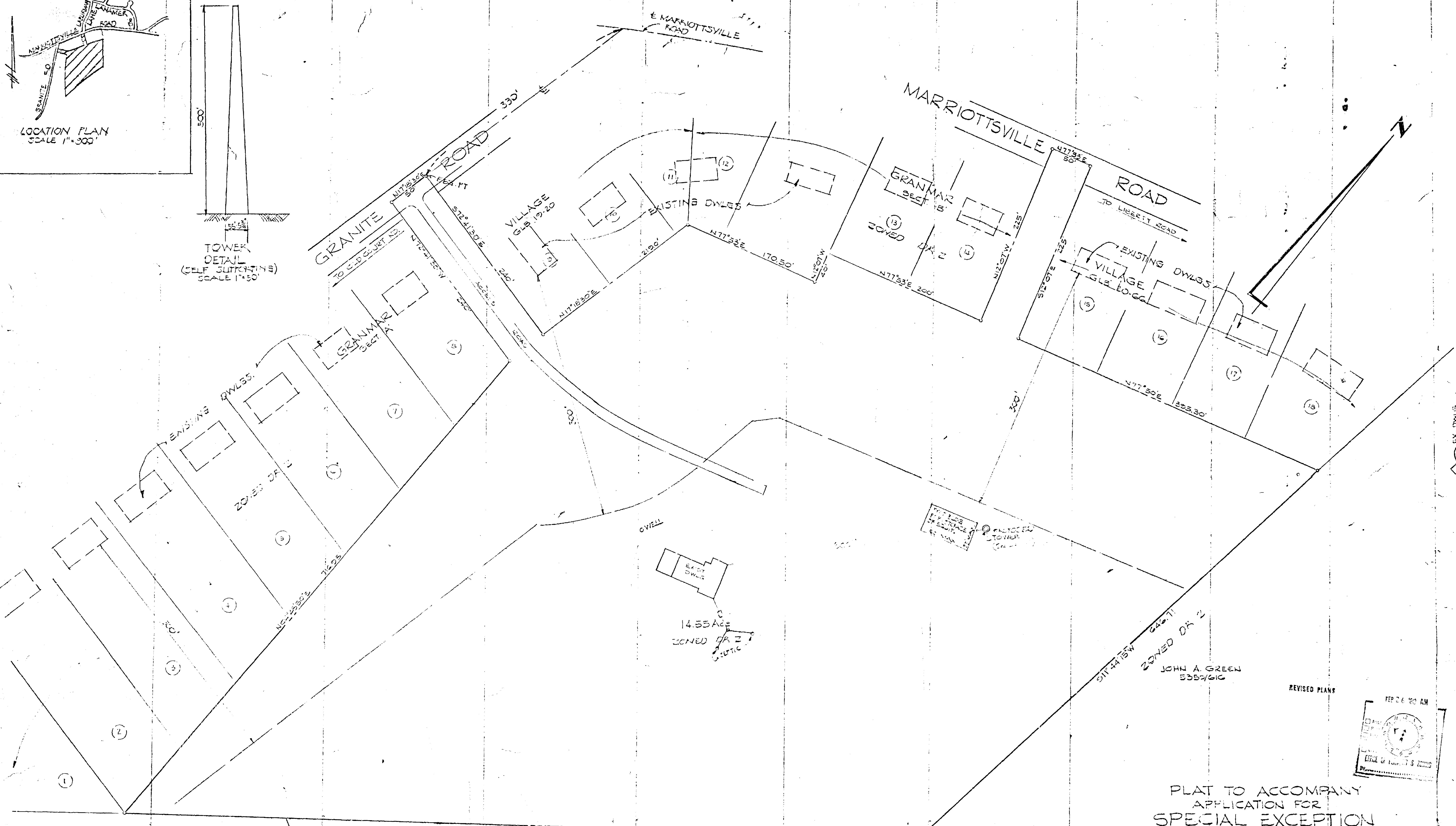
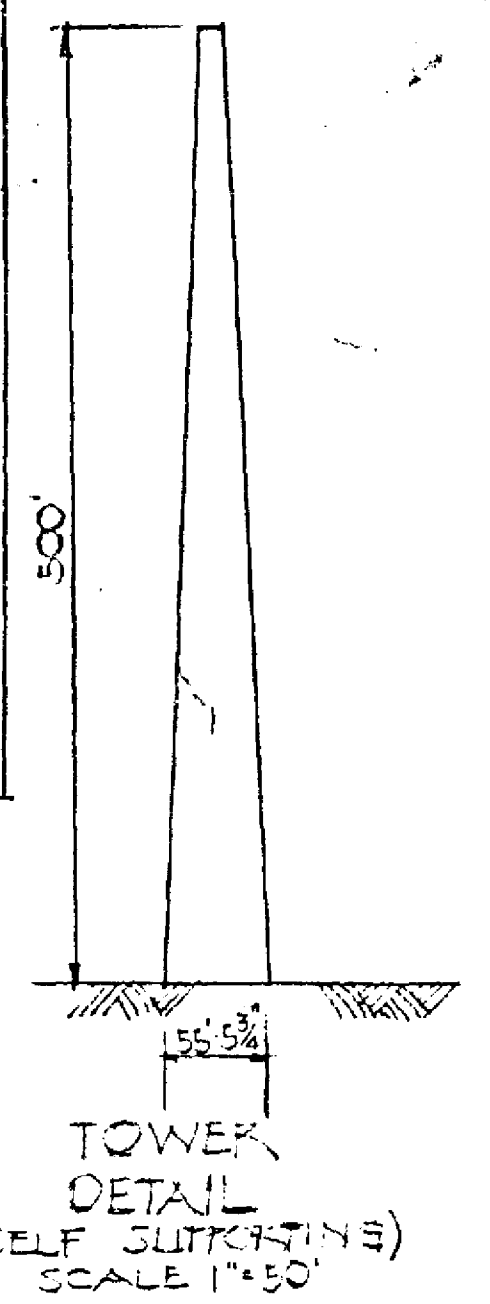
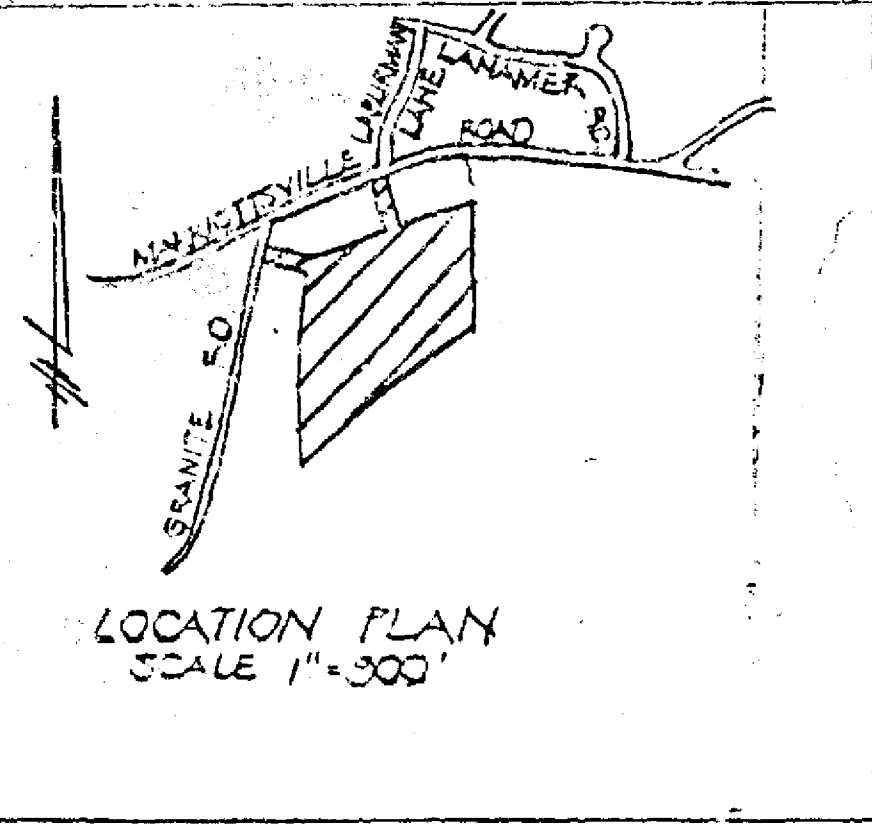
NOTES:
EX. ZONING DR 2

PETITIONER'S
EXHIBIT 2

PLAT TO ACCOMPANY
APPLICATION FOR
SPECIAL EXCEPTION

PROPERTY LOCATED OFF
MARIOTTVILLE & GRANITE RDS.
2ND ELECTION DISTRICT BALTIMORE CO.
MARYLAND
SCALE 1"=50' APRIL 13, 1979
2-20-80

OWNER:
ARTHUR SHAW JR
418-119



KATHRYN E. RIEBEN
4422/278



THE NATIONAL BIRCHWOOD CORP.
4287-703
49.3 AC.
ZONED DR 2

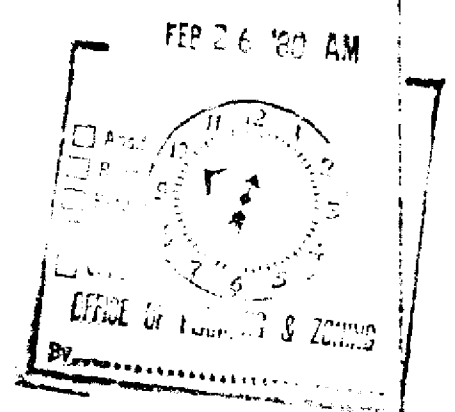
NOTES
1. EX. ZONING DR 2

PLAT TO ACCOMPANY
APPLICATION FOR
SPECIAL EXCEPTION

PROPERTY LOCATED OFF
MARIOTTSVILLE & GRANITE RDS.
2ND ELECTION DISTRICT BALTIMORE CO.
MARYLAND

SCALE 1"=50' APRIL 13, 1979
2:20:30

OWNER:
ARTHUR SHAW JR.
418-110



REVISED PLANS

JOHN A. GREEN
538/616

PETITION FOR SPECIAL EXCEPTION

2nd District

ZONING: Petition for Special Exception
LOCATION: East side of Granite Road, 330 feet South of Marriottsville Road
DATE & TIME: Tuesday, April 1, 1980 at 1:30 P.M.
PUBLIC HEARING: Room 105, County Office Building, 111 W. Chesapeake Avenue, Towson, Maryland

The Zoning Commissioner of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County, will hold a public hearing:

Petition for Special Exception for a wireless transmitting tower and receiving structure 500 feet in height including a control house

All that parcel of land in the Second District of Baltimore County

Being the property of Arthur R. Shaw, Jr., et ux, as shown on plat plan filed with the Zoning Department

Hearing Date: Tuesday, April 1, 1980 at 1:30 P.M.
Public Hearing: Room 105, County Office Building, 111 W. Chesapeake Avenue, Towson, Maryland

BY ORDER OF WILLIAM B. HANCOCK ZONING COMMISSIONER OF BALTIMORE COUNTY

PETITION OF OBJECTION

We the under-signed file this petition as an indication of our objection to the construction of a 500 ft. transmitting and receiving tower referenced in the zoning petition # 80203-X.

A partial list of the objections are as follows:

- * Height (Washington Monument 555ft.)
* Purpose (Commercial use)
* Location (Residential area)
* Unknown radio interference (appliances, television, telephone)
* Safety to residents & property (children climbing; ice blowing off; blowing paint during maintenance)
* Property devaluation

This list is by no means inclusive of all our objections.

Table with 3 columns: NAME, ADDRESS, SIGNATURE. Lists 25 objectors including Patricia L. Smith, Barry Phipps, Evelyn D. Parks, etc.

WITH THIS SIGNATURE I CERTIFY THE WITNESSING OF THE ABOVE SIGNATURES

494-3165

County Board of Appeals
Room 219, Court House
Towson, Maryland 21204

Jan. 9, 1981

NOTICE OF ASSIGNMENT

NO POSTPONEMENTS WILL BE GRANTED WITHOUT GOOD AND SUFFICIENT REASONS. REQUESTS FOR POSTPONEMENTS MUST BE IN WRITING AND IN STRICT COMPLIANCE WITH BOARD RULE 2(b). ABSOLUTELY NO POSTPONEMENTS WILL BE GRANTED WITHIN FIFTEEN (15) DAYS OF SCHEDULED HEARING DATE IN ACCORDANCE WITH RULE 2(c), COUNTY COUNCIL BILL #108

CASE NO. 80-203-X ARTHUR R. SHAW, JR., et ux
SE-Wireless transmitting tower and receiving structure 500' in height
E/S of Granit Rd., 330' S of Marriottsville Rd.
2nd District
7/3/80 - Z.C. (Hammond) DENIED special exception

ASSIGNED FOR: TUESDAY, APRIL 14, 1981, at 10 a.m.

- cc: H. Emilie Parks, Esq. Counsel for Petitioners
Mr. & Mrs. Arthur Shaw, Jr. Petitioners
Mr. C. M. Schevker Protestant
Mr. Homer Seidel, Jr.
Mr. M. S. Dean
Mr. Barry Smith
John W. Hession, Esq. People's Counsel
J. E. Dyer Zoning Office
W. Hammond
Mr. C. Waller
Ms. Jane Phipps
Mr. Arnold Jablon

Entered 4/14/81 George W. Liebmann, Esq. Counsel for Protestants (Village of Kings Park Community Assn., Herwood Heights Community Assn., Michael Dean, Lawrence Phipps, and Jane Phipps)
June Holmen, Secretary

PETITION OF OBJECTION

We the under-signed file this petition as an indication of our objection to the construction of a 500 ft. transmitting and receiving tower referenced in the zoning petition # 80203-X.

A partial list of the objections are as follows:

- * Height (Washington Monument 555ft.)
* Purpose (Commercial use)
* Location (Residential area)
* Unknown radio interference (appliances, television, telephone)
* Safety to residents & property (children climbing; ice blowing off; blowing paint during maintenance)
* Property devaluation

This list is by no means inclusive of all our objections.

Table with 3 columns: NAME, ADDRESS, SIGNATURE. Lists 25 objectors including Patricia L. Smith, Barry Phipps, Evelyn D. Parks, etc.

WITH THIS SIGNATURE I CERTIFY THE WITNESSING OF THE ABOVE SIGNATURES

April 14, 1981

Re: 80-203-X, Arthur R. Shaw, Jr.
The undersigned were present at the hearing Room 105, PROTESTANTS, DURING THE HEARING ON THIS CASE.

Table with 2 columns: NAME, ADDRESS. Lists names and addresses of attendees at the hearing.

PETITION OF OBJECTION

We the under-signed file this petition as an indication of our objection to the construction of a 500 ft. transmitting and receiving tower referenced in the zoning petition # 80203-X.

A partial list of the objections are as follows:

- * Height (Washington Monument 555ft.)
* Purpose (Commercial use)
* Location (Residential area)
* Unknown radio interference (appliances, television, telephone)
* Safety to residents & property (children climbing; ice blowing off; blowing paint during maintenance)
* Property devaluation

This list is by no means inclusive of all our objections.

Table with 3 columns: NAME, ADDRESS, SIGNATURE. Lists names and addresses of objectors.

WITH THIS SIGNATURE I CERTIFY THE WITNESSING OF THE ABOVE SIGNATURES

PETITION OF OBJECTION

We the under-signed file this petition as an indication of our objection to the construction of a 500 ft. transmitting and receiving tower referenced in the zoning petition # 80203-X.

A partial list of the objections are as follows:

- * Height (Washington Monument 555ft.)
* Purpose (Commercial use)
* Location (Residential area)
* Unknown radio interference (appliances, television, telephone)
* Safety to residents & property (children climbing; ice blowing off; blowing paint during maintenance)
* Property devaluation

This list is by no means inclusive of all our objections.

Table with 3 columns: NAME, ADDRESS, SIGNATURE. Lists names and addresses of objectors.

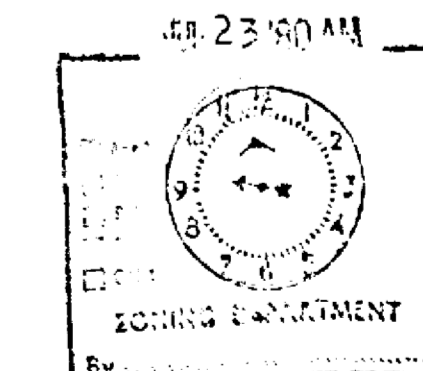
WITH THIS SIGNATURE I CERTIFY THE WITNESSING OF THE ABOVE SIGNATURES

Signature and name of witness.

RE: PETITION FOR SPECIAL EXCEPTION *
E/S of Granite Road, 330' S. of *
Marriottsville Road - 2nd Election * BEFORE THE
District * ZONING COMMISSIONER
Arthur R. Shaw, Jr., et ux * OF
Petitioners * BALTIMORE COUNTY
No. 80-203-X (Item No. 406) *

NOTICE OF APPEAL BY ARTHUR R. SHAW, JR. AND DOROTHY B. SHAW

Mr. Commissioner:
Please enter an appeal by Arthur R. Shaw, Jr. and Dorothy B. Shaw, 6311 Windsor Mill Road, Baltimore, Maryland 21207, to the Board of Appeals of Baltimore County from the order entered in the above matter on July 3, 1980.



Signature and name of H. Emilie Parks, Esq.
Address: 305 W. Chesapeake Ave., Towson, Md. 21204
Phone: (301) 321-6350
Attorneys for Arthur R. Shaw, Jr., and Dorothy B. Shaw

I HEREBY CERTIFY that on this 22 day of July, 1980, I have mailed a copy of the above Notice of Appeal to Mr. Charles M. Schevker, 10101 Marriottsville Rd., Randallstown, Md. 21133, Mr. Homer Seidel, Jr. 10012 Marriottsville Rd., Randallstown, Md. 21133, Mr. Michael S. Dean, 10017 Marriottsville Road, Randallstown, Md. 21133, Mr. Larry Smith, 3615 Granite Road, Randallstown, Md. 21133, John W. Hession, III, Esquire, People's Counsel, County Courts Bldg., Towson, Md. 21284.

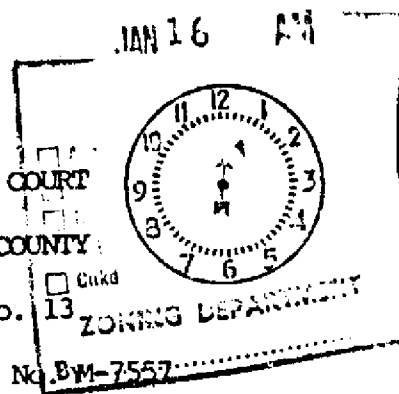
PETITION FOR SPECIAL EXCEPTION
for a wireless transmitting tower
and receiving structure 500' in
height including a control house
E/S of Granite Rd., 330² S. of
Marriottsville Road, 2nd District

ARTHUR R. SHAW, JR., et ux,
Petitioners

Zoning File No. 80-203-X

: : : : : :

IN THE CIRCUIT COURT
FOR BALTIMORE COUNTY
Misc. Docket No. 13
Folio 207/File No. BM-7557



ANSWER TO MOTION TO REVISE ORDER AND REQUEST FOR HEARING

People's Counsel for Baltimore County answers as follows:

1. People's Counsel admits Paragraphs 1-3, but further states that the reference to Section 502.3 of the Baltimore County Zoning Regulations (BCZR) is incomplete and misleading.
2. People's Counsel denies Paragraph 4.
3. In further answering, People's Counsel states:
 - (a) There has been no fraud, mistake, or irregularity.
 - (b) Pursuant to BCZR Section 502.3, the Zoning Commissioner, and on appeal, the County Board of Appeals, have authority to establish the time limit for utilization of a Special Exception, and the Court has no original jurisdiction to establish the time limit.
 - (c) Pursuant to BCZR 502.3, the time limit is generally established at two years, unless the Commissioner or Board specifies a longer period not exceeding five years.
 - (d) In the present case, because the Order did not specify a period longer than two years, the time limit was thereby necessarily set at two years.
4. In further answering, People's Counsel states that the jurisdiction to grant extensions of time limits is in the Zoning Commissioner and not in the Circuit Court. In the present case, the time for requesting

- 2 -

an extension has passed, and the Special Exception has expired.

5. In further answering, People's Counsel states that the Movants' remedy is to file a new Special Exception proceeding. The rights under the old Special Exception have been extinguished.

Phyllis Cole Friedman
People's Counsel for Baltimore County

Peter Max Zimmerman
Deputy People's Counsel
Room 223, Court House
Towson, Maryland 21204
494-2188

STATEMENT OF POINTS AND AUTHORITIES:

BCZR 502.3 states,

"A Special Exception which has not been utilized within a period of two years from the date of the final order granting same, or such longer period not exceeding five years, as may have been specified therein, shall thereafter be void. The Zoning Commissioner or, on appeal, the County Board of Appeals, in connection with the grant of any Special Exception, shall fix within the foregoing limits, the period of time for its utilization. Any party to the proceedings may, by so specifying, appeal from either the order of the Zoning Commissioner or of the County Board of Appeals as the case may be, solely as to the reasonableness of the period of time allowed or, alternatively, may have such question determined in conjunction with any appeal from the grant or refusal of the application for a Special Exception. After a final order granting a Special Exception the Zoning Commissioner, at any time prior to expiration of the period of time authorized for its utilization, may grant one or more extensions of such period, provided that a maximum time for utilization of the Special Exception is not thereby extended for a period of more than five years from the date of the final order granting same. [B.C.Z.R., 1955; Bills No. 42, 1962; No. 85, 1967.]

⁶ Thus (comma) in Bills No. 42, 1962 and No. 85, 1967."

- 3 -

Until the filing of the present Motion, the Petitioner never made an issue of the two year time limit for utilization and failed to take advantage of the opportunity to request an extension in timely fashion. In any event, the question of time limit is clearly not an "irregularity" under Rule 2-535, such being limited to matters which go to the heart and integrity of the judicial process.

People's Counsel reserves the right to file a supplemental Memorandum as necessary and appropriate.

Peter Max Zimmerman

I HEREBY CERTIFY that on this 14th day of January, 1986, a copy of the foregoing Answer to Motion to Revise Order and Request for Hearing was mailed to H. Enslie Parks, Esquire and Leland S. Van Koten, Esquire, Parks, Hansen & Ditch, Suite 1012, 409 Washington Ave., Towson, MD 21204, Attorneys for Appellant; Malcolm F. Spicer, Jr., Esquire, County Attorney, Office of Law, Mezzanine, Court House, Towson, MD 21204; and Arnold Jablon, Zoning Commissioner, County Office Building, Towson, MD 21204.

Peter Max Zimmerman

PETITION FOR SPECIAL EXCEPTION * IN THE
 for a wireless transmitting tower * CIRCUIT COURT
 and receiving structure 500' in *
 height including a control house * FOR BALTIMORE COUNTY
 E/S of Granite Road, 330² S. of *
 Marriottsville Road * Mis. Docket No. 13
 2nd District *
 ARTHUR R. SHAW, JR., et ux * Folio 207/File No. M-7557
 Petitioners *
 Zoning File No. 80-203-X *

MOTION TO REVISE ORDER

Arthur R. Shaw, Jr. and Dorothy B. Shaw, Petitioners, by its undersigned counsel of record, moves this Court to revise its Order dated May 26, 1982, and as grounds therefor states as follows:

1. The said Order did not set forth a date for the expiration of the special exception granted therein.
2. Section 502.3 of the Baltimore County Zoning Regulations provides, in pertinent part, that an order granting a special exception "shall fix within the foregoing limits, the period of time for its utilization."
3. Pursuant to Section 502.3 of the Baltimore County Zoning Regulations, a special exception may be granted for a period of not less than two (2) nor more than five (5) years.
4. The failure to specify a time for utilization of the of the special exception is either a mistake or irregularity or a clerical mistake, thus justifying the exercise of this Court's revisory power under Rule 2-535 of the Maryland Rules of Procedure.

WHEREFORE, Appellant respectfully prays that the Order of this Court entered on May 26, 1982 be revised to include the following language: "The

said special exception shall expire five (5) years from May 26, 1982, unless construction of the improvements permitted by this Order shall have commenced prior thereto."

H. Emslie Parks
 H. Emslie Parks
Leland S. Van Koten
 Leland S. Van Koten
 Parks, Hansen & Ditch
 Suite 1012
 409 Washington Ave.
 Towson, Md. 21204
 (301) 821-6350

Attorneys for Appellant

I HEREBY CERTIFY that on this 5th day of January, 1986, I have mailed a copy of the within Motion, Memorandum and proposed Order, to Phyllis Cole Friedman, Esquire, People's Counsel for Baltimore County, Peter Max Zimmerman, Esquire, Deputy People's Counsel, Room 223 Court House, Towson, Maryland 21204, Arnold Jablon, Esquire, 2338 York Road, Timonium, Md. 21093, attorney for Protestants, and County Board of Appeals of Baltimore County, Room 219 Court House, Towson, Md. 21204.

Leland S. Van Koten
 Leland S. Van Koten

PETITION FOR SPECIAL EXCEPTION * IN THE
 for a wireless transmitting tower * CIRCUIT COURT
 and receiving structure 500' in *
 height including a control house * FOR BALTIMORE COUNTY
 E/S of Granite Road, 330² S. of *
 Marriottsville Road * Mis. Docket No. 13
 2nd District *
 ARTHUR R. SHAW, JR., et ux * Folio 207/File No. M-7557
 Petitioners *
 Zoning File No. 80-203-X *

MEMORANDUM OF POINTS AND AUTHORITIES
 IN SUPPORT OF MOTION TO REVISE ORDER

Section 502.3 of the Baltimore County Zoning Regulations requires that an order granting a special exception "shall fix within the foregoing limits, the period of time for its utilization." The limits referred to are a minimum duration of two (2) years and a maximum duration of five (5) years. The obvious purpose of this requirement is to give the property owner notice of the time within which he must use the special exception.

Despite the above requirement, the Order entered by the Court on May 26, 1982, failed to state a time for utilization of the special exception—an omission which was not noticed by anyone at the time. Although more than thirty days have passed since the entry of the Order, Rule 2-535(b) of the Maryland Rules of Procedure specifically permits the Court to exercise revisionary power over a judgment on motion of a party "filed at any time," in the case of "mistake, or irregularity." Similarly, Rule 2-535(d) permits clerical mistakes to be corrected at any time.

An "irregularity" has been consistently defined by the Court of Appeals as "the doing or not doing of that, in the conduct of a suit at law, which, conformable with the practice of the court, ought or ought not to be done." Mutual Benefit Society of Baltimore, Inc. v. Haywood, 257 Md. 538, 541, 263

A.2d 868 (1970), quoting Berwyn Fuel and Feed Co. v. Kolb, 249 Md. 475, 479, 240 A.2d 239 (1968).

It seems clear that failure to state a time for utilization of the special exception was an "irregularity" within the contemplation of Rule 2-535 and that the Court may revise its Order to provide that the special exception must be used within five (5) years of the original order. It is therefore respectfully urged that the Motion to Revise Order be granted.

H. Emslie Parks
 H. Emslie Parks

Leland S. Van Koten
 Leland S. Van Koten
 Parks, Hansen & Ditch
 Suite 1012
 409 Washington Ave.
 Towson, Md. 21204
 (301) 821-6350

Attorneys for Appellant

PETITION FOR SPECIAL EXCEPTION * IN THE
 for a wireless transmitting tower * CIRCUIT COURT
 and receiving structure 500' in *
 height including a control house * FOR BALTIMORE COUNTY
 E/S of Granite Road, 330² S. of *
 Marriottsville Road * Mis. Docket No. 13
 2nd District *
 ARTHUR R. SHAW, JR., et ux * Folio 207/File No. M-7557
 Petitioners *
 Zoning File No. 80-203-X *

ORDER

Upon consideration of Petitioners' Motion to Revise Order and of the Memorandum of Points and Authorities filed in support thereof, it is this day of

1986, by and for the Circuit Court for Baltimore County

ORDERED that the Order entered by this Court on May 26, 1982, be and it is hereby revised to include the following language:

"The said special exception shall expire five (5) years from May 26, 1982, unless construction of the improvements permitted by this Order shall have commenced prior thereto."

 Judge

MATTHEW J. VLISSIDES & ASSOCIATES
ENGINEERING CONSULTANTS
7601 BURFORD DRIVE
MCLEAN, VIRGINIA 22102
(703) 356-9504

KEY PERSONNEL RESUME'S
&
LIST OF MAJOR PROJECTS

1970 - 1980

- WKBN-TV 1500' G. Tower Analysis & Design
- Design of 5 Sectionalized Loran "C" Antenna Systems
- Design of 3 Loran "B" Antenna Systems
- 105' Tracking Antenna, Muscat, Oman
- WLBT-TV 2000' G. Tower Inspection & Analysis
- WPLG-TV 1000' G. Tower Inspection, Analysis & Modification
- WCKT-TV 1000' G. Tower Inspection, Analysis & Modification
- WMAU-TV 1000' G. Tower Inspection, Analysis & Modification
- WWDC-FM 400' G. Tower Expansion
- WRC-TV 400' S.S. Tower Inspection, Analysis & Modification
- American University 400' S.S. Tower Analysis & Modification
- Louisville Police Department 200' S.S. Tower Inspection, Analysis & Reinforcement
- Norfolk & Western Railways M/W System Design of Civil Works for GT & E International, Waltham, Massachusetts
- Supervision of Construction for the Etam, W. Va. and Andover, Earth Satellite Stations for COMSAT Corp.
- WNDU-TV 1000' G. Tower Replacement of Existing Guying System with Insulated One
- Greater Motower, 1000' G. Tower Turnkey Contract
- E. Mernone, 800' S.S. Tower Reinforcement & Addition of New Antennas
- WKBN-TV 1500' G. Tower Turnkey Contract
- KOLR 500' G. Tower Inspection, Analysis & Evaluation
- WEAU-TV 1000' & 2000' G. Towers Inspection, Analysis & Evaluation
- WJBC-2 Addition of NURAD Microwave Antenna to existing 1000' G. Tower
- WFGC 400' FM G. Tower Analysis
- WIVK-AM/FM 900' G. Tower Erection
- Fairchild OLAA/STC Data Link U.S. Air Force Terminals

- Kankakee Cable TV 400' G. Tower Inspection & Analysis
- WTMJ-TV 1000' G. Tower Inspection & Analysis
- WNYS-TV 886' G. Tower Inspection & Evaluation
- WLCY-TV 461' G. Tower Inspection & Evaluation
- T-Cas Inc., Technical Evaluation of Bidder Responses to the Nigerian Ministry of Communications Standard Specification, Design, Fabrication and Erection of Towers
- Motorola, Inc. 125' S.S. Tower Inspection & Analysis
- KEDT-TV 1000' G. Tower Inspection & Analysis
- WESH-TV 1000' G. Tower Inspection, Analysis & Evaluation
- MCI Telecommunications Colorado-California M/W System Tower Analyses
- WBNS-TV 1300' Candelabra G. Tower Analysis & Preliminary Design
- WITG-TV 640' S.S. Tower Inspection, Analysis & Evaluation
- Sanders Associates Low and High Band Rombic Antenna Analyses
- WKQQ-FM 550' G. Tower Inspection, Analysis & Evaluation
- WJXT-TV 900' G. Tower Inspection, Analysis & Evaluation
- KIMT-TV 1500' G. Tower Inspection, Analysis & Evaluation
- Intelsat Kuwait 105' Tracking Antenna Consulting
- WREX-TV 600' G. Tower Inspection, Analysis & Evaluation
- KCTS-TV 500' S.S. Tower Inspection & Analysis
- WTVF-TV 1200' G. Tower Inspection, Analysis & Evaluation
- KOTV-TV 1133' G. Tower Inspection, Analysis & Evaluation
- NOAA/NESS (3) 24' Tracking Antennas Design & Installation of New Driving System.
- WABB-FM 840' G. Tower Analysis & Design
- COMSAT Torus Antenna Structural Analysis & Design for Andover, Etam, California & Alaska
- WSBK-TV 1250' G. Tower Inspection, Analysis & Evaluation
- WSBT-TV 1000' G. Tower Analysis, Evaluation & Reinforcement Design

MATTHEW J. VLISSIDES, P.E.

"Mr. M.J. Vlissides, an Engineering Consultant, has 20 years experience in structural and mechanical engineering and is a specialist in antenna and tower design, fabrication supervision and installation.

"During the past ten years he has performed extensive successful consulting work in the area of communications for L.T.V. Electro-systems, Inc., Comsat Corporation, Northrop-PAGE Communications Engineers, Inc., NASA Goddard Space Flight Center, ITT-SPC, COSMOS Engineers, Inc., Stainless, Inc., Bachtel Corporation, MCI, Micro-flect Company, Inc., R.F. Systems, Inc., Telcom, Inc., DCA, Coast Guard, Plessey Ltd., Burleson Associates, Inc., E-Systems, Inc., RCA, Fairchild Space & Electronics, Inc., David L. Steel, Sr., P.E., Harris International, RCA Global, RMS, Sanders Associates, T-Cas, TELCOM, Teleconsult, Intelsat, numerous Broadcasting Stations throughout the USA, and others.

"Prior to establishing his consulting office, Mr. Vlissides was chief structural engineer for Northrop-PAGE where he was responsible for the analysis, design, specification writing and fabrication supervision of advanced structures, such as self-supporting and guyed communication towers, antennas, tracking stations, radio telescopes and structures for the space communications program. He was instrumental in the development of the 42' antenna transportable commercial station operated by Comsat, and in the design of the wheel and track antenna and the integrated two-story building with antenna on top, utilized by LTV Aircraft Company.

"Mr. Vlissides has participated in the successful engineering and implementation of several multimillion dollar projects, including the structural design and implementation of earth stations in Panama, Iran, Lebanon, Brazil, and the Comsat stations at Brewster, Andover and Paumotu. He was responsible for the mechanical design of earth stations in Australia, Thailand and the Philippines, as well as West Coast tracking stations for the U.S. Navy.

"In the intricate area of shock and vibration isolation and electronic equipment packaging in shelters, Mr. Vlissides has solved difficult problems for Page Communications Engineers at OGDEN Laboratories involving the MRC-113 U.S. Air Force Program.

"Mr. Vlissides participated in the analysis, design and implementation of large microwave and troposcatter communication programs, including the multimillion dollar IWCS in Vietnam, The Iranian Microwave (INTS), the NATO Bypass, and the Hongkong-Taiwan-Philippines tropo system. The major areas of involvement covered feasibility studies, advance survey details, civil-mechanical and electrical designs, and final implementation.

'Mr. Vlissides' major recent studies and prototype designs include:

- Large Tracking Antenna Tower & Foundation Analysis & Design Consideration (July 1968)
- Large Tracking Antenna Building & Foundation Earthquake Analysis & Design Considerations (July 1968)
- Application of Fiberglass/Plastic to transportable Communications systems
- High-gain Antennas Surface Geometry Determination (Jan. 1968)
- Optimum Antenna Design for Synchronous Communications Satellites (Jan. 1970)
- Original Design of 32-foot Transportable or Fixed Tracking Antennas (April 1971)
- Participation in the preparation of Earth Station Antenna Standards for the Electronics Industries Association (EIA) (1969-1971)

"Effective low cost methods for equipment shock and vibration isolation (June 1971)

Design of an experimental multibeam antenna system of satellite communications (1971-1972) Comsat Corporation

Analysis, design & fabrication supervision of the Sectionalized Loran-C Transmitting Antenna for Cosmos Engineers, Inc. and the U.S. Coast Guard (1972-1973)

"Mr. Vlissides has a B.S. degree from the Athens Greece Military Academy, B.C.E. and M.C.E. in Structural Mechanics from the Catholic University of America, where he has been a Doctoral Candidate in Structural Mechanics and Dynamics.

His language capabilities include English and Greek.

BIOGRAPHICAL SKETCH

Name: Sol Hirsch
Born: February 8, 1923, New York, N.Y.
Education: B.S. degree, City College of New York, 1950.
Meteorology Major
M.S. degree, Johns Hopkins University, 1971.
Management Science, Operations Research, Statistics

Experience: Served in Army Air Force, 1943-1946, as an observer.
Entered service with United States Weather Bureau in October 1950 at Baltimore, Maryland.
Served as an observer-briefer, 1950-1952. Public Service Forecaster for period 1952-1962; originated Maryland State forecasts during portion of this period.

Began service with the National Environmental Satellite Service in 1962 and was involved in the following activities:
• Surveillance of tropical systems on a world-wide basis; obtained empirical estimates of max wind speed; sent bulletins to foreign countries.
• Summaries of tropical conditions on a world-wide basis.
• Empirical estimates of moisture in cloud systems which were entered into the N M C analyses and progs.
• Frontal Analyses of weather systems in the northern and southern hemispheres.
• Participant in excessive precipitation estimation program.
• Prepared cloud progs based on PE progs for N M C Aviation Branch.
• Briefed forecasters in most N M C Branches.
• Developed and wrote most of the SOP's in the Satellite Analysis Branch.

In July of 1978 began special assignment to the Department of Agriculture; objective was to develop a unit to service needs of the Department. Established satellite section in this unit and set procedures to maintain surveillance of the entire world. Established procedures to facilitate briefing in areas from Australia, Southeast Asia westward to South America. Made short range forecasts for these areas on an irregular basis. Developed format for daily briefings of agriculture officials. A special briefing was held for Secretary Bob Bergland. Assignment ended in January of 1979.

WILLIAM D. CRENSHAW
DESIGNER

Summary of Experience

Over 22 years of professional experience as a designer of structures. Most recent and largest part of experience has been in the analysis and design phases of all types of guyed and self-supporting towers. Tower design and inspection assignments have been overseas as well as in the USA.

Education

Washington-Lee High School
Technical Design Courses in Structural Steel & Concrete Structures

Experience

- 1974 to Present - Matthew J. Vlissides & Associates, Designer
- 1972 to 1974 - Page Communications Engineers, Inc., Vienna, VA, Designer
- 1970 to 1972 - Matthew J. Vlissides, P.E., Washington, D.C., Designer
- 1961 to 1970 - Page Communications Engineers, Inc., Washington, D.C. Designer
- 1957 to 1961 - Atlas Machine & Iron Co., Arlington, VA, Detailer
- 1956 to 1957 - Ceco Steel Corp., Kenilworth, MD, Detailer
- 1955 to 1956 - Rosslyn Steel & Cement Co., Washington, D.C. Draftsman

CLINT CAPPS
ERECTION SUPERVISOR

Summary of Experience

Over 25 years of steel erection experience especially in the erection of communication towers and tracking antennas. He is one of the very few chief riggers recognized nationwide and has been involved in the erection of at least 250 towers ranging from 100' to 2063'. Recently, he completed for us the unique 1500' WKBN-TV guyed tower in Youngstown, Ohio made exclusively for the first time in history of Cor-Ten Steel. Mr. Capps erected the SLT-Antenna Systems in Searchlight, Nevada.

Education

High School Diploma

Experience

From April 1953 to present he worked exclusively in steel tower erection as a rigger and chief rigger with the following companies:

- J.M. Hamilton Company
- Hamilton Erection Company
- International Tower Systems Company
- King Tower Company
- High Tower Company
- G. Olsen Tower Company

QUALIFICATIONS OF THE APPRAISER

MEMBER:

Maryland Real Estate Commission (Associate Broker)
National Association of Independent Fee Appraisers (IFA designation)
Past President, N.A.I.F.A. Local Chapter, 1979
Associate Member of the Society of Real Estate Appraisers
Candidate Member of the American Institute of Real Estate Appraisers.
Faculty Member of Catonsville Community College, Real Estate Department

EDUCATIONAL BACKGROUND

Salisbury State College, B.S., 1959
Graduate student, University of Baltimore, M.B.A. Program
Real Estate Appraisal Course 1A, American Institute of Real Estate Appraisers and successful writing of examination, 1973.
Real Estate Appraisal Course 1B, American Institute of Real Estate Appraisers, 1974
Successful writing of the National Association of Independent Fee Appraisers, Residential Examination, 1975
Successful writing of the American Institute of Real Estate Appraisers, Examination #8, 1976
Real Estate Appraisal Course #201, Society of Real Estate Appraisers and successful writing of examination, 1977.
Inner City Valuation Seminar, Society of Real Estate Appraisers, 1979

PROFESSIONAL EXPERIENCE:

November, 1971 - December, 1975:
Real estate appraisals and sales for Westview Realty, Inc.
Vice President, December, 1974
December 1975 - August, 1979:
Real estate appraiser for H.F. Cole & Company, Inc. Assignments include residential (single and multi-family), commercial and industrial properties. Appraisals, as well as market analysis, development and construction management, feasibility studies among others.
August, 1979:
Established own appraisal practice. Assignments include residential (single and multi-family) and commercial properties.

APPRAISAL ASSIGNMENTS - (PARTIAL LIST)

- | | |
|------------------------------------|---|
| Columbia Bank & Trust Co. | Patapsco Federal Savings & Loan Assn. |
| Savings Bank of Baltimore | Mortgage Guaranty Insurance Corp. |
| Investors Mortgage Insurance Corp. | Merrill Lynch Relocation Mgt. |
| Stead Mortgage Company | Bank of Oklahoma |
| Pratermy Federal Savings & Loan | Bank of St. Louis |
| First Mortgage Corporation | State of Maryland - Dept. of General Services |
| Maryland National Bank | |

QUALIFIED AS EXPERT WITNESS BEFORE:

Howard County Circuit Court
Federal District Court

BRIAN D. MCGRAW

- U.S. Coast Guard Tower Analysis of Proposed Modifications to the SLT Antenna
- Omega Navigation Station 1200' G. Tower Inspection of Rehabilitation
- KCLO-TV 1500' Tower Replacement of TV Antenna & 6th G. Level Cables
- MCI-Collins Ohio Valley M/W System Sites Design
- WBNS-TV 760' S.S. Tower Inspection, Analysis & Evaluation
- WPIK/WXRA-FM 400' G. Tower Extension to 500' & Other Associated Work
- Consultant to PBS for MO Satellite Terminal Development & Installation in Fairfax County, VA
- Design of the Concrete Building & Special Foundation for the 60' Tracking Antenna "C" Station COMSAT Eatam, W. Va.
- Design of the Concrete Building & Special Foundation for the 60' Tracking Antenna "S" Station COMSAT Lenox, W. Va.
- Design of the Concrete Building & Special Foundation for the 105' Tracking Antenna in Nigeria, for Harris International
- WFMV-TV 759' G. Tower Inspection, Analysis & Evaluation
- KDUH-TV 1965' G. Tower Inspection, Analysis & Evaluation
- WAFE-AM 330' G. Tower Inspection
- Page Boy Communications 310' G. Tower Inspection
- WTHR-TV 941' G. Tower Analysis & Evaluation
- WILX-TV 924' G. Tower Inspection, Analysis & Evaluation
- WIIC-FM 415' G. Tower Analysis & Evaluation
- WWAY-TV 1100' G. Tower Inspection, Analysis & Evaluation
- WBT 450' S.S. Tower Analysis & Evaluation
- WHIO-TV 1019' G. Tower Inspection & Analysis
- WWBT-TV 715' Guyed Tower Inspection, Analysis & Tensioning of Tower
- WNET-TV 480' Guyed Tower Inspection
- KOCO-TV 1430' G. Tower Inspection, Analysis & Measuring of Guy Tensions
- Comtech Laboratories, Medscat Site Survey in Libya

He has extensive experience in the design of structures using non-conventional materials as plastics, non-metallic filaments, glass filaments, etc.

In the area of multi-leveled guyed towers, Mr. Vlissides expanded a computer program able to handle guyed towers of up to 20 guy levels, and carrying concentrated loads and a top electronic umbrella with up to 36' long radials. The tower is treated as a beam-column on elastic supports with all secondary effects taken into consideration. Recently, Mr. Vlissides has developed a computerized design of a family of self-supporting and guyed microwave towers, covering a range of heights from 20-foot stub antenna mounts to 500-foot applicable and very economical for large communication projects.

Mr. Vlissides, in addition, has extensive experience in building structural analysis and design, such as highrise office and apartment buildings, hospitals, churches, communications buildings, etc.

Earlier, Mr. Vlissides was employed as a Structural Engineer by the U.S. Navy Department, Bureau of Harbors and Docks, where he was responsible for the development of BUDOCKS criteria and standards and the design of structures for antennas and other communications facilities, and was heavily involved in the Nord Antenna and West Pac, Australia Antenna Projects. In a previous position with the District of Columbia Highway Department, Bridge Division, he was Field Engineer for the D.C. approaches of the Theodore Roosevelt Bridge. Prior to this, he was involved in the engineering, administration, design and construction supervision of Public Works for the Greek Government.

Mr. Vlissides' professional affiliations include:

- Association of Federal Communications Consulting Engineers
- American Society of Civil Engineers
- National Society of Professional Engineers
- American Concrete Institute
- Professional Engineer in the District of Columbia, Lic. #5949
- Professional Engineer in the State of New York, Lic. #044849
- Professional Engineer in the State of Maine, Lic. #2639
- Professional Engineer in the State of Maryland, Lic. #7868
- Professional Engineer in the State of Virginia, Lic. #05782
- Professional Engineer in the State of Pennsylvania, Lic. #20621.E
- Professional Engineer in the State of Illinois, Lic. #62-32261
- Professional Engineer in the State of New Jersey, Lic. #12618
- Professional Engineer in the State of Kentucky, Lic. #11506
- Certificate of Qualification by the National Engineering Examiners, No. 4003
- Tau Beta Pi Honorary Engineering Society
- Certified Fallout Analyst and Protective Construction Analyst, DOD - 2T0318865
- Electronic Industries Association, TR-34.2 Subcommittee on Earth Station Antennas. TR 14.7 Tower Committee

FRED W. PURDY, P.E.
SENIOR ENGINEER

Summary of Experience

Over 23 years of professional experience as a civil and structural engineer, experienced in all phases of general design and construction. Most recent experience has been surveying, designing, supervision and construction of communication sites in various parts of the world, and mainly the design, supervision and inspection of the installation/erection of tall guyed and self-supporting towers and large tracking antennas.

Education

B.S.C.E. - Chicago Technical College, 1951

Registration

Professional Engineer - North Carolina and Ohio

Experience

- 1974 to Present - Matthew J. Vlissides & Associates, Senior Engineer
- 1971 to 1974 - Rel-Reeves, Inc. Boynton, FL, Mgr. Construction Eng.
- 1968 to 1971 - Page Communications Engineers, Inc., Washington, D.C. Senior Engineer
- 1966 to 1968 - Allison Engineering Corp., Eaton, NJ, Senior Engineer
- 1956 to 1966 - Consulting Engineer, self-employed, Greensboro, NC
- 1953 to 1956 - Joorhees & Everhart-Architects, High Point, NC, Design Engineer
- 1951 to 1953 - Armour & Company, Junior Structural Engineer

JOEL E. EDELMAN
ENGINEER, ANALYST

Summary of Experience

Over 7 years of professional experience in mathematical analysis and engineering with heavy concentration in computer programming, structural modeling and computer analysis of tall communication towers and space communication antennas.

Education

- B.A. - Kent State University, Major in Mathematics, 1964
- M.A. - Kent State University, Major in Mathematics, 1967
- M.S. - Rensselaer Polytechnic Institute, Major in Mechanical Engineering, 1979

Experience

- 1979 to Present - Matthew J. Vlissides & Associates, Engineer-Analyst
- 1978 to 1979 - ENSCO, Engineer-Analyst
- 1976 to 1978 - Student, Rensselaer Polytechnic Institute
- 1971 to 1976 - Mathematics Department Chairman, Private High School
- 1968 to 1971 - Student, Indiana University
- 1966 to 1968 - Student, Kent State University
- 1964 to 1966 - Computer Programmer, System Level
- 1961 to 1964 - Student, Kent State University

LIST OF MAJOR PROJECTS

- 100' Parabolic Tracking Antenna, Peking, China
- 100' Parabolic Tracking Antenna, Shanghai, China
- 100' Parabolic Tracking Antenna, Lisbon, Portugal
- 100' Parabolic Tracking Antenna, Lorenzo Marques, Mozambique
- 100' Parabolic Tracking Antenna, Luanda, Angola
- WDCG-FM 400' G. Tower Analysis
- WTTG Metromedia 540' S.S. Tower Analysis & Modification
- WMOD-FM 400' S.S. Tower Analysis & Modification
- WFLN 320' S.S. Tower Analysis & Modification
- WTAM 480' G. Tower Analysis & Inspection
- WJ-TV 1000' G. Tower Inspection & Analysis
- KNUT-TV 1430' G. Tower Analysis & Design
- WKAR 1000' G. Tower Inspection, Analysis & Guy Retensioning
- KUDE-FM S.S. Tower Analysis & Modification
- KQTV 751' S.S. Tower Inspection, Analysis & Upgrading
- KCMO-TV 1061' S.S. Tower Inspection, Analysis & Modification
- American University, 400' S.S. Tower Analysis
- WDCG 809' S.S. Tower Structural Evaluation
- Educational TV, Channel 19 1200' G. Tower Inspection
- U.S. Coast Guard Loran-C Antenna 700' G. Tower & Antenna System Election Supervision
- AMSAT Satellite Earth Terminal Site Criteria & Design
- WDCG 809' S.S. Tower Inspection & Analysis, for Mr. Edward Mernone
- Comsat Corp. 100' Replacement Satellite Tracking Antenna Modification Design, Fabrication & Installation Supervision
- Motower, Inc. 1088' G. Tower Analysis & Design
- KGLO-TV 1500' G. Tower Inspection, Analysis & Modification
- WSBT-TV 1100' G. Tower Inspection

- KPRC-TV 1377' Candelabra G. Tower Inspection, Analysis & Evaluation
- WALA-TV 1200' G. Tower Inspection, Analysis & Evaluation
- WITN-TV 1523' G. Tower Inspection
- MCI Communications Several Tower Projects throughout the Country
- WAFB-TV 1726' G. Tower Inspection & Analysis
- WDBN-FM 500' G. Tower Analysis
- WDMV-TV 600' S.S. Tower Inspection & Analysis
- WDCM-TV 400' S.S. Tower Inspection & Analysis
- WCIV-TV 1800' G. Tower Inspection & Analysis
- WCIV-TV 2000' G. Tower Consulting
- KCRA-TV 2000' G. Tower Consulting
- WBNS-TV 1000' G. Tower Turnkey Contract
- WBBH-TV 1000' G. Tower Inspection
- WKOK-Radio (5) 300' AM Tower Inspection
- WJLA-TV 600' S.S. Tower Installation Murad Antenna
- KFDM-TV 900' G. Tower Inspection & Analysis
- WRIV-TV 950' G. Tower Inspection & Analysis
- WATU-TV 1500' G. Tower Inspection & Analysis
- WBTV-TV 1200' Candelabra G. Tower Feasibility Study
- WWBT-TV 900' G. Tower Feasibility Study

ROLLINS BROADCASTING OF DEL., INC. v. HOLLINGSWORTH Del. 143
Cite as 218 A.2d 143

ROLLINS BROADCASTING OF DELAWARE, INC. and Board of Adjustment of New Castle County, Defendants Below, Appellants.

John H. HOLLINGSWORTH, Mary A. Ingersoll, Frederick P. Chappell, Wayne D. Suttler and Robert R. Moneymaker, Plaintiffs Below, Appellees.

Supreme Court of Delaware.
Nov. 4, 1968.

The New Castle County Board of Adjustment granted a special zoning exception to applicant to construct a community antenna television tower, and neighboring property owners appealed. The Superior Court rendered a judgment reversing the exception, and the applicant appealed. The Supreme Court, *Herrmann, J.*, held that Board erred in granting permit to construct tower in agricultural and general purpose district under exception to zoning code of county, where members of Board relied on facts known to them personally, and only other source of much of factual material appearing in Board's decision was in oral statements and argument of counsel, since neither source of information was sufficient to fulfill requirement that factual grounds necessary for exception to zoning code be established by evidence of record, susceptible of cross-examination, rebuttal, and judicial review.

Affirmed.

1. Zoning Code 218
County board of adjustment erred in granting permit to construct community antenna television tower in agricultural and general purpose district under exception to zoning code of county, where members of board relied on facts known to them personally, and only other source of much of factual material appearing in Board's decision was in oral statements and argument of counsel, since neither source of information was sufficient to fulfill requirement that factual grounds necessary for exception to zoning code be established by evidence of record, susceptible of cross-examination, rebuttal, and judicial review.

Part of a system, known as CATV, by which improved and greater television reception is made available to subscribers to the service. For a detailed discussion

144 Del. 218 ATLANTIC REPORTER, 2d SERIES

[1] The application for the permit to construct the tower in an R-2 District was made pursuant to Article IV, Section 2(16) and Article XIX, Section 4 of the Zoning Code of New Castle County.* After a hearing, the Board of Adjustment approved the application and granted the special exception, subject to certain conditions not pertinent here. By certiorari, the appellee property owners obtained review by the Superior Court. That Court reversed the Board by granting summary judgment in favor of the property owners, holding that there was no evidence to support the Board's conclusion. We agree.

The application to the Board consisted of a very sparse, unacknowledged form Application for a Hearing, accompanied by a plot plan of the subject tract, a block zoning map of the nature and functions of CATV systems, see *United States v. Southwestern Cable Co.*, 332 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1091 (1969).

Article IV provides in pertinent part: "SECTION 2. R-2 DISTRICTS (AGRICULTURAL AND GENERAL PURPOSE)—In an R-2 District, no building or structure shall be used and no building shall be erected or altered which is arranged, intended, or designed to be used, except for one or more of the following uses:

(1) That a proposed use on a specific lot or parcel is reasonably necessary for the convenience and welfare of the public and (2) that the proposed use on the lot or parcel involved is not detrimental or injurious to the neighborhood or the County, may grant a special exception, subject to such conditions as the Board of Adjustment deems necessary to protect the health, safety and welfare of the neighborhood and the County, to permit any of the following uses in the designated districts:

(a) Any principal part of an antenna tower, excluding guy cables, shall be set back from the street line or any other lot line of the lot on which it is located a distance of not less than the height of such tower.

(b) Any blinking or rotating light thereon shall be screened so as not to throw its light below the horizontal plane in which it is installed.

(c) No identification sign thereon shall be illuminated.

(d) The proposed height of the tower is reasonably necessary to render satisfactory service to all parts of the service area.

(e) The proposed location and height will not affect adversely the use of neighboring property.

(f) Before approving a special exception for such use, the Board will have required that the applicant be submitted to the Department of Planning of New Castle County for review and report.

ROLLINS BROADCASTING OF DEL., INC. v. HOLLINGSWORTH Del. 145
Cite as 218 A.2d 145

ROLLINS BROADCASTING OF DELAWARE, INC. and Board of Adjustment of New Castle County, Defendants Below, Appellants.

John H. HOLLINGSWORTH, Mary A. Ingersoll, Frederick P. Chappell, Wayne D. Suttler and Robert R. Moneymaker, Plaintiffs Below, Appellees.

Supreme Court of Delaware.
Nov. 4, 1968.

The New Castle County Board of Adjustment granted a special zoning exception to applicant to construct a community antenna television tower, and neighboring property owners appealed. The Superior Court rendered a judgment reversing the exception, and the applicant appealed. The Supreme Court, *Herrmann, J.*, held that Board erred in granting permit to construct tower in agricultural and general purpose district under exception to zoning code of county, where members of Board relied on facts known to them personally, and only other source of much of factual material appearing in Board's decision was in oral statements and argument of counsel, since neither source of information was sufficient to fulfill requirement that factual grounds necessary for exception to zoning code be established by evidence of record, susceptible of cross-examination, rebuttal, and judicial review.

The application to the Board consisted of a very sparse, unacknowledged form Application for a Hearing, accompanied by a plot plan of the subject tract, a block zoning map of the nature and functions of CATV systems, see *United States v. Southwestern Cable Co.*, 332 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1091 (1969).

Article IV provides in pertinent part: "SECTION 2. R-2 DISTRICTS (AGRICULTURAL AND GENERAL PURPOSE)—In an R-2 District, no building or structure shall be used and no building shall be erected or altered which is arranged, intended, or designed to be used, except for one or more of the following uses:

(1) That a proposed use on a specific lot or parcel is reasonably necessary for the convenience and welfare of the public and (2) that the proposed use on the lot or parcel involved is not detrimental or injurious to the neighborhood or the County, may grant a special exception, subject to such conditions as the Board of Adjustment deems necessary to protect the health, safety and welfare of the neighborhood and the County, to permit any of the following uses in the designated districts:

(a) Any principal part of an antenna tower, excluding guy cables, shall be set back from the street line or any other lot line of the lot on which it is located a distance of not less than the height of such tower.

(b) Any blinking or rotating light thereon shall be screened so as not to throw its light below the horizontal plane in which it is installed.

(c) No identification sign thereon shall be illuminated.

(d) The proposed height of the tower is reasonably necessary to render satisfactory service to all parts of the service area.

(e) The proposed location and height will not affect adversely the use of neighboring property.

(f) Before approving a special exception for such use, the Board will have required that the applicant be submitted to the Department of Planning of New Castle County for review and report.

* See *Sever v. Darling*, 7 Terry 203, 83 A.2d 96 (1953) and *County of Bruns Civic Association, et al. v. Freuder Corporation*, 208 A.2d 10.

This requirement applies to zoning matters, 2 Rathkopf on Zoning and Planning (3rd Ed.) 64-67.

See also Searles v. Darling, 7 Terry 263, 83 A.2d 96 (1951); Petition of Sheli Oil Company, Del.Super., 203 A.2d 845 (1964); Application of Julian, 3 Storey 175, 167 A.2d 21 (1960).

From the Board's detailed decision, it is manifest in the instant case as in the Dragon Row case, that the members of the Board of Adjustment relied upon facts known to them personally. The only other source of much of the factual material appearing in the Board's decision was in the oral statements and argument of counsel. Neither source of information is sufficient to fulfill the requirement that the factual grounds necessary for an exception to the Zoning Code be established by evidence of record, susceptible of cross-examination, rebuttal, and judicial review.

Raymond H. SMITH, Defendant Below, Appellant, v. STATE of Delaware, Plaintiff Below, Appellee. Supreme Court of Delaware. Oct. 29, 1968.

Defendant was convicted in the Superior Court of burglary in the first degree and of larceny of an automobile and he appealed. Supplementing 243 A.2d 719, the Supreme Court, Carey, J., held that asserted fact that it was only after conviction that defendant was given addresses of some witnesses who were not present at his trial could not be presented for first time on appeal.

- 1. Criminal Law §742(1) Credibility of witnesses, including defendant who had given an explanation as to his possession of stolen automobile was for trier of fact.
2. Larceny §55 Evidence supported conviction for larceny of automobile. Del.C. § 631.
3. Criminal Law §641.13(7) Record did not support contention of incompetence of counsel assigned to prosecute appeal.
4. Criminal Law §1035(2) Asserted fact that it was only after conviction that defendant was given addresses of some witnesses who were not present at his trial could not be presented for first time on appeal. Superior Court Rules, Criminal rule 33, Del.C.Ann.
5. Criminal Law §1186(1) Mere fact that criminal charge having no connection with case against defendant.

ZONING BOARD OF ADJUSTMENT OF THE CITY OF SAN ANTONIO, Appellant, v. Don MARSHALL, Appellee. No. 14345. Court of Civil Appeals of Texas. San Antonio. Feb. 10, 1965. Rehearing Denied March 11, 1965.

Proceeding by property owner on writ of certiorari complaining of ruling of city zoning board of adjustment which had denied him a building permit to construct radio tower. The 45th District Court, Bexar County, Robert R. Murray, J., entered a judgment for property owner and the board appealed. The Court of Civil Appeals, Barrow, J., held that affidavits filed by property owner were insufficient to overcome presumption of legality of zoning board of adjustment's order denying variance to build 125-foot tower on ground that proposed tower would create a hazard and be against public interest.

- 1. Zoning §678, 681 A legal presumption exists in favor of order of zoning board of adjustment and burden of proof to establish its illegality rests on person challenging ruling.
2. Zoning §704 Court when considering legality of zoning board of adjustment order must substitute its findings for that of board, even though court concludes that overwhelming preponderance of evidence is against board's decision.
3. Zoning §703 On appeal from zoning board of adjustment's order question is whether there is any substantial evidence affording rea-

sonable support for findings and order entered by the board, and this is a question of law and not of fact.

4. Zoning §702 If evidence before court as a whole is such that reasonable minds could have reached conclusion that zoning board of adjustment must have reached in order to justify its actions, board's action must be sustained.

5. Zoning §503 Although zoning code which excluded commercial type broadcasting excluded radio towers in determining height of buildings which might be erected in zone in which property was situated, a variance was required before granting a permit to construct a new radio tower of 125 feet on building to be used to contact repair truck.

6. Zoning §678 Affidavits filed by property owner seeking variance for erection of 125-foot radio tower atop his building were insufficient to overcome presumption of legality of zoning board of adjustment's order denying variance on ground that proposed tower would create a hazard and be against public interest.

7. Zoning §503 Zoning board of adjustment did not abuse discretion in refusing to dismiss, at request of property owner, operating a television sales and repair business, to erect a 125-foot radio tower on building roof to communicate with truck. Vernon's Ann.Civ.St. art. 101g.

Sam S. Wolf, City Atty., William R. Ward, Asst. City Atty., San Antonio, for appellant. Groce, Heblon, Fahey & Smith, San Antonio, for appellee.

BARROW, Justice. Don Marshall brought this writ of certiorari pursuant to the terms of Art. 101g, Vernon's Ann.Civ.St., complaining of the Zoning Board of Adjustment of the City of San Antonio, and seeking to reverse the ruling of the Board denying him a building permit to construct a 125-foot radio tower on the roof of his building. Both sides filed motions for summary judgment. The trial court overruled the motion of the Board and granted judgment on Marshall's motion requiring the Board to issue him a building permit to construct a radio tower on top of his building.

The motions were based upon the pleadings of the parties, a stipulation of certain facts, the certified record of the proceedings before the Board, and three affidavits filed by Marshall. Marshall owns two lots located at 120 W. Mirabele, which are in a "B" zone in the City of San Antonio. In 1950, permission was granted to construct a post office building on this property, although an "L" zone is required for same under the City Code. After the post office left the premises, Marshall applied for and on May 3, 1962, was granted permission by the Board to operate a TV sales and repair business at this location. The Board's order did not authorize construction of a radio tower, although its minutes recognized that a dispatcher would be on duty at night with a radio equipped truck.

Marshall remodelled the building, and at the same time constructed a 115' tower at the rear of it. In June 1963, eighty feet of this tower was blown down with some damage to neighboring property. On July 18, 1963, the Board denied Marshall's application for a building permit to construct a radio tower at the rear of his building because "it is against the public interest substantiated by the fact that it would be within 25 feet of each side property line as well as 67 feet

from the rear property line and would constitute a hazard in the neighborhood. In the Board's opinion, the owner has the possibility of leasing or renting other towers in the City whereby he would be able to make contact with his trucks to carry out his business thereby, offering him some relief."

The following legal principles govern this appeal: (1) A legal presumption exists in favor of the Board's order, and the burden of proof to establish its illegality rests upon Marshall; (2) the Court, when considering the legality of the Board's order must not put itself in the position of the Board and substitute its findings for that of the Board, even though the preponderance of the evidence is against the Board's decision; (3) the question on appeal from the Board's order is whether or not there is any substantial evidence affording reasonable support for the findings and order entered by the Board, such being a question of law and not of fact. If the evidence before the Court, as a whole, is such that reasonable minds could have reached the conclusion that the Board

must have reached in order to justify its action, the Board's action must be sustained. City of San Angelo v. Boehme Bakery, 114 Tex. 281, 190 S.W.2d 67 (1945); Jacobson v. Preston Forest Shopping Center, Inc., Tex.Civ.App., 359 S.W.2d 156, wr. ref., n. r. e.

[5] One of the primary questions is whether a variance is required for the erection of the tower on Marshall's building. The City Code prohibits the erection of a building in a "B" zone exceeding 35' in height, but excludes chimneys, cooling towers, radio towers, etc., in determining the height. The City Code does not authorize commercial type broadcasting in a "B" residence district, and it is our opinion that a variance is required for the granting of the permit to construct a new tower. Marshall urges, however, that a tower is authorized under the variance granted him in 1962, for the use of the building for a TV sales and repair business, in that a radio setup is absolutely essential to this business. He further urges that a tower on his building would not constitute a hazard or be against the public interest.

Marshall filed three affidavits in support of his motion for summary judgment. In his own affidavit, he averred that it was essential to have a radio setup in order to operate his business, and that the cost of renting telephone lines from another tower would be prohibitive. Mr. Rhodes, who is the communication officer for the City of San Antonio, executed an affidavit stating that it was necessary for Marshall to have access to a radio tower in order to operate his business. Both Mr. Rhodes and Mr. Crump, an experienced radio tower installer, expressed the opinion that a radio tower could be safely installed on top of Marshall's building in accordance with existing plans and specifications.

The Board did not file any affidavits in support of its motion, but relies upon the certified minutes of the hearing at which Marshall's permit was denied. The minutes of the Board do not purport to be a report-

er's transcript of the proceedings and leave much to be desired as to what testimony was given. It is seen, however, that a number of residential property owners, within 200 feet of Marshall's property, opposed this application and were represented at the hearing by counsel. There were also consist largely of statements by this attorney and Marshall's attorney as to what testimony was given at the prior Board hearing when the application for construction of the 115' tower was denied. It was stated that it is feasible and efficient to use another tower, although it would involve "considerable cost." There were also statements concerning the fall of the first tower, and whether or not the proposed tower would constitute a hazard. The Board found that the proposed tower would create a hazard and be against the public interest. It further found that Marshall has other recourse.

[6] It is our opinion that the affidavits filed by Marshall do not overcome the presumption of legality of the Board's order. No facts are set forth to support the conclusions that a radio setup is necessary for the operation of a TV rental and repair business, and that it would not be economically feasible to use a tower away from this location. Furthermore, the question of whether or not the tower was authorized under the variance granted in 1962 is propounded in the appeal from the Board's refusal to permit the reconstruction of the 145' tower at the rear of Marshall's building, and is not before us on this appeal. The trial court erred in granting Marshall a summary judgment.

[7] The Board urges that its motion should be granted in that Marshall has failed, as a matter of law, to show that the Board abused its discretion in refusing to grant a variance for construction of a new tower on the roof of the building. Although the summarized minutes of the proceedings before the Board are not as complete as might be desired, we cannot say from the record as a whole, that the Board

shown a need for its facilities [citations]. This has never meant that a utility may place a facility wherever it chooses within the community [citations]. (Matter of Consolidated Edison Co. of N. Y. v. Hoffman, supra, p. 610, 403 N.Y.S.2d p. 199, 374 N.E.2d p. 111).

[4] Assuming, arguendo, that petitioner is a public utility, the determination should nevertheless be confirmed. The magnitude of the variance sought is great (the proposed height is 280 feet; the restriction in the ordinance is 50 feet). There is a large residential area to the north and east of the subject property, "just beyond the three-hundred (300) foot radius"; the petitioner concedes that there is an existing residence about 700 feet from the subject site. The proximity of the high voltage lines of the Long Island Lighting Company and the normal occurrence of win storms, with the possibility that ice forming on the proposed tower will be blown off, pose a threat to vehicular traffic on the adjacent highways, one of which is Jericho Turnpike, a main arterial highway, running east and west. The services provided by the petitioner are limited to the needs of large business concerns and there is no evidence that any individual in the community or the State will be served (cf. Matter of Consolidated Edison Co. of N. Y. v. Hoffman, 43 N.Y.2d 598, 609, 403 N.Y.S.2d 193, 198, 374 N.E.2d 105, 110, supra). On this record, the denial of the variance is supported by substantial evidence.

[1-3] Although the applicant for an area variance need show only that strict compliance with the zoning law will cause "practical difficulties", the magnitude of the variance sought is a significant factor (Matter of Consolidated Edison Co. of N. Y. v. Hoffman, 43 N.Y.2d 598, 606, 403 N.Y.S.2d 193, 196, 374 N.E.2d 105, 108). Even where a utility is involved, the courts function under the familiar limited standard of review—the board's determination will be sustained if it has a rational basis and is supported by substantial evidence. While "a zoning board may not exclude a utility from a community where the utility has

shown a need for its facilities [citations]. This has never meant that a utility may place a facility wherever it chooses within the community [citations]. (Matter of Consolidated Edison Co. of N. Y. v. Hoffman, supra, p. 610, 403 N.Y.S.2d p. 199, 374 N.E.2d p. 111).

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[5] One of the primary questions is whether a variance is required for the erection of the tower on Marshall's building. The City Code prohibits the erection of a building in a "B" zone exceeding 35' in height, but excludes chimneys, cooling towers, radio towers, etc., in determining the height. The City Code does not authorize commercial type broadcasting in a "B" residence district, and it is our opinion that a variance is required for the granting of the permit to construct a new tower. Marshall urges, however, that a tower is authorized under the variance granted him in 1962, for the use of the building for a TV sales and repair business, in that a radio setup is absolutely essential to this business. He further urges that a tower on his building would not constitute a hazard or be against the public interest.

Marshall filed three affidavits in support of his motion for summary judgment. In his own affidavit, he averred that it was essential to have a radio setup in order to operate his business, and that the cost of renting telephone lines from another tower would be prohibitive. Mr. Rhodes, who is the communication officer for the City of San Antonio, executed an affidavit stating that it was necessary for Marshall to have access to a radio tower in order to operate his business. Both Mr. Rhodes and Mr. Crump, an experienced radio tower installer, expressed the opinion that a radio tower could be safely installed on top of Marshall's building in accordance with existing plans and specifications.

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er's transcript of the proceedings and leave much to be desired as to what testimony was given. It is seen, however, that a number of residential property owners, within 200 feet of Marshall's property, opposed this application and were represented at the hearing by counsel. There were also consist largely of statements by this attorney and Marshall's attorney as to what testimony was given at the prior Board hearing when the application for construction of the 115' tower was denied. It was stated that it is feasible and efficient to use another tower, although it would involve "considerable cost." There were also statements concerning the fall of the first tower, and whether or not the proposed tower would constitute a hazard. The Board found that the proposed tower would create a hazard and be against the public interest. It further found that Marshall has other recourse.

abused its discretion in refusing to grant this variance. Montgomery v. City of Dallas, Tex.Civ.App., 245 S.W.2d 753, wr. ref., n. r. e.; Driskell v. Board of Adjustment, Tex.Civ.App., 195 S.W.2d 594, wr. ref., n. r. e.

The judgment is reversed and here rendered that Marshall take nothing by his appeal from the order of the Board of Adjustment of August 15, 1963.

James B. SIMPSON, Appellant, v. Modesta Good SIMPSON, Appellee. No. 5904. Court of Civil Appeals of Texas. Eastland. Jan. 29, 1965.

Divorce action. The District Court, Borden County, Sterling Williams, J., entered judgment granting wife a divorce and confirmed a property settlement agreement which had been executed by the parties prior to commencement of the divorce action, and husband appealed from the judgment insofar as it related to the property division. The Court of Civil Appeals, Callins, J., held that fact that parties were mistaken in believing they were divorced by virtue of a Mexican decree was not such a mistake of fact as constituted a ground for cancellation of conveyances and division of property pursuant to a property settlement agreement executed by the parties while they were separated. Judgment affirmed. See also 378 S.W.2d 352, 380 S.W.2d 352.

1. Husband and Wife §274(2) A division of property was not void as against public policy on theory it was promissory of a divorce where such agreement was executed by the parties while they were permanently separated and under a belief that a divorce which husband had secured in Mexico was valid.

2. Husband and Wife §278(2) If a separation agreement is made at a time when the parties have already separated with the expectation of remaining permanently apart such an agreement is not contrary to public policy and will be upheld if entered into without coercion or other undue influence and the division is just and equitable.

3. Contracts §93(2) For a mutual mistake of fact to constitute grounds for cancellation or rescission of an instrument it must appear that the parties contracted under a mistake of fact that was material and essential to an understanding of the consequences of the agreement, and that the mistake did not relate to a mere incident thereto.

4. Husband and Wife §278(1) Fact that parties were mistaken in believing they were divorced by virtue of a Mexican decree was not such a mistake of fact as constituted a ground for cancellation of conveyances and division of property pursuant to a property settlement agreement executed by the parties while they were separated.

5. Husband and Wife §278(1) Husband could convey or agree to convey his separately owned undivided interest in real property held by parties as tenants in common as part of a settlement agreement executed after the parties had become permanently separated. Legg, Saxe & Baskin, Pat M. Baskin, Midland, for appellant.

tion, if one was made, desirability of assigning attorney to represent petitioner was to be carefully considered. CPLR 1101(c), 1102(a). 2. Mandamus §73(1) Allegations in petition proceeding to recover certain property claimed to be in possession of town police property clerk and other defendants were more properly cognizable in action for replevin than in Article 78 proceeding. CPLR 7601 et seq.; Penal Law § 410.00.

Leonard Stanley, appellant pro se. Before HOPKINS, J. P., and TITONE, GIULOTTA and O'CONNOR, JJ. MEMORANDUM BY THE COURT. In a proceeding pursuant to CPLR article 78 inter alia to recover certain property claimed to be in the possession of the respondents, petitioner appeals from an order and judgment (one paper) of the Supreme Court, Rockland County (KELLY, J.), entered September 15, 1973, which (1) denied petitioner's motion for leave to proceed as a poor person, without prejudice to the respondent upon proper papers, and (2) granted, without prejudice, the motion of the respondent Property Clerk of the Police Department of the Village of Spring Valley to dismiss the petition for failure to state a cause of action.

Order and judgment affirmed, without costs or disbursements. [1] The denial of the application for leave to proceed as a poor person was proper in view of petitioner's failure to serve the County Attorney of Rockland County. Service upon the District Attorney is not sufficient (see CPLR 1101, subd. 1). Upon recapitulation, if one is made, the desirability of assigning an attorney to represent petitioner pursuant to CPLR 1102 (subd. (a)) should be carefully considered. [2] Turning to the balance of the order appealed from, it is our belief that while section 410.00 of the Penal Law is not dis-

positive of the motion to dismiss, the allegations contained in the petition are more properly cognizable in an action for replevin and not, as presently pleaded, in the posture of an article 78 proceeding (see Clay v. McCabe, 56 A.D.2d 747, 392 N.Y.S.2d 29, cf. Matter of Caggiano v. Frank, 44 A.D.2d 828, 355 N.Y.S.2d 170; see, also, Metallic Flowers v. City of New York, 4 A.D.2d 292, 228 259, 164 N.Y.S.2d 227, 233 235, no J. 5 N.Y.2d 245, 183 N.Y.S.2d 891, 157 N.E.2d 170; People v. Spencer, 64 Misc.2d 1013, 1016, 317 N.Y.S.2d 480, 483).

allegation more replevin nature Clay v. McCabe 129 of A.D.2d Metallic Flowers mod. 5 N.E.2d 4 1013.

63 AD2d 970 In the Matter of UNITED STATES TRANSMISSION SYSTEMS, INC., Petitioner, v. Raymond H. SCHOEFFLIN et al., constituting the Board of Appeals of the Town of Oyster Bay, Respondents. Supreme Court, Appellate Division, Second Department. June 5, 1978.

Article 78 proceeding was brought to review determination of board of appeals of town which, after hearing, denied application for variance pertaining to height of a tower. The Supreme Court, Appellate Division, held that, even if petitioner, lease optionee of parcel of property located in area zoned for industrial use, were public utility, zoning board properly denied petitioner's application for variance pertaining to height of proposed tower, where height was 280 feet, but restriction in ordinance was 50 feet, large residential area was near and existing residence was about 700 feet away, there was possibility that ice forming on tower would be blown onto adjacent highways, services provided by petitioner were limited to needs of large business concerns, and there was no evidence that any individual in community or state would be served.

Stanley P. Amelkin, Jericho, for petitioner.

tower would be blown onto adjacent highways, services provided by petitioner were limited to needs of large business concerns and there was no evidence that any individual in community or state would be served.

Determination confirmed and proceeding dismissed.

1. Zoning §535 Although applicant for area variance need show only that strict compliance with zoning law will cause "practical difficulties", magnitude of variance sought is significant factor. 2. Zoning §702, 703 Even where applicant for area variance is public utility, court will sustain zoning board's determination if it has rational basis and is supported by substantial evidence. 3. Zoning §353 While zoning board may not exclude utility from community where utility has shown need for its facilities, utility may not place facility wherever it chooses within community. 4. Zoning §514 Even if petitioner, lease optionee of parcel of property located in area zoned for industrial use, were public utility, zoning board properly denied petitioner's application for variance pertaining to height of proposed tower, where height was 280 feet, but restriction in ordinance was 50 feet, large residential area was near and existing residence was about 700 feet away, there was possibility that ice forming on tower would be blown onto adjacent highways, services provided by petitioner were limited to needs of large business concerns, and there was no evidence that any individual in community or state would be served.

Murray Pudalov, Massapequa Park, for respondents. Before GIULOTTA, J. P., and SHAPIRO, COHALAN and O'CONNOR, JJ. MEMORANDUM BY THE COURT. Proceeding pursuant to CPLR article 78 to review a determination of the respondent Board of Appeals of the Town of Oyster Bay, dated August 31, 1977, which, after a hearing, denied petitioner's application for a variance pertaining to the height of a tower.

The petitioner, the "lease optionee" of a parcel of property located in an area which is zoned for industrial use, was denied a variance which would have enabled it to construct a microwave transmission tower 280 feet high. The height restriction in the zoning ordinance is 50 feet. While the petitioner contends that it is a public utility, the only evidence in that regard is the statement by the petitioner's project engineer, William Chambers, that petitioner is a "common carrier" which provides "telephone channels to long haul customers such as air lines, brokerage houses, construction companies and so forth." Chambers informed the board that the tower was needed so that petitioner could expand its system from New York City to Connecticut.

[1-3] Although the applicant for an area variance need show only that strict compliance with the zoning law will cause "practical difficulties", the magnitude of the variance sought is a significant factor (Matter of Consolidated Edison Co. of N. Y. v. Hoffman, 43 N.Y.2d 598, 606, 403 N.Y.S.2d 193, 196, 374 N.E.2d 105, 108). Even where a utility is involved, the courts function under the familiar limited standard of review—the board's determination will be sustained if it has a rational basis and is supported by substantial evidence. While "a zoning board may not exclude a utility from a community where the utility has

shown a need for its facilities [citations]. This has never meant that a utility may place a facility wherever it chooses within the community [citations]. (Matter of Consolidated Edison Co. of N. Y. v. Hoffman, supra, p. 610, 403 N.Y.S.2d p. 199, 374 N.E.2d p. 111).

[4] Assuming, arguendo, that petitioner is a public utility, the determination should nevertheless be confirmed. The magnitude of the variance sought is great (the proposed height is 280 feet; the restriction in the ordinance is 50 feet). There is a large residential area to the north and east of the subject property, "just beyond the three-hundred (300) foot radius"; the petitioner concedes that there is an existing residence about 700 feet from the subject site. The proximity of the high voltage lines of the Long Island Lighting Company and the normal occurrence of win storms, with the possibility that ice forming on the proposed tower will be blown off, pose a threat to vehicular traffic on the adjacent highways, one of which is Jericho Turnpike, a main arterial highway, running east and west. The services provided by the petitioner are limited to the needs of large business concerns and there is no evidence that any individual in the community or the State will be served (cf. Matter of Consolidated Edison Co. of N. Y. v. Hoffman, 43 N.Y.2d 598, 609, 403 N.Y.S.2d 193, 198, 374 N.E.2d 105, 110, supra). On this record, the denial of the variance is supported by substantial evidence.

[5] One of the primary questions is whether a variance is required for the erection of the tower on Marshall's building. The City Code prohibits the erection of a building in a "B" zone exceeding 35' in height, but excludes chimneys, cooling towers, radio towers, etc., in determining the height. The City Code does not authorize commercial type broadcasting in a "B" residence district, and it is our opinion that a variance is required for the granting of the permit to construct a new tower. Marshall urges, however, that a tower is authorized under the variance granted him in 1962, for the use of the building for a TV sales and repair business, in that a radio setup is absolutely essential to this business. He further urges that a tower on his building would not constitute a hazard or be against the public interest.

Marshall filed three affidavits in support of his motion for summary judgment. In his own affidavit, he averred that it was essential to have a radio setup in order to operate his business, and that the cost of renting telephone lines from another tower would be prohibitive. Mr. Rhodes, who is the communication officer for the City of San Antonio, executed an affidavit stating that it was necessary for Marshall to have access to a radio tower in order to operate his business. Both Mr. Rhodes and Mr. Crump, an experienced radio tower installer, expressed the opinion that a radio tower could be safely installed on top of Marshall's building in accordance with existing plans and specifications.

defendant at the time of termination and where the contract and notices mailed to the plaintiff by the defendant all referred to the credit requirements maintained by the defendant, and where the contract provisions concerning termination were substantially followed, the court finds no lack of cause or lack of good faith, as those terms are used in sections 197 and 197-a of the General Business Law, in the defendant's action in terminating the agreement. Accordingly, the plaintiff's demand for an injunction must be denied.

As to the defendant's counterclaim, the proof showed that by the time of trial the plaintiff had admirably reduced its indebtedness to the defendant to the sum of \$28.12 which the court finds due and owing the defendant by the plaintiff and for which the defendant is entitled to judgment together with statutory costs and disbursements.



77 Misc.2d 798

VIDEO MICROWAVE, INC. and Stevens Memorial Methodist Church, Inc., Petitioners v. ZONING BOARD OF APPEALS OF THE TOWN OF LEWISBORO, State of New York, Respondent.

Supreme Court, Westchester County. April 8, 1974.

Article 78 proceeding to annul and set aside town zoning board of appeals' denial of application for zoning variance and special permit authorizing construction, maintenance and operation of building and tower for interstate communication purposes. The Supreme Court, Westchester County, George Beisheim, Jr., J., held that even if corporation organized for purpose of constructing, maintaining and operating regional system of signal transmission by radio to television broadcasting stations was a "public utility" within zoning ordinance requiring that public utility be permitted in any district under such conditions as would protect character of district, corporation was not entitled to special permit.

Petition denied.

1. Zoning - 11

Public utilities which are essential to public health, safety and welfare enjoy a favored position in relation to zoning regulations.

2. Zoning - 384

Even if corporation organized for purpose of operating regional system of signal transmission by radio to television broadcasting

stations was a "public utility" within zoning ordinance requiring that public utility be permitted under conditions as would protect character of district, corporation was not entitled to special permit for building and 340-foot high microwave relay tower with flashing or revolving lights in district, in which land use was limited to single-family homes on two-acre lots, in that permit was not necessary for public health, safety or welfare and no conditions could ameliorate harmful effects of tower.

Bleasley, Platt, Schmidt & Fritz, New York City, for petitioners. McCarthy, Firgar, Donovan & Glatthaar, White Plains, for respondent.

GEORGE BEISHEIM, Jr., Justice.

Petitioners have instituted this Article 78 proceeding to annul and set aside the determination of respondent Zoning Board of Appeals of the Town of Lewisboro denying petitioners' application for a zoning variance and special permit authorizing the construction, maintenance and operation of a building and tower for alleged interstate communication purposes.

Petitioner, Video Microwave, Inc. (hereinafter called "Video") is a Massachusetts corporation organized for the purpose of constructing, maintaining and operating a regional system of signal transmission by radio to television broadcasting stations. It is the proposed lessee of the property involved in this proceeding. The petitioner, Stevens Memorial Methodist Church, Inc., is the owner of the property in the Town of Lewisboro proposed to be leased to Video for the purpose hereinafter indicated.

Preliminarily, it should be stated that petitioners, during the oral argument of this matter, withdrew certain objections contained in the affidavit of Charles H. Carson, commercial manager of Video, as to the completeness of the record before the court when the alleged missing items were produced for the court by either petitioners or respondent. Respondent also withdrew its defense that Video was not doing business within the State of New York.

Specifically, petitioners sought a Special Permit pursuant to Article XVI, Section 2(m), of the Lewisboro Zoning Ordinance to erect a 340-foot high microwave relay tower on property designated as Part of Lot 1 in Block 10056 on Sheet 47 on the Tax Map of Lewisboro. The aforesaid property is in an R-2 (2-acre) residential district and consists of approximately 2 acres. Petitioners also requested a variance of Article V of the Zoning Ordinance which limits the use of the property in question to single-family homes on 2-acre lots; and an

large, that is which is not limited or restricted to any particular class of the community."

Respondent argues that the Staminski case, supra, cited by petitioners is not applicable to the facts of the case at bar since the function of the CATV company is to receive broadcast signals and transmit them to the public by voice while the function of the petitioner Video is to serve the television networks by relaying programs from the point of their origination to various broadcast stations. Respondent contends that Video provides no service to the public and, therefore, does not come within the definition of a public utility prescribed in the Staminski case, 62 Misc.2d at page 1052, 310 N.Y.S.2d at page 171:

"A business or service which is engaged in regularly supplying the public with some commodity or service which is of public consequence or need, such as electricity, gas, water, transportation or telephone or telegraph service" (emphasis added).

Respondent's position is weakened by the fact that the Town of Lewisboro Zoning Board of Appeals in a prior decision handed down on September 14, 1967, granted a special permit to the American Telephone and Telegraph Company to erect a 125-foot tower whose application had been made "for a permit to a public utility under Article XVI, Section 2(m) of the Lewisboro Zoning Ordinance. This determination, of course, would not be conclusive on the present Board since there had been no opposition to the American Telephone and Telegraph Company application and, moreover, if the Board had erred in 1967 the present Board would not be obligated to perpetuate such error.

[1] This court believes that whether or not Video may be a public utility in the "broad sense of that term" is not the determining factor in the case at bar. Those public utilities which are essential to the public health, safety and welfare enjoy a favored position in relation to zoning regulations. Long Island Water Corp. v. Michaels, 28 A.D.2d 887, 282 N.Y.S.2d 22; Long Island Lighting Co. v. Horn, 23 A.D.2d 583, 256 N.Y.S.2d 690; Long Island Lighting Co. v. City of Long Beach, 280 App.Div. 823, 113 N.Y.S.2d 762, aff'd, 305 N.Y. 880, 114 N.E.2d 429; Consolidated Edison Co. v. Village of Briarcliff Manor, 208 Misc. 225, 144 N.Y.S.2d 379; Long Island Lighting Co. v. Village of Old Brookville, Sup., 72 N.Y.S.2d 718, aff'd, 273 App.Div. 856, 77 N.Y.S.2d 143, aff'd, 298 N.Y. 569, 81 N.E.2d 104; Wallerstein v. Westchester Joint Water Works, 166 Misc. 34, 1 N.Y.S.2d 111; Municipal Gas Co. v. Nolan, 121 Misc. 606, 201 N.Y.S. 582, aff'd, 208 App.Div. 753, 202 N.Y.S. 939.

[2] In all of the cases hereinbefore cited, the decision of a zoning board in granting a special permit to a public utility was affirmed, or the denial thereof was reversed by the courts, upon a showing that the

interpretation of, and if necessary, a variance of Article IV, Section 2(d and g), which limits the height of any structure to 45 feet, except that flagpoles, aerials and certain other projections are exempted from said height requirement, and from the minimum 40-foot rear yard requirement contained in said section.

The pertinent sections of the zoning law are as follows:

ARTICLE XVI, SECTION 2(m)

"Permit any public utility in any district under such conditions and safeguards as will protect the character of the district."

ARTICLE IV, SECTION 2(d)

"No building or structure shall be erected to a height exceeding four stories or forty-five feet."

The decision of the Board of Appeals (Exhibit 10 attached to the return) contained, inter alia, the following findings:

"VMI is in the process of designing for future construction a microwave relay system linking New York and Boston, and with spurs to certain other cities, e. g., Albany and Providence. The system is designated to carry, in both directions, television programs for ultimate re-broadcast. The proposed system itself [sic] however, is not a broadcast system, but one which is designed for point-to-point transmission of program material between television stations. There will be no direct service to the general public (i. e., the television audience) by means of the proposed system. VMI is a commercial enterprise which is in competition with AT & T for the business of transmitting television programs from the point of their origination to broadcast stations which in turn broadcast the programs to the public. VMI serves the television industry only and thus is not a public utility as that term is used in Article XVI(2)(m)."

"The proposed location of the Tower is on a hill so that it will be visible from the many homes located within the immediate area. It cannot be seriously denied that this structure is extremely tall and in the location selected, will be an eyesore, both to the immediate residents who cannot escape looking at it, and to all those within a rather large radius. By its very nature and intended use the tower must be highly visible. Indeed the requirement for orange and white colors and flashing lights is intended to insure high visibility.

"VMI claimed at the hearing that the site selected was the only practical one in view of its availability, height, location and relation to other radio facility paths. The board has carefully considered this evidence, and the testimony by VMI's representative that another site in Wilton is technically feasible, and concludes that applicant has not demonstrated that the chosen site is the only

as such is the principal building proposed for this parcel. It is not exempt from the height limitations of the ordinance.

"For the foregoing reasons, the application must be and is hereby denied both as to the requested variance and alternatively, for a special permit."

Petitioners contend that the Board of Appeals arrived at the erroneous conclusion that Video is not a public utility, and they argue to the contrary, that Video is a public utility within the scope of Article XVI, Section 2(m) of the zoning law. They contend further that the Board's refusal to issue a special permit on the ground that the character of the district could not be protected was an arbitrary and capricious determination unsupported by substantial evidence.

Respondent points out that Section III of the Ordinance grants to the Board of Appeals the authority to make interpretations of the Ordinance. It contends that the Board's interpretation that a corporation which does not directly serve the public is not a public utility within the meaning of Article XVI, Section 2(m), was correct and proper. Respondent also maintains that petitioner had no valid claim of hardship for which a variance might be granted since the alleged hardship was not caused by the nature of the particular property, but by the alleged need for this particular location in Video's overall system. Respondent further argues that there were no safeguards which the Board of Appeals could have prescribed which would have protected the surrounding residential neighborhood from the adverse effects of the proposed 340-foot tower.

In support of its contention that the proposed tower was a "public utility structure", petitioners rely upon the case of Staminski v. Romeo, 62 Misc.2d 1051, 1055, 310 N.Y.S.2d 169, 174, where the Supreme Court, Suffolk County, upheld a decision of a Board of Appeals which had issued a special permit for a CATV antenna mast upon the ground that CATV companies which transmit television signals by wire are regulated in the public interest by the Federal Communications Commission and hence "are impressed with a public interest and can be classified as public utilities in the broad sense of that term". Petitioners also rely upon Black Hills Video Corp. v. Federal Communications Commission, 8 Cir., 399 F.2d 65; State of Washington ex rel. Pruzan v. Redman, 60 Wash.2d 521, 374 P.2d 1002. In the Redman case, the court upheld the Zoning Board's issuance of a conditional use permit for the erection of a radio transmission station and three 240-foot steel towers on land zoned for agricultural use on the basis that a radio station is a public utility impressed with a public interest.

Respondent relies upon the definition of a public utility contained in Black's Law Dictionary (3rd Edition) at page 1463, to wit: "Any agency, instrumentality, business industry or service which is used or conducted in such a manner as to affect the community at

feasible one. It is unbelievable that the system could be planned all the way down to the last location needed with no alternative if the chosen site was unavailable.

"The members of the Board have inspected the proposed site and surrounding area. The general vicinity of the proposed tower is a low density residential neighborhood consisting of single family homes on plots of two acres or larger with a considerable amount of vacant land. The recently adopted master plan proposes that this area of the Town retain its low-density rural character. The proposed tower will be clearly visible from homes in the area.

"This tower simply cannot be located at the chosen site without doing visual damage to the neighborhood. It will be an eyesore which cannot be camouflaged, and indeed must, by virtue of its height and purpose be made highly visible."

It also contained the following "Conclusion":

"The Board notes that the tower is, by virtue of its size and importance, the key part of this installation. Without the tower, the related building and equipment would be useless. The tower can therefore be considered to be the principal structure on the site. As such, it clearly violates the applicable provisions of the Zoning Ordinance.

"The Board is of the opinion and indeed the applicant has admitted that the tower will have an adverse effect on nearby property. The tower itself will be an eyesore and the flashing lights a constant annoyance to surrounding residents.

"The Board is of the opinion that the requested variances are use variances and cannot be granted without an adverse effect on surrounding property. The proposed [sic] commercial use is not in conformity with the Zoning Ordinance or the master plan. The applicant has not shown undue hardship and has not even attempted to show that the property in question is not suitable for the uses for which it is zoned.

"Since VMI does not in any way directly serve the public, either in the Town of Lewisboro or elsewhere, we have concluded that it is not a public utility as that term is used in Article XVI(2)(m) of the Ordinance. It is thus not eligible for a special permit.

"In addition, were we to conclude that VMI was a public utility, we would also conclude that we could not issue a permit for the tower under Article XVI, Section 2(m) of the Ordinance, since the character of the district could not be protected by any conditions attached to such a permit.

"The board is of the opinion that the tower proposed by the applicant is clearly not an aerial as that term is used in Article IV Section 2(d). The proposed tower is an independent structure and

services of the public utility were necessary for, and were being used by the community whose zoning board of appeals ruled upon the application for the special permit requested. In the Michaels case, electric distribution station was involved; in the Horn case, an electric high tension overhead transmission line. The court held in the Village of Old Brookville case that gas storage facilities cannot be absolutely prohibited within a municipality whose citizens used the gas. In the Nolan case, the court held a community's citizenry cannot be deprived of an adequate water supply because the zoning ordinance made no provision for a district in which to locate a water tower.

It should be noted that in all of the aforementioned cases, the public utility at the time of the application was serving an essential need of the community for gas, electric power or water, and the utility project or improvement permitted was necessary for the continuation of one of these vital and necessary services.

Such is not the fact in the case at bar. Here, the service which Video seeks to supply is primarily a service which allegedly will benefit (and only indirectly) the residents of New England. The benefits, if any, to the people in Lewisboro will be of minor significance. This is made clear by petitioners' own application to the Zoning Board of Appeals. Under the heading "COMMENTS ON PUBLIC INTEREST, CONVENIENCE AND NECESSITY", sub-heading "INTRODUCTION" forming part of the aforesaid application, Video stated as follows:

"The microwave system proposed by the applicant has been designed especially to meet the commercial and public television communication needs of New England."

Under the subheading "PUBLIC SERVICE CHARACTERISTICS" Video stated:

"New England has long been an important area for manufacturing, commerce, banking, higher education and scientific and medical research. Its population is approximately 12,000,000 which is about 6% of the national total. It has 3% of the nation's commercial television stations (26) (plus two satellite stations) and 10% of the educational stations (18). Over 80% of its population, (10,000,000) is concentrated in the three-state southern tier bordering New York State, which is served by seventeen commercial television stations and five educational television stations."

Under the subheading "PUBLIC SERVICE SURVEY" it was stated:

"There is a well defined need to provide more flexibility and improve quality of television communications in New England."

Under the subheading "EXISTING FACILITIES" it was stated: "Television transmission service into New England is currently provided by the Bell Telephone System. Best available information indicates that six two-way microwave channels form the backbone system. The proposed system is designed and routed to best meet the regional television needs. Frequency congestion limits expansion of existing routes which can use existing common facilities, but a new route for television which can avoid frequency interference problems and free existing circuits now dedicated to television for new applications."

Under the subheading "SATELLITE COMMUNICATIONS" it was stated:

"As discussed in previous sections, the needs for television transmission in New England are local, regional, and national."

"The New England study also showed that it is important to provide low cost circuits from Boston to Springfield, Hartford, New York, New Bedford, etc., and vice versa, as well as to provide low cost local television service by microwave."

A careful reading of "Application To The FEDERAL COMMUNICATIONS COMMISSION, Washington, D. C. 20554, For Video Common Carrier Microwave Station Construction Permit Under Part 21 Of the Commission's Rules, Zion Hill Station Woburn, Massachusetts" submitted by Video in connection with this application fortifies statement of purpose taken from Video's "COMMENTS ON PUBLIC INTEREST, CONVENIENCE AND NECESSITY" aforesaid. Moreover, the record reveals that the television networks already have the necessary facilities for transmission by reason of their contracts with the American Telephone and Telegraph Company.

Video claims that its plan will furnish this transmission service cheaper to the networks than is presently done by American Telephone and Telegraph Company. The principal reason for this reduced cost apparently is that American Telephone and Telegraph Company employs more towers but of lower height than Video's plan proposes. Obviously, the 340-foot tower proposed by Video will have a longer line of sight than the 125-foot tower of American Telephone and Telegraph Company. Moreover, even if Video's lower cost contention be true, there is no proof, nor is it claimed, that there will be any saving to the television audience or the public generally, who at present pay nothing for their television programs which are financed through the advertising of businesses financially big enough to pay for this expensive advertising medium. NBC, CBS, ABC and others may save some money but this is no saving to the average television watcher anywhere as might be the case if certain improvements in the distribution of electrical power reduced the cost of the electric utilities

which, hopefully, might pass some of the savings to the users of electricity.

The court has carefully examined the entire record before the Lewisboro Zoning Board of Appeals, including all exhibits submitted. The court holds that all findings of fact made by the Zoning Board are supported by the record, as are all of its conclusions with the possible exception of the conclusion that Video is not a public utility.

On the other hand, there is no question that a 340-foot orange and white tower with three or four supporting cables with flashing or revolving lights would be detrimental to the character of the area in a high-class, residential district in a quiet, rural town such as Lewisboro, and would interfere with the quiet enjoyment of their homes by the residents thereof and would seriously reduce the property value of said homes.

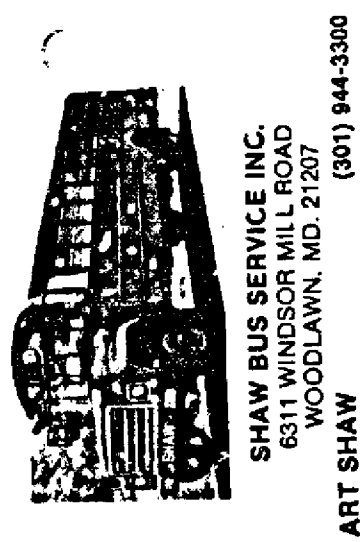
The testimony of affected property owners and the admissions of Mr. Carson, representative of Video, established the adverse effect of petitioners' proposal if, indeed, the 340-foot tower does not prove the prospective damage to the neighborhood. For example, at page 8 of the minutes:

"Arthur Voute: Considering the close proximity to the school, if one of the children did get over the fence, what would be the danger? Mr. Carson: Electrically, nothing. They could attempt to climb the tower."

At page 9: "Mr. Rowedder: Will there be flashing lights? Mr. Carson: Rather than flashing they are in a cycle. There are lights at one-third and two-thirds and they are fixed."

At page 11: "Paul Zill: I live about 600 feet South of the proposed structure. As a pilot I know you see these from 20 miles at night. A lot of other places in the area will see it. If we set a precedent in allowing this area to go commercial I have been told by one of the owners of the Vista View Farms that they will also make an application to go commercial."

At page 16: "Mr. Rowedder: Do you feel if there are homes in the vicinity a location which is less densely populated would be more appropriate? Mr. Carson: With regard to the concern for the general locale."



Mr. Rowedder: You do feel there is an element of danger?

Mr. Carson: I am talking about my concern and applying for something and taking into account the general locale.

Mr. Raynor: What effect would it have on the value of real estate in the area?

Mr. Carson: The initial impact is a negative one."

At pages 17 and 18: "Jay Kornfeld: It would be a detriment to my house to see a blinking light.

Mr. Dick Mead: I am opposed to it on the basis of commercializing 123. I think just adding this here is making it worse further down the line.

Mr. Rowedder: You oppose to it on the commercial basis.

M. Primarle: I think the Master Plan pointed it out. Mrs. Hunger: Naturally none of us would like to have the tower, but if you begin taking snatches of residential areas—we spent so much time on the Master Plan I would strongly advise the Board to consider the importance of preserving the area. I am opposing the tower because it is detrimental to the area."

At page 21: "Mr. Carson: I think the trends that run through the letters and comments from the audience are all similar to other hearings. Possibly this is a commercial venture. The Town plan was planning for this kind of thing. On property value, if people don't like it then I guess it will affect property value."

The court finds further that it would have been a useless gesture for the Board to try to prescribe any conditions to the granting of the special permit requested because no conditions could ameliorate the harmful effects to this residential community of a 340-foot tower with three revolving lights and three or four supporting cables or wires.

In conclusion, the court finds it hard to accept petitioners' contention that one two-acre plot of land in an R-2 high-class residential district in the Town of Lewisboro is the only feasible spot in an area of 125 square miles in which Video could erect a 340-foot tower allegedly necessary for its purpose. It is hard to accept even that the tower had to be located in the Town of Lewisboro. In fact, Video conceded there was at least one other feasible location. Mr. Carson said the owner of this location would not lease it (page 16 of minutes)—he did not say the owner would not sell it. In any event, to grant petitioners the relief which they seek would be to destroy every vestige of home rule given to a township. In this case, it would destroy the careful planning prescribed for the Town of Lewisboro under its Master Plan.

It is unnecessary to consider the Board's decision in denying the variances requested by the petitioners inasmuch as those questions are not pertinent since the court has upheld the determination of the Board in denying a special permit for the 340-foot tower.

Petitioners' application for an order annulling and setting aside the determination of the Zoning Board of Appeals of the Town of Lewisboro which had denied petitioners' application for a zoning variance and a special permit to permit the construction, maintenance and operation of a building and tower as described in the petition is in all respects denied.

Submit judgment on notice.



77 Misc.2d 643 The PEOPLE of the State of New York, v. Kenneth GUENTHER, Defendant. Monroe County Court. April 9, 1974.

Defendant in a prosecution for promotion of gambling moved for suppression of evidence, and, following an order that any and all motions regarding an eavesdropping warrant be heard by the issuing magistrate, the motion was brought before the County Court, Eugene W. Bergin, J., for hearing. It was held that under present statutory law, there is no procedural distinction between a motion to contravene issuance of search warrant and a motion to suppress evidence, and it is clearly the legislative intent that all issues and motions be determined in a single proceeding. Accordingly the trial court had jurisdiction under the statutes to hear all motions for suppression of evidence, including evidence seized pursuant to the issuance of an eavesdropping order and warrant.

Motions referred to trial judge for such action as deemed appropriate.

1. Criminal Law § 87.1(1) Searches and Seizures § 29

Under present statutory law, there is no procedural distinction between motion to contravene issuance of search warrant and motion to suppress evidence, and it is clearly legislative intent that all issues and motions be determined in single proceeding. Code Cr. Proc. § 807; CPL 710.10 et seq., 710.20, 710.50.

180-263-X

17 Granite Rd. Woodstock, Md. April 2, 1980

Mr. William E. Hammond, Zoning Commissioner, 179 County Office Building Towson, Maryland 21204

Dear Mr. Hammond:

Re: Case 80-203-X, 500 Ft Tower ACTHUR R. SHAW, Sr., et al

We, the undersigned, have spent much time and money in the restoration of an 18th century house, built in 1753 and occupied by the Griffith and Worthington families, and marked by the Colonial Dames XVIIIth Century. If the proposed 500 foot tower is allowed to be constructed, the entire landscape will suffer, and the value of our property will decrease.

This community - entirely non-commercial - is disturbed by the threat of devaluation of their property and the marring of the landscape.

The Shaw Bus Service, Inc., has operated for many years at 6211 Windsor Hill Road, Woodlawn, as shown on their business card, enclosed. What is here their business is and that is where the tower should be.

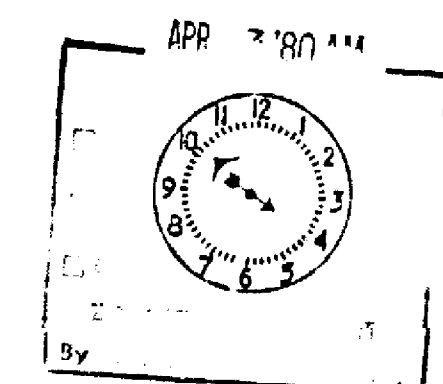
It is my feeling the business is being created by the young man, Art Shaw, who approached me while I read the zoning notice. He tries around the name of his lawyer, which I felt was intimidation. Apparently the young man wishes to operate his business in the luxury of his home instead of at the commercial site. Many, doubtless, would enjoy working in such a way, but, I dare say, few would be so indifferent to the welfare of all.

The proposed tower would be constructed just west of Herwood Elementary School. The fierce winds which we experience in this area, blow from the west, and any accident to the tower would find the school in its path.

It being so unfair for all to suffer for one, I feel sure you will be good and kind enough to permit us to continue to live here in peace and harmony without a high dark tower darkening our sky.

Most sincerely,

Ellen Doherty Helton (720-203) Charles D. Walter



Mr. William E. Hammond Zoning Commissioner Rm. # 109 111 W. Chesapeake Ave. Towson, Md. 21204

Dear Mr. Hammond:

We, the residents of Herwood Heights and Gran-Mar Village communities, offer this formal petition, in protest of zoning case # 80-203-X as evidenced by the following list of names and respective signatures affixed hereto. The aforementioned case involves a zoning application, whereby, a Mr. Arthur Shaw authorized agent for Shaw Bus Service, Inc., requests approval to erect a wireless transmitting tower; measuring 55.5 feet at its base and 500 feet in height, with an appertenant receiving and control house measuring approximately 30 feet by 60 feet. The proposed location of this tower is at longitudinal coordinates 39°, 22', 25 sec. and latitudinal coordinates 76°, 50', 06 sec.

Our reasons for protest are as follows:

- 1. The appearance of this tower will present a detriment to the aesthetic surroundings of our residential community.
2. It's existence, causes a potential devaluation of property values which may also hinder future efforts of resale.
3. The construction of this tower presents a potential public nuisance through increased traffic delivering materials to the construction site, and heavy construction equipment to erect the tower.
4. The existence of this tower presents a potential hazard to the public safety and welfare of the community residents, in the event of faulty workmanship, substandard materials, or negligence.

We, the undersigned, wish to be recognized as having filed this formal protest to zoning case # 80-203-X, as we ascertain only negative attributes to such a project.

With This Signature I Certify The Witnessing Of the Above Signatures.

Handwritten signatures and dates: Charles M. Scherker 4/9/80, Shirley McSmith Acting 4/8/80, 9101 Argonne Rd., My commission expires July 1, 1982.

PROTEST TO ZONING CASE # 80-203-X

Table with columns: NAME (please print), STREET ADDRESS, SIGNATURE. Lists names and addresses of protesters such as Charles M. Scherker, 1001 Marriottsville Rd.

Table with columns: NAME (please print), STREET ADDRESS, SIGNATURE. Lists names and addresses of protesters such as Howard P. Kelly, 3188 Howard Rd.

HERWOOD HEIGHTS COMMUNITY ASSOCIATION, INC. RANDALLSTOWN, MARYLAND 21133

22 October 1980

Board of Appeals Room 219 Old Court House Towson, Maryland 21204

Re: #80-203-X 146

To Whom It May Concern:

As president of the Herwood Heights Community Association, Inc., I wish to be notified as to the hearing date of the above appeal. This Association would like to be heard in opposition to the petitioner and in support of the zoning Commissioner.

Please send notification to the following address:

3717 Lanamer Road Randallstown, Maryland 21133

Thank you.

Sincerely,

Handwritten signature: Arnold Jablon

Vertical stamp: BALTIMORE COUNTY OFFICIALS

80-203-X
 ARTHUR R. SHAW, JR., et ux
 10016 Marriottsville Rd.
 Randallstown, Md. 21133
 March 17 1981
 MAR 19 '81 AM
 Zoning Department

Dear Commissioners:
 As residents of Marriottsville home we strongly object to the construction of a 500-foot free standing transmitting and receiving tower by Mr. Becker. We feel that any structure the height of the Washington Monument has no place in a fine residential area. In fact, we would like the area to remain strictly residential. Allowing this tower to be built would just open the door to other commercial enterprises. Perhaps Mr. Shaw could find another way to keep in touch with his buses. A way that may

not be as costly to him and also to the neighborhood in the way of property values. Marriottsville Road is heavily traveled and could not tolerate the additional burden of school buses being housed in the area. We feel this situation would surely follow the creation of a tower. We plan to attend the appeal hearing on April 14, 1981 at 10 am. Yours truly,
 Richard M. Beckett
 Richard M. Beckett

80-203-X
 3/17/81
 Please be advised that we are opposed to the construction of a transmitting & receiving tower proposed to be built on Marriottsville Road. Please help us protect the safety, beauty, & quiet of our neighborhood. Thank you —
 Marilyn & Alan Brown
 3714 Suzanne Rd
 Randallstown, Md. 21133

LAW OFFICES OF
 GEORGE W. LIEBMAN
 THE KEYSER BUILDING
 207 EAST REDWOOD STREET
 BALTIMORE, MARYLAND 21202
 101 752 0897
 April 14, 1981
 County Board of Appeals
 Court House, Room 219
 Towson, Maryland 21204
 Re: Arthur R. Shaw, Jr.
 et ux
 Case No. 80-203-X
 Gentlemen:
 Please enter my appearance in this matter as attorney for the Village of Kings Park Community Association, the Hernwood Heights Community Association, Michael Dean, Lawrence Phipps, and Jane Phipps, protestants.
 Yours sincerely,
 George W. Liebman
 GWL/ir

WRIGHT & PARKS
 ATTORNEYS AT LAW
 MERCANTILE TOWSON BUILDING
 SUITE 102
 408 WASHINGTON AVENUE
 TOWSON, MARYLAND 21204
 TELEPHONE
 301-821-6350
 MAY 1, 1981
 Baltimore County Board of Appeals
 Room 219, Court House
 Towson, Md. 21204
 Re: Case No. 80-203-X
 In Re: Petition for Special Exception
 Eastside of Granite Road, 330 feet south of
 Marriottsville Road, Second District
 Arthur R. Shaw, Jr., et ux, Petitioners
 Dear Members of the Board:
 Protestants have submitted a reply memorandum which cites the case of B.P. Oil v. County Board of Appeals, 42 App. 576 (1979), as being in support of the Protestants' position. I trust that this letter will be accepted in lieu of a rebuttal memorandum.
 The B.P. Oil case was decided under a statute which required that the Board find that "for the public convenience and service a need exists for the proposed use for service of the population in the general neighborhood considering the present availability of such uses to the neighborhood." 42 Md. App. at 578. As was pointed out in the Petitioners' Memorandum, no such requirement is present in the Baltimore County Zoning Regulations.
 It was the requirement of showing special need which the petitioner in B.P. Oil was found not to have met. The long quotation from the B.P. Oil case included at pages 8 and 9 of the Protestants' Memorandum omits language in the middle of the quotation which clearly demonstrates that the burden which B.P. failed to meet is one which does not exist in the present case. That language, which should appear where the quotation in Protestant's Memorandum shows an omission on page 9, is as follows:

WRIGHT & PARKS
 PAGE NO. 2
 DATE: May 1, 1981
 TO: Baltimore County Board of Appeals
 "Its own market survey showed some public support for its proposed facility but no strong or unambiguous cry for such services. The evidence as to what was the appropriate neighborhood was also ambiguous at best -- one version arguably showing need; the other, significantly dispelling it. The need was, in short, fairly debatable."
 Protestants have failed to cite a single case in which the denial of a special exception under the Baltimore County Zoning Regulations or under regulations involving a comparable standard of proof has ever been affirmed by the Maryland appellate courts. The reason is that such regulations involve a presumption that the proposed use is in the public interest.
 Thank you very much for your consideration of this matter.
 Very truly yours,
 Leland S. Van Koten
 LSV:ce
 BALTIMORE COUNTY BOARD OF APPEALS
 MAY 1 11 00 AM '81

494-3180
 County Board of Appeals
 Room 219, Court House
 Towson, Maryland 21204
 June 16, 1981
 H. Emslie Parks, Esquire
 Suite 402
 305 W. Chesapeake Avenue
 Towson, Maryland 21204
 Re: Case No. 80-203-X
 Arthur R. Shaw, Jr., et ux
 Dear Mr. Parks:
 Enclosed herewith is a copy of the Opinion and Order passed today by the County Board of Appeals in the above entitled case.
 Very truly yours,
 Edith T. Eisenhart
 Edith T. Eisenhart, Adm. Secretary
 Encl.
 cc: Mr. and Mrs. Arthur R. Shaw, Jr.
 George W. Liebman, Esquire
 Mr. Charles M. Schevker
 Mr. Homer Seidel, Jr.
 Mr. Michael S. Dean
 Mr. Barry Smith
 Mr. Charles Walter
 Ms. Jane Phipps
 Mr. Arnold Jablon
 John W. Hession, III, Esquire
 Mr. W. E. Hammond
 Mr. J. E. Dyer
 Mr. N. E. Gerber
 Mr. J. Hoswell

494-3180
 County Board of Appeals
 Room 219, Court House
 Towson, Maryland 21204
 June 7, 1981
 George W. Liebman, Esq.
 The Keyser Bldg.
 207 E. Redwood St.
 Baltimore, Md. 21202
 Re: Case No. 80-203-X
 Arthur R. Shaw, Jr., et ux
 Dear Mr. Liebman:
 Notice is hereby given, in accordance with the Rules of Procedure of the Court of Appeals of Maryland, that an appeal has been taken to the Circuit Court for Baltimore County from the decision of the County Board of Appeals rendered in the above matter.
 Enclosed is a copy of the Certificate of Notice.
 Very truly yours,
 June Holmen, Secretary
 Encl.
 cc: Charles M. Schevker
 Homer Seidel, Jr.
 Michael S. Dean
 Barry Smith
 J. W. Hession, III, Esq.
 Charles Walter
 Jane Phipps
 Arnold Jablon
 J. E. Dyer
 W. Hammond

July 7, 1981

BILLED TO: H. Emslie Parks, Esq.
409 Washington Ave.
Towson, Md. 21204

Cost of certified documents filed
in Case No. 80-203-X \$20.00

Arthur R. Shaw, Jr., et ux
E/S of Granite Rd., 330' S of Marriottsville Rd.
2nd District

MAKE CHECKS PAYABLE TO: Baltimore County, Md.

REMIT TO: County Board of Appeals
Rm. 219, Court House
Towson, Md. 21204

494-3180

County Board of Appeals
Room 219, Court House
Towson, Maryland 21204
July 7, 1981

H. Emslie Parks, Esq.
409 Washington Ave.
Towson, Md. 21204

Re: Case No. 80-203-X
Arthur R. Shaw, Jr., et ux

Dear Mr. Parks:

In accordance with Rule B-7 (a) of the Rules of Procedure of the Court of Appeals of Maryland, the County Board of Appeals is required to submit the record of proceedings of the zoning appeal which you have taken to the Circuit Court for Baltimore County in the above matter within thirty days.

The cost of the transcript of the record must be paid by you. Certified copies of any other documents necessary for the completion of the record must also be at your expense.

The cost of the transcript, plus any other documents, must be paid in time to transmit the same to the Circuit Court not later than thirty days from the date of any petition you might file in court, in accordance with Rule B-7 (a).

Enclosed is a copy of the Certificate of Notice; also invoice covering the cost of certified copies of necessary documents.

Very truly yours,

June Holmen
June Holmen, Secretary

Encls.
cc: Mr. and Mrs. Arthur R. Shaw, Jr.

COLUMBIA OFFICE
WALTER PARK
Registered Surveyor
PHONE 730-9060

TOWSON OFFICE
HUDKINS ASSOCIATES, INC.
Engineers, Surveyors and
Landscape Architects
200 EAST JOPPA ROAD
ROOM 101, SHELL BUILDING
TOWSON, MARYLAND 21204
PHONE 829-9000

BEL AIR OFFICE
L. GERALD WOLFF
Landscape Architect
PHONE 838-0888

July 2, 1979

DESCRIPTION TO ACCOMPANY APPLICATION FOR SPECIAL EXCEPTION:

Beginning for the same at a point in the center of Granite Road, said point being distant southerly 330 feet measured along the centerline of said Granite Road from its intersection with the center of Marriottsville Road thence leaving said Granite Road (1) South 72 degrees 41 minutes 30 seconds East 240 feet (2) North 17 degrees 18 minutes 30 seconds East 219.0 feet (3) North 77 degrees 53 minutes East 170.50 feet (4) North 12 degrees 07 minutes West 50 feet (5) North 77 degrees 53 minutes East 200 feet (6) North 12 degrees 07 minutes West 225 feet to the center of said Marriottsville Road thence binding thereon North 77 degrees 53 minutes East 50 feet thence leaving the center of said Marriottsville Road (1) South 12 degrees 07 minutes East 225 feet (2) North 77 degrees 53 minutes East 395.30 feet (3) South 11 degrees 44 minutes 15 seconds West 646.71 feet (4) South 55 degrees 30 minutes West 968.19 feet (5) North 04 degrees 48 minutes 50 seconds East 716.98 feet (6) North 72 degrees 41 minutes 30 seconds West 240 feet to a point in the center of said Granite Road thence binding thereon North 17 degrees 18 minutes 30 seconds East 50 feet to the place of beginning.

Containing 14.55 Acres of land more or less.

Malcolm E. Hudkins
Malcolm E. Hudkins
Registered Surveyor #5095

*7-2-79
8:59
Shaw et ux
21204
July 2, 1979
NCE*

Mr. William Hammond
Zoning Commissioner of Baltimore County
Baltimore County Office Building
Towson, Maryland 21204

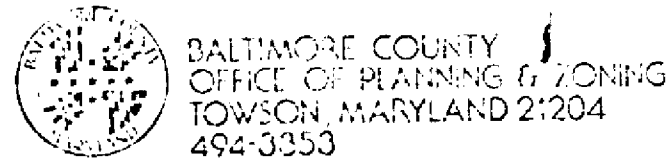
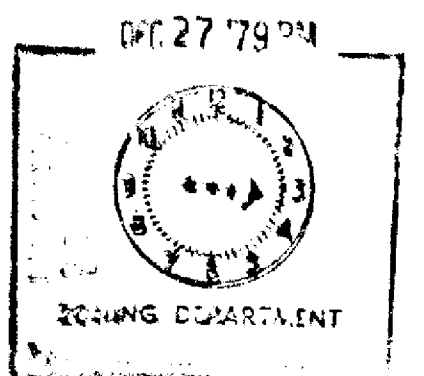
Re: Special Exception
for Transmitting Tower
Marriottsville & Granite Roads
Election District #2

Dear Mr. Hammond:

I am requesting that the subject case be heard as expeditiously as possible. This request is being made because my business, the Shaw Bus Co., located at 6311 Windsor Mill Road is presently experiencing great difficulty with its existing communication system. The communication between buses and the office is essential, in that the safety and convenience of the riders, a large amount of which is school children, many handicapped, is at stake.

Thank you for your cooperation in this matter.

Very truly yours,
Arthur R. Shaw



WILLIAM E. HAMMOND
ZONING COMMISSIONER

July 3, 1980

H. Emslie Parks, Esquire
Suite 402, 305 West Chesapeake Avenue
Towson, Maryland 21204

RE: Petition for Special Exception
E/S of Granite Road, 330' S of
Marriottsville Road - 2nd
Election District
Arthur R. Shaw, Jr., et ux -
Petitioners
NO. 80-203-X (Item No. 146)

Dear Mr. Parks:

I have this date passed my Order in the above referenced matter in accordance with the attached.

Very truly yours,

William E. Hammond
WILLIAM E. HAMMOND
Zoning Commissioner

WEH/esr

Attachments

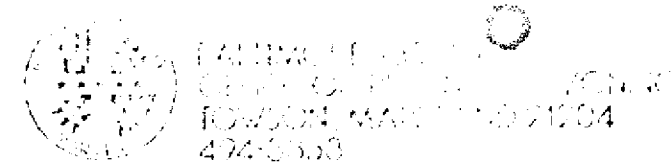
cc: Mr. Charles M. Schevker
10101 Marriottsville Road
Randallstown, Maryland 21133

Mr. Barry Smith
3615 Granite Road
Woodstock, Maryland 21163

Mr. Homer Seidel, Jr.
10012 Marriottsville Road
Randallstown, Maryland 21133

John W. Hessian, III, Esquire
People's Counsel

Mr. Michael S. Dean
10017 Marriottsville Road
Randallstown, Maryland 21133



WILLIAM F. HENNING
ZONING COMMISSIONER

March 26, 1980

Mr. & Mrs. Arthur R. Shaw, Jr.
6311 Windsor Mill Road
Baltimore, Maryland 21207

RE: Petition for Special Exception
E/S Granite Rd., 330' S Marriottsville
Road - Case No. 80-203-X

Dear Sirs:

This is to advise you that \$51.00 is due for advertising and posting of the above-property.

Please make check payable to Baltimore County, Maryland and remit to Sondra Jones, Room 113, County Office Building, Towson, Maryland 21204, before the hearing.

Very truly yours,

William F. Henning
WILLIAM F. HENNING
Zoning Commissioner

WEH:ej

3/5/80

Mr. & Mrs. Arthur R. Shaw, Jr.
6311 Windsor Mill Road
Baltimore, Maryland 21207

NOTICE OF HEARING

RE: Petition for Special Exception - E/S Granite Road, 330 feet S of
Marriottsville Road - Case No. 80-203-X

TIME: 1:30 P.M.

DATE: Tuesday, April 1, 1980

PLACE: ROOM 106 COUNTY OFFICE BUILDING, 111 W. CHESAPEAKE AVENUE,
TOWSON, MARYLAND

John D. Seyfert
ZONING COMMISSIONER OF
BALTIMORE COUNTY

BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

Mr. W. E. Hammond
Zoning Commissioner
John D. Seyfert, Director
Office of Planning and Zoning
TO: _____ Date: March 11, 1980
FROM: _____
SUBJECT: Petition No. 80-203-X Item 146

Petition for Special Exception
East side of Granite Road, 330 feet South of Marriottsville Road
Petitioner- Arthur R. Shaw, Jr., et ux

Second District

HEARING: Tuesday, April 1, 1980 (1:30 P.M.)

It is the office's opinion that the proposed 500 foot tower would not be in keeping with the residential character of the area.

John D. Seyfert
John D. Seyfert, Director
Office of Planning and Zoning

JDS:JGH:ab

RE: PETITION FOR SPECIAL EXCEPTION
E/S of Granite Rd., 330' * BEFORE THE
S of Marriottsville Rd., * COUNTY BOARD OF
2d District * APPEALS OF
ARTHUR R. SHAW, JR., et ux * BALTIMORE COUNTY
Petitioners * Case No. 80-203-X

PETITIONERS' MEMORANDUM OF LAW
STATEMENT OF FACTS

This matter is before the Board upon a Petition for a Special Exception to permit the construction of a wireless transmitting and receiving tower at a location southeast of the intersection of Granite and Marriottsville Roads. The subject property is zoned R.C. 3, the zoning having been changed from D.R. 2 by the County Council subsequent to the hearing before the Zoning Commissioner. Wireless transmitting and receiving towers are permitted by special exception in both R.C. 3 and D.R. 2 zones.

The property which is the subject of this Petition is the residence of Petitioners and has been for a number of years. Petitioners testified that they intend to continue living on the property regardless of the decision on this Petition. The Petitioners' daughter, son-in-law and grandchildren live directly across Granite Road from their property. The closest residence to the site of the proposed tower is that of the Petitioners. The photographs which were introduced into evidence, both as Petitioners' exhibits and as Peoples Counsel's exhibits, indicate that the Petitioners' residence is at least as large and well maintained as the others in the neighborhood and shown on the photographs.

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would actually reduce the possibility of lightning striking any nearby structures. He further testified that construction of the tower would require only six to ten men working over a period of six to eight weeks. Mr. Vlissides stated that the proposed tower would not, in his opinion, pose any threat to the health or safety of residents of the surrounding community.

Mr. Charles Suit, the radio technician whose testimony was previously mentioned, stated that transmissions from the tower would not cause interference with radio or television reception by the residents of neighboring properties.

Mr. Brian McGraw, a real estate appraiser, testified that in his opinion the construction of the tower would not have an adverse effect on the value of neighboring properties. He indicated that the sales price of property in the vicinity of similar towers in western Baltimore County had not been affected by the proximity of such towers. Although counsel for protestants cross-examined Mr. McGraw concerning the extent of his research into the effect of towers upon the assessed valuations and subsequent sales prices of properties which were near towers, it is important to note that the protestants did not produce any affirmative evidence that the proximity to a tower had ever caused a reduction in assessed valuation or a reduction in the sales price of any property either in Baltimore County or elsewhere.

Mr. Holt, a resident of the neighborhood, testified that although he would have a clear view of the tower from his house, he did not think that it would reduce the value of his property and that he had no objection to the construction of the tower. Mr. Holt further testified that he had worked for WBAL in the vicinity of that station's tower for a number of years and confirmed that there was no danger posed by ice blowing from a tower.

Petitioner Arthur R. Shaw, Jr., is the President of Shaw Bus Company, which operates a fleet of 38 school buses. The services provided by Shaw Bus Company include transportation of children who attend the School for the Deaf in Frederick, children who attend the Rosewood State School for the retarded, pregnant girls in Baltimore City, and other students with health problems, as well as students without medical problems.

Arthur R. Shaw, III, the son of Petitioners and the Vice President of Shaw Bus Company, testified concerning the importance of two-way radio communications to his company and the history of problems in achieving adequate communications from existing tower locations. Shaw Bus Company has used antennas atop the downtown Baltimore Hilton Hotel, on Windsor Mill Road, and most recently has used an antenna on a tower at the University of Maryland Baltimore County campus. Although the latter antenna location has resulted in improved communications, the Shaw Bus Company's use of the tower may be terminated by the University at any time on 30 days' notice.

The history of antenna problems was confirmed by Mr. Charles Suit, an electronics technician who has serviced the radio system operated by the bus company and who is familiar with these problems. Mr. Ronald Sisk, an official of the School for the Deaf, testified that while two-way radio communications are not a legal requirement for the school buses transporting children who attend that institution, he considers such communications to be "essential."

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No representative of any governmental agency appeared to testify that there was anything about the proposed tower which would be contrary to the public interest.

The only testimony in opposition to the special exception came from residents of the area, who testified that they thought the tower would be an eyesore, that they were concerned about the possibility of their children climbing on the tower, that they were concerned about the safety of the tower, that they considered it to be unjustified to place a "commercial use" such as the proposed tower in a residential area and that they thought the presence of the tower would cause a reduction in the value of their property. One neighboring resident, who holds a 2d class FCC license and had some military experience in radio communication testified that he was concerned that the tower structure might interfere with radio and television reception in the neighborhood. This witness conceded, however, that he had no actual experience with tower structures and their effect upon radio and television reception and further testified that he had not used his FCC license in connection with his employment.

ARGUMENT

THE PETITION FOR A SPECIAL EXCEPTION SHOULD BE GRANTED

Wireless transmitting and receiving structures are permitted by special exception in R.C. 3 zones pursuant to the provisions of Section 1A02.2.B.31 of the Zoning Regulations. Section 502 of the Zoning Regulations clearly states that all of the uses permitted by special exception "are proper uses of land," but further provides that since "under certain conditions they could be detrimental to the health, safety

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Mr. Matthew Vlissides, a licensed professional engineer with many years of experience in tower construction, testified that he had reviewed the plans for the tower and that the plans meet all applicable engineering standards and all of the requirements of the BOCA Basic Building Code which is in effect in Baltimore County.

The proposed tower is manufactured by Unarco-Rohn, Inc., one of the largest tower manufacturers in the United States. The witness testified that he had personal experience with hundreds of identical towers in the United States and abroad and that, to the best of his knowledge, such a tower had never failed. In fact, Mr. Vlissides testified that he had heard of only one failure of a self-supporting tower of any type anywhere in the world and that this resulted from a direct hit by a tornado.

Mr. Vlissides testified that before the tower was in districts, winds would have to average for a one-hour period 112 miles per hour up to 300 feet and 122 miles per hour from 300 to 500 feet. Also, before being in distress, the tower could withstand gusts of up to 135 miles per hour up to 300 feet and 146 miles per hour from 300 to 500 feet. As an added safety factor, the tower is designed to withstand these wind loads with a 1/2 inch coating of heavy glaze ice on every exposed surface.

Mr. Sol Hirsch, an experienced meteorologist, testified that the highest gusts which have ever been measured at the weather monitoring station at Baltimore-Washington International Airport were 80 miles per hour on two occasions in the early 1950s. At 33 feet above ground level, these would be equivalent to 67 miles per hour. Mr. Hirsch testified that winds at the site of the proposed tower would

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or general welfare of the public," they are to be permitted only pursuant to special exception. (Emphasis supplied.)

Wireless transmitting and receiving towers are not permitted as a matter of right, except as an accessory use, in any zone. By the same token, however, such towers are permitted by special exception in rural conservation, density residential, business and manufacturing zones. See, e.g., Baltimore County Zoning Regulations, Sec. 1A01.2.C.30 (R.C. 2 zones); Sec. 1A02.2.B.31 (R.C. 3 zones); Sec. 1A03.3.B.14 (R.C. 4 zones); Sec. 1A04.2.E.21 (R.C. 5 zones); Sec. 1B01.1.C.20 (all D.R. zones); Sec. 230.13 (B.L. zones); Sec. 233.4 (B.M. zones); Sec. 236.4 (B.R. zones); Sec. 245.4.a (M.L.R. zones); Sec. 253.2.D (M.L. zones); and Sec. 256.4 (M.H. zones).

The standards for determining whether to grant a special exception are set forth in Sec. 502.1 of the Zoning Regulations and are the same whether the zone involved is a rural conservation or a heavy manufacturing zone. The County Council, in permitting wireless transmitting and receiving towers to be constructed in residential and rural conservation zones, has determined that as a general matter there is nothing about such towers which is inconsistent with the welfare of the residents of residential or rural areas. The proper standards for consideration of special exception applications have been considered in numerous cases decided by the Maryland appellate courts.

In Turner v. Hammond, 270 Md. 41, 54, 310 A. 2d 543 (1973) the Court of Appeals pointed out that special exception uses are provided for as part of the comprehensive zoning

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probably be slightly less than at EWI and that the tower site would certainly not be subject to any higher winds than EWI. Mr. Hirsch testified that according to estimates prepared by the National Bureau of Standards, the expected 100 year maximum winds are gusts of 74 miles per hour at 33 feet and 119 miles per hour at 500 feet, with the maximum expected one hour sustained winds being 63 miles per hour at 33 feet and 88 miles per hour at 500 feet. The comparable maximums expected in the next 300 years are gusts of 85 miles per hour at 33 feet and 128 miles per hour at 500 feet, with maximum sustained winds of 66 miles per hour at 33 feet and 97 miles per hour at 500 feet.

Mr. Hirsch testified that heavy ice normally does not form during periods of high winds and that it would be virtually impossible for heavy glaze ice to form in winds which approached the maximum expected velocities since the water would blow off the tower before it had a chance to freeze. Mr. Hirsch further testified that a tornado would do more damage to an enclosed structure such as a house than to an open structure such as the proposed tower.

The combination of the engineering and meteorological testimony thus indicates that the proposed tower is designed to withstand conditions which are much more severe than any which will likely exist in the Baltimore area in the next 300 years.

Mr. Vlissides testified that any heavy ice which formed on the tower would either slide down the tower itself or fall directly underneath the tower. He testified that the tower would be equipped with devices to prevent climbing on the tower, and Mr. Shaw testified that he intended to install fencing around the tower and would be willing to have the special exception conditioned upon the provision of such fencing. Mr. Vlissides testified that the tower

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plan and that such a use shares "the presumption that...it is in the interest of the general welfare and, therefore, valid." The Court pointed out that such uses are to be permitted "absent any fact or circumstance negating the presumption." The Court further stated that while an applicant for a special exception has the burden of adducing testimony to show that the proposed use meets the standards prescribed by the zoning ordinance, "he does not have the burden of showing affirmatively that his proposed use accords with the general welfare." 270 Md. at 55. The Court held that the Salisbury Board of Zoning Appeals had improperly denied a special exception for an apartment house in what was essentially a single-family residential zone.

To the same effect is Rockville Fuel and Feed Company v. Board of Appeals, 257 Md. 183, 262 A. 2d 199 (1970), in which the Court of Appeals pointed out that the special exception "is a valid zoning mechanism that delegates to an administrative board a limited authority to permit enumerated uses which the legislative body has determined can, prima facie, properly be allowed in a specified use district, absent any fact or circumstance in a particular case which would change this presumptive finding." 257 Md. at 188.

In Rockville Fuel, the Gaithersburg Board of Appeals had denied a special exception for a concrete plant in a heavy industrial zone on the basis of a memorandum from the planning commission opposing the special exception, testimony from the owner of a neighboring apartment building that he feared structural damage to his building from vibrations, and testimony from a resident of the area that dust and heavy trucks associated with the operation would adversely affect the area. The Court of Appeals held that none of this was sufficient to overcome the presumption that the use

was consistent with the public welfare and that the testimony of the protestants "amounted to unsupported dislike and fear of the project." 257 Md. at 193.

The Court of Appeals held in Rockville Fuel that "there is no need...for the applicant to show affirmatively that the granting of his application would be a benefit to the community at large..." 257 Md. at 191. The applicants in the present case, in producing evidence of the services provided and the need for radio communication have thus gone well beyond the requirements of the statute.

The fact that special exception uses are presumptively permissible and that the applicant need not demonstrate hardship or a necessity for the special exception was also the holding in Montgomery County v. Merlands Club, Inc., 202 Md. 279, 96 A. 2d 261 (1953), in which the Court of Appeals held that the Montgomery County Board of Appeals had incorrectly denied a special exception for a swimming and tennis club in a residential zone.

There have been at least two reported cases in recent years involving appeals from decisions of this Board in which the Board had denied applications for special exceptions. In Anderson v. Sawyer, 23 Md. App. 612, 329 A. 2d 716 (1974), cert. denied 274 Md. 725 (1975), there was an application for a special exception for a funeral home in a D. R. 5.5 zone. The Board denied the application on the strength of the testimony of protestants to the effect that the funeral home would create traffic congestion, create a "wedge for future commercialization," have a depressing psychological effect on the residents of neighboring properties, and make those properties less valuable. The protestants' testimony concerning reduction in property values was supported by the testimony of a qualified real estate appraiser. 23 Md. App. at 623. The Court of Special Appeals held, however, that

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special exception use presents a hazard to neighboring properties or a detriment to the health, safety or general welfare of the locality involved are demonstrated by the case of Gowl v. Atlantic Richfield Company, 27 Md. App. 410, 341 A.2d 832 (1975).

The Gowl case involved an application for a special exception to permit above-ground storage of more than 30,000 gallons of petroleum products per 20,000 square feet of lot area. Although the property in question was in a manufacturing zone, it was within 500 feet from a residential district and some of the proposed structures themselves were only 550 feet from a residential district. The Howard County Board of Appeals denied the application, in part because some of the supporting structures for a pipeline to be constructed in connection with the storage facility were to be located within the floodplain. The Board ruled that the presence of such structures in the floodplain "would provide a potential danger to the surrounding properties, as well as menace the general welfare." 27 Md. App. at 413.

The Court of Special Appeals noted, however, that there was expert testimony to the effect that the supporting structures were designed to withstand flood waters of greater strength than any expected in the area. The Court held that the Board had incorrectly denied the special exception. In discussing the Board's finding of a potential danger, the Court quoted with approval the following language from the opinion of the trial court, which had also held that the special exception should have been granted:

"The Board's finding...cannot be faulted as an abstract proposition. There was, however, testimony that the likelihood of such a danger was minimal. It should be borne in mind that

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the special exception should have been granted and therefore reversed the action of the Board.

The Court of Special Appeals conceded that funeral homes had inherent deleterious effects on residential areas and could for that reason be prohibited altogether in such cases if the County Council chose to do so. The Court went on, however, to point out that the County Council, by permitting such a use as a special exception, had determined that as a general matter the use was to be permitted. The following language of the Court is as applicable to the present case as it was to Anderson if one merely substitutes the words "radio tower" for "funeral home":

"[I]n the instant case the legislature of Baltimore County has determined that as part of its comprehensive plan funeral homes are to be allowed in residential zones notwithstanding their inherent deleterious effects. By defining a funeral home as an appropriate use by way of special exception, the legislature of Baltimore County has, in essence, declared that such uses, if they satisfy the other specific requirements of the ordinance, do promote the health, safety and general welfare of the community. As part of the comprehensive zoning plan this legislative declaration shares in a presumption of validity and correctness which the courts will honor. (Citations omitted.)

"The presumption that the general welfare is promoted by allowing funeral homes in a residential use district, notwithstanding their inherent depressing effects, cannot be overcome unless there are strong and substantial existing facts or circumstances showing that the particularized proposed use has detrimental effects above and beyond the inherent ones ordinarily associated with such uses. Consequently, the bald allegation that a funeral home is inherently psychologically depressing and adversely influences adjoining property values, as well as other evidence which confirms that generally accepted conclusion, is insufficient to overcome the presumption that such a use promotes the general welfare of a local community. Because there were neither facts nor valid reasons to support the conclusion that the grant of the requested special exception would adversely affect adjoining and surrounding properties in any way other than would result from the location of any funeral home in any residential zone, the evidence presented by the protestants was, in effect, no evidence at all." 23 Md. App. at 624-625 (Emphasis supplied.)

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all uses of this nature present a 'potential' danger but if the possibilities rather than the probabilities of danger are good grounds for denying permits for such uses, it is difficult to see how these uses could be permitted anywhere, regardless of what steps might be taken to minimize the potential dangers accompanying them." 27 Md. App. at 415.

The suggestion of the People's Counsel that the Board should automatically deny a special exception for a tower which is taller than the distance to neighboring properties is without any support in either the Zoning Regulations or the Maryland cases. There was no evidence whatever before the Board to the effect that any foreseeable conditions would cause the tower to fail. The technical aspects of the construction of the tower, including but not limited to the construction of the foundation, will be subject to inspection and approval by the appropriate Baltimore County authorities. The Petitioners would be willing to have the special exception conditional upon inspection and approval of the construction by an independent engineer experienced in tower construction, such as Mr. Vlissides or a similarly qualified engineer. The Petitioners will be living in closer proximity to the tower than any of their neighbors and may therefore be expected to assure that the tower is constructed in a manner which is as safe as humanly possible.

Many houses are located directly under or in close proximity to large trees which could demolish a house if they fell. There are no engineering studies or inspections to certify that such trees are capable of withstanding anything approaching the conditions which the tower proposed in this application is designed to survive. Yet there is no requirement that an owner of property remove any trees which could conceivably damage neighboring property in the event that they fell.

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The facts in the present case are even stronger than those in Anderson, since the protestants in this case failed to produce any expert testimony to support their assertions as to the adverse effects of the proposed tower. Furthermore, as in Anderson, none of the testimony indicated why any of the adverse effects feared by the protestants would be any worse in the present case than in any other case in which there is an application for a special exception for the same use in any other residential area.

The fact that special exception uses are presumptively permissible was again emphasized by the Court of Special Appeals in Miller v. Kiwanis Club of Loch Raven, Inc., 29 Md. App. 285, 347 A.2d 572 (1975), in which the Court of Special Appeals held that this Board had incorrectly denied an application for a special exception for a swimming club in an R.D.P. zone.

The People's Counsel suggested to the Board that the present application should be denied because the height of the tower is greater than the distance to certain nearby residences and because Petitioners' expert witness would not "guarantee" that it was absolutely impossible for the tower to fall. As was pointed out above, the expert witness did testify that he had never known of a failure of this type of tower in his experience with several hundred such towers, that the tower is designed to withstand conditions much more severe than those which have ever occurred in this area and much more severe than those which may be expected in this area in the next three hundred years, and that he was aware of only one failure of any type of self-supporting tower (which occurred as the result of a direct hit by a tornado). He further testified that the only thing which could make the tower fail at ground level and thus fall its entire

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Man-made structures such as multi-story office and apartment buildings are required to meet only reasonable engineering standards. They are not required to be designed so as to resist every theoretically possible catastrophe including deliberate sabotage, yet there are numerous such structures which are taller than their distance to neighboring properties. There is nothing in the zoning regulations which justifies requiring that radio towers, alone among all tall objects, meet the standard which has been suggested by the People's Counsel.

Had the County Council intended to prohibit towers which are taller than their distance to neighboring property, it could easily have so provided. In fact, there is a requirement that amateur radio antennas, which are permitted as accessory uses as a matter of right, be "no higher than 100 feet or the horizontal distance to the nearest property line, whichever is less..." Zoning Regulations, Sec. 1A02.2.B.31. The fact that the Council elected to apply this height limitation only to accessory use antennas when the limitation could easily have been made applicable to all towers strongly indicates that it did not view such a limitation as being necessary in situations where the safeguards inherent in the special exception procedure would be applicable.

The concerns of the protestants that the tower would be an eyesore and result in general deterioration of the neighborhood similarly furnish no basis for denial of the special exception. The Court of Appeals has held that a zoning ordinance which has as its sole purpose the achievement of an aesthetically pleasing result is not a permissible use of the police power. Mayor and City Council of Baltimore v. Mano Schwartz, Inc., 268 Md. 79, 299 A.2d 828 (1973).

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length would be the dynamiting or similar deliberate sabotage of one or more of the tower legs.

That the fact that a tower is higher than the distance to nearby residences is not by itself sufficient to mandate denial of a special exception is demonstrated by the case of Levy v. Montgomery County, 248 Md. 346, 236 A.2d 737 (1968), cert. denied, 393 U.S. 877, in which the Montgomery County Board of Appeals granted a special exception to permit the construction of a 1219 foot self-supporting tower and a transmitter building on a less than four-acre lot in a residential subdivision. Although the opinion of the Court of Appeals did not discuss the distance to neighboring residences, the transcript of testimony indicated that the base of the tower was within 300 feet from five different houses and was only 180 feet from the nearest house. Levy v. Montgomery County, supra, Appendix for Appellees, at 104-105. Copies of the relevant pages from the transcript are attached hereto. Despite the fact that the protestants in Levy, unlike those in the present case, produced testimony from a qualified real estate appraiser that the tower would cause a decrease in the value of the adjacent properties, the Court of Appeals affirmed the Board's granting of the special exception.

It is respectfully submitted that the Levy case is almost directly controlling upon the present application. The tower proposed in the present application is only 41% of the height of the Levy tower, but is more than 60% farther from the closest neighboring house.

The proper considerations in determining whether a

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Generalized concerns about neighborhood deterioration, such as those expressed by the protestants, have recently been held by the Court of Special Appeals to be an insufficient basis for denying a conditional use permit for outdoor advertising signs under a statute which contains requirements which are quite similar to those which are applicable in the present case. In Mayor and City Council of Baltimore v. Foster & Kleiser, 46 Md. App. 163, 416 A.2d 762 (1980), the Court of Special Appeals reversed a denial of such a permit and stated as follows:

"The City Council, by permitting billboards as a conditional use, has legislatively determined that, as a general rule, they do not menace or endanger the public health, safety, general welfare, or morals within the area of their permitted use. The Board has a limited amount of discretion to deny the use if there is substantial evidence to show that, notwithstanding the underlying legislative conclusion, a particular structure would, in fact, have such an effect. But it may not thwart the legislative will based upon unspecified and unsupported protestations and concerns." 46 Md. App. at 171-172.

The cases cited by protestants in their memorandum are inapplicable to the present case. First, all of those cases are from other jurisdictions and thus do represent interpretations of Maryland law. Furthermore, each of those cases is readily distinguishable from the present application.

In Zoning Board of Adjustment v. Marshall, 387 S.W. 2d 714 (Tex. Civ. App., 1965), the holding was that the proposed tower required a variance for which it was necessary for the property owner to show undue hardship. A requirement that the applicant prove that existing towers are unavailable is obviously relevant to such a requirement. As was pointed out above, however, there is no requirement for a showing of undue hardship or necessity in order to justify the granting of a special exception under Maryland law.

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The case of Rollins Broadcasting of Delaware, Inc. v. Hollingsworth, 248 A.2d 143 (Del., 1968), als. cited by protestants, was decided on procedural grounds. No testimony was taken by the Board, the members of which improperly relied upon facts known to them personally in deciding upon the application.

In United States Transmission Systems, Inc. v. Schoepflin, 63 App. Div. 2d 1970, 405 N.Y. S.2d, 764 (1978), the application was one for a height variance which required a showing of "practical difficulties." Such difficulties need not be shown to justify a special exception under Maryland law. Furthermore, the administrative body was concerned about danger from ice blowing off the tower. There was uncontradicted testimony in the present case that any ice heavy enough to do damage would either slide down the tower or drop directly under the tower.

The case of Video Microwave, Inc. v. Zoning Board of Appeals of the Town of Lewisboro, 77 Misc. 2d 798, 354 N.Y.S. 2d 817 (Sup. Ct., 1974), is a decision of a New York State trial court under a statute which apparently required the applicant to show that the tower was "necessary for the public health, safety or welfare." 354 N.Y.S. 2d at 817. As was pointed out above, the Maryland appellate courts have expressly held that an applicant for a special exception need not satisfy such a requirement. Unlike the situation with respect to the present application, there was no presumption in Video Microwave that the tower was in the public interest and therefore permissible.

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the school for the deaf in Frederick and most of which are utilized for conventional school transportation uses.

The son of petitioners, Arthur R. Shaw, III, the Vice President of the Shaw Bus Company, testified that Shaw Bus Company had utilized various antennas and now utilized an antenna on a tower at the University of Maryland, Baltimore County campus which provided satisfactory transmission. Although a lease was produced showing that use of the tower could be terminated on thirty (30) days notice no evidence was produced concerning the University's intention in that regard nor was it established that other equally satisfactory towers were not available in the Baltimore metropolitan area. Further, Mr. Shaw acknowledged that the rent of the University of Maryland, Baltimore County campus tower was nominal, that the Chesapeake & Potomac Telephone Company made available at low rates leased lines which would permit the use of towers elsewhere in the State should this be necessary at low cost and that even construction of the tower proposed by the application would not necessarily solve transmission and reception problems relating to school buses in the Frederick area since reception could not be assured when school buses were on the "downhill" of hills and mountains between Frederick and Baltimore. There was introduced as a respondent's exhibit a map furnished the applicant by Motorola indicating that Motorola could assure the applicant only of reception within a radius falling well short of the Frederick area.

Ronald Sisk, an official of the Maryland School for the Deaf, testified that the Shaw Bus Company provided only a small portion of the bus transportation services utilized by the School

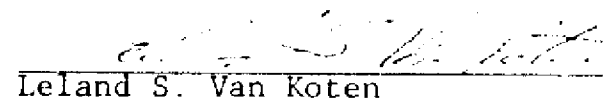
CONCLUSION

For the reasons set forth above, it is respectfully urged that Petitioners' application for a special exception should be granted.


H. Emslie Parks

Leland S. Van Koten
Wright & Parks
409 Washington Ave.
Suite 1012
Towson, Md. 21204
(301) 821-6350
Attorney for Petitioners

I HEREBY CERTIFY that on this 14th day of April, 1981, I have mailed a copy of the within Memorandum to George W. Liebmann, Esquire, The Keyser Building, 207 E. Redwood Street, Baltimore, Md. 21202, Attorney for the Protestants, and to John W. Hessian, III, Esquire, People's Counsel for Baltimore County, County Office Bldg., Towson, Md. 21204.


Leland S. Van Koten

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for the Deaf; that he was not in a position to verify that the tower would fully provide communications with Shaw Buses in the Frederick area; that there was no legal requirement that radio communication to such buses be provided; and that most of the buses engaged by the School for the Deaf did not have and were not required to have two-way radio communications.

Mr. Matthew Vlissides, a licensed professional engineer, testified that the tower in question was required by federal regulations to be painted in orange and white colors for maximum visibility and was required to have flashing lights at several levels; that the tower was of rigid construction and if the tower were to fall, unlike towers supported by guy wires, it would not fall in place but would at best fall in segments which might be up to 300 feet in length; that at least one such tower (at St. Louis) had fallen when struck by a tornado.

Mr. Sol Hirsch, a meteorologist, testified as to gusts measured at a monitoring station at Baltimore-Washington airport some thirty miles from the tower. His testimony was equivocal as to whether measurements taken there were adequate to include sudden gusts and tornado conditions. Mr. Hirsch acknowledged that the records kept of tornado conditions throughout the State were spotty and imperfect and the statistical compilation he used to describe the highest gusts encountered at BWI airport showed almost equally modest wind conditions at points such as Key West, Florida notorious for hurricane and other high wind conditions.

Mr. Vlissides acknowledged that construction of the tower would require six to ten men working over a period of six to eight weeks together with associated equipment and that demolition of

Mr. Donovan: They are in 23 foot centers. We have evergreen trees at 10 foot high that will be on roughly I would say 10 foot centers.
Mr. Becker: Mr. Donovan, have you estimated how much landscaping would cost that is proposed?
Mr. Donovan: The only thing I know, the clients have told us they want it done properly. And we, the tree sales that we are providing is a mature size.
Mr. Becker: So all these figures you mention are of mature trees?
Mr. Donovan: When we say 16 foot trees, this is what we will write the specifications for.
Mr. Becker: At the time of planting?
Mr. Donovan: That is right.
Mr. Thomas: How close is the brick wall that you testified to the property line?
Mr. Donovan: Well, it varies from 28 feet to 22 feet at this point 28.
Mr. Thomas: Do you know the total number of shade trees that will be installed on that property?
Mr. Donovan: No, we have not developed that yet.
Mr. Thomas: Do you know the total number of evergreens [OS] that will be planted?
Mr. Donovan: Not at this particular time.
Mr. Thomas: For the record, would you give me the specific distances for each of these five houses located immediately adjacent to the subject property?
Mr. Donovan: From where to what building, then?
Mr. Thomas: First, from the proposed building, then to the tower itself, starting with Lot 15, Block 5?
Mr. Donovan: Lot 15, to the tower, 220 feet.
Mr. Thomas: Lot 15, to the tower, 220 feet.

Apr. 104
Proceedings

Mr. Thomas: Lot 14, Block 5?
Mr. Donovan: Lot 14, the nearest structure is 95 feet.
To the nearest leg of the tower, 180 feet.
Mr. Thomas: Lot 13, Block 5?
Mr. Donovan: The nearest structure, will be 110 feet.
To the tower would be 200 feet.
Mr. Thomas: Lot 12, Block 5?
Mr. Donovan: 84 feet and the nearest tower, 165, 205 feet.
Mr. Thomas: Let's try that same measurement again coming straight this way.
Mr. Donovan: To this tower leg, this is farther away.
Mr. Becker: Why don't you try it?
Mr. Thomas: Give me the measurement again, the closest to the area?
[109] Mr. Donovan: 82 feet.
Mr. Thomas: That is Lot 12, Block 5, The fifth house, Lot 26, Block 2?
Mr. Donovan: 100 feet, and to the nearest tower, 165, 205 feet.
Mr. Thomas: Directing your attention to the last house, you just mentioned, Lot 26, Block 2, there would be no intervening building between it and the tower?
Mr. Donovan: That is right. As this section shows, flying that this 120 foot tower is not going to be clearly visible to each of these residents, are you?
Mr. Donovan: If this thing is planted properly, and there are adequate shade trees around, adequate canopy, I don't very seriously that the tower, itself, in the immediately adjacent houses is going to be that visible.
Chairman Sanders: Going to be that visible. In other words, not going to be standing out there in its own form.

Apr. 105
Proceedings

the tower should it become technologically obsolete would cost at least fifty thousand dollars.

Mr. Charles Suit, a radio technician called by applicant stated that transmissions from the tower would not cause interference with radio or television reception by neighboring properties but was unable to express an opinion as to whether the physical presence of the tower itself would cause such interference.

Mr. Brian McGraw, a real estate appraiser, called by the applicant indicated that he had conducted no examination of the resale value of prices surrounding the two other radio towers about which he testified or the tax assessments of such properties and that his testimony related solely to the sale of undeveloped tracts between developers. Protestants introduced an exhibit showing a tax assessment for one property described by Mr. McGraw which was substantially less than the price earlier paid as between developers for the property in question, which property was located in close proximity to a radio tower.

The only testimony of a neighbor presented by the applicant was testimony of a neighborhood resident who worked for a radio station and was particularly accustomed to towers in his vicinity.

Although the applicant claimed that the tower was necessary for his school bus business he acknowledged that other bus operators such as Harrelson Transportation Company functioned with much smaller towers. Uncontradicted testimony introduced by the applicant indicated that the cost of the tower was in excess of One Hundred and Fifty Thousand Dollars, an amount far in excess of the sums currently paid for the existing transmission facilities of applicant. Applicant did not deny the possibility of further commercial use of the tower alleging only that the tower was

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In Re: Petition for Special Exception
Eastside of Granite Road, 330 feet south of
Marriottsville Road, Second District

ARTHUR R. SHAW, JR., ET LX * BEFORE THE
Petitioners * COUNTY BOARD OF APPEALS
* OF BALTIMORE COUNTY
* Case No. 80-203-X

PROTESTANTS' REPLY MEMORANDUM OF LAW

Statement of Facts

This matter is before the Board upon appeal from denial by the Zoning Commissioner of an application for special exception to permit the construction of a radio tower in a residential zone, the tower to be 500 feet in height (a height closely approximating that of the District of Columbia Washington monument). Under the terms of Section 502.1 of the County's zoning regulations:

"Before any special exception shall be granted, it must appear that the use for which the special exception is requested will not: (a) be detrimental to the health, safety or general welfare of the locality involved, (b) tend to create congestion in roads, streets, and alleys therein, (c) create a potential hazard and cause undue concentration of population, (e) interfere with adequate provisions for schools, parks, water, sewerage, transportation or other public requirements, conveniences, or improvements, (f) interfere with adequate light and air."

The Zoning Commissioner finding that the first of these standards had not been met denied the special exception.

On appeal the evidence adduced showed the following:

The petitioner, Arthur R. Shaw, Jr., is the President of a school bus company operating a fleet of thirty-eight school buses, two or three of which are utilized to transport children attending

"primarily" for its own benefit. Although applicant was invited by a member of the Board to modify his application for an unusually large building at the base of the tower no such modification was tendered at the close of testimony nor was any explanation tendered of the dimensions of the building.

Testimony adduced by Peoples' Counsel showed that the tower, if it fell, would fall on a possible radius including a portion of the neighboring street and several neighboring properties at least one of which was located as close to the tower as the residence of the applicant.

Numerous residents of the neighborhood testified as to its peculiarly rural character also evidenced by its recent rezoning as RC3 from DR2 and as to the fact that the unobstructed nature of views was a major inducement to property owners to purchase in the neighborhood. Each property owner testified that the 500 foot orange and white tower would have a detrimental effect upon the value of his property and concern was expressed that the tower would operate as an attractive nuisance and that it would endanger properties if it fell. Several property owners testified as to the presence of small children in the area. One property owner testified as to his ownership nearby of a historical home which would undergo special depreciation in consequence of a view such as the tower. One resident holding an FCC license whose testimony was accepted by the Board as expert testimony testified that the tower structure as distinct from transmission iron it would interfere with radio and television reception in the neighborhood. No contrary testimony was adduced on behalf of the applicant.

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Argument

The petition for special exception must be denied for two reasons: First, the property owner has failed to meet the requirements of Turner v. Hammond and Anderson v. Sawyer establishing that "the applicant has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements." Second, there are demonstrated detrimental effects from the proposed tower not present with respect to all radio towers in residential areas.

In the present case, there was a total failure of proof on the part of the applicant with respect to at least three issues:

- 1. A special impact upon neighboring properties in consequence of their rural, residential and historic character.
2. Interference by the tower structure itself with radio reception of the neighboring residential properties.
3. The hazard presented by the tower were it to fall.

While it is true, as applicant points out, that where a special exception is authorized, its denial requires evidence of "facts or circumstances showing the particularized proposed use has detrimental effects above and beyond the inherent ones ordinarily associated with such uses," in the present case, there was abundant evidence, some adduced by the developer himself, as to such peculiar, detrimental effects. First, the tower in question was far higher than most radio towers - ten times as high as the fifty foot limit for accessory uses and several times as high as other towers in the vicinity evidence as to which was adduced by the applicant. Second, there was evidence of the peculiarly rural residential character of the area in question. The evidence was clear that this was no ordinary area and that it differed from most portions of the RC2, RC3, RC4, RC5, DR, BL, BR, MLR, ML and

Certificate of Service

I HEREBY CERTIFY that on this 29th day of April, 1981, a copy of the foregoing Protestants' Reply Memorandum of Law was mailed to:

H. Emslie Parks, Esquire, 409 Washington Avenue, Suite 1012, Towson, Maryland 21204
John W. Hessian, 3rd, Esq., People's Counsel for Baltimore County, County Office Building, Towson, Maryland 21204

Handwritten signature of H. Emslie Parks

RECEIVED BALTIMORE COUNTY CLERK OF COURTS

MH zones in which radio towers are also permitted by special exceptions. In this vicinity, there were vistas surrounding residences and historic homes, rendering a radio tower, particularly one of this extraordinary height a peculiarly discordant use, supplying "probative evidence of harm or disturbance in light of the nature of the zone involved" of the type referred to in Anderson v. Sawyer, 23 Md. App. 612. The complete collapse of the applicant's appraisal testimony and the additional and contradicted testimony as to possible interference by the physical structure itself with radio reception clearly demonstrated the applicant's failure to meet the first standard for grant of a special exception.

Finally, there is a second peculiar feature of the tower which rendered it objectionable in this location, in a sense that it would not be objectionable in other locations of the same zones within which it is a permitted special exception: the fact that the tower, if it fell, would extend beyond the boundaries of the property on which it was located. The past practice of the Board has refused to approve rigid towers where the height of the tower is greater than the distance to the nearest lot line. Even with respect to towers which are permitted accessory uses and which are barely 100 feet in height, the zoning regulations would bar erection if the tower is higher than "the horizontal distance to the nearest property line." Zoning Regulations, §1A02.2.b.31. Applicant's assertion on page 15 of its memorandum that "the fact the Council elected to apply this height limitation only to accessory use antennas when the limitations could have easily have been made applicable to all towers" proves the opposite of what

IN THE MATTER OF ARTHUR R. SHAW, JR., ET UX * BEFORE THE * COUNTY BOARD OF APPEALS * OF * BALTIMORE COUNTY * CASE NO. 80-203-X

MEMORANDUM OF PROTESTANTS

The protestants herein direct the attention of the Board to the following decided cases relating to the appropriateness of denying special exceptions to radio and television transmitting towers in residential districts:

- United States Transit Systems v. Schoepflin, 63 App.Div. 2d 970, 405 N.Y.S. 2d 764 (1978) in which the Court stressed that the tower in question was 280 feet high, was not applied for by a public utility, was situated within seven hundred feet of a residential area, and was near highways and high voltage lines.
- Video Microwave, Inc. v. Zoning Board of Appeals, 77 Misc. 2d, 798, 354 N.Y.S. 2d 817 (1974) in which the Court stressed that the applicant was not a public utility, that there were feasible sites for the facility in question, and that the facility in question would be painted in bright colors and have flashing lights disruptive of a residential district and suitable "in Times Square, not in Lewisburg."
- Collins Broadcasting of Delaware v. Hollingsworth, 248 A.2d 143 (Delaware 1968).

the applicant wishes it to prove. The fact that the Council felt it necessary to apply this limitation even to towers that were less than 100 feet in height demonstrates a fortiori that the Board is justified in applying such a limitation to towers of greater height and in considering the hazards presented by such towers in determining whether an applicant has met the burden of showing that a tower does not "create a potential hazard" within the meaning of §502.1(c). It is thus clear that the cases from other jurisdictions cited in the initial memorandum of protestants made clear that the present application is one which at the least, is fairly debatable. It presents a case in which the Board is free to deny a special exception without any fear of a court reversal. The blunt fact is that the applicant here has not sustained its burden. As stated in BP Oil v. County Board of Appeals, 42 Md. App. 576, 579, a case more recent than any cited by the appellant:

"The proponent always has the burden of proof (pertinently, here, the production burden) and must introduce enough to generate a fairly debatable question in order to sustain a zoning decision in his favor. The thrust of these principles cannot, however, be reversed and turned upon a negative decision where a board is not persuaded to act. They do not impose upon an opponent of zoning change some corresponding burden to generate a fairly debatable doubt. By a sleight of hand, BP flashes a legitimate burden upon a proponent to sustain an action and tries to palm it off as a transferred burden upon the opponent to sustain a non-action. Though it may work with rabbits, the sleight of hand won't work with the allocation of the burden of proof. Where BP seeks, as here, to say that the Board was compelled as a matter of law to rule in its favor, BP assumes not merely the lesser burden of generating a fairly debatable issue so as to permit a ruling in its favor but the significantly greater burden of actually dispelling fair debate by proof so clear and decisive as legally to compel

Zoning Board of Appeals v. Marshall, 387 S.W. 2d 714 (Texas Civ. App.) in which the Court stressed, among other things, that there was no prohibition against the applicant renting lines permitting him to make use of an already existing tower for his transmissions. It is submitted that the factors stressed in these cases are all present here and that the special exception must be denied.

Handwritten signature of George W. Liebmann
George W. Liebmann, The Keyser Building, 207 E. Redwood Street, Baltimore, Maryland 21202, 752-5887

Certificate of Service

I HEREBY CERTIFY that on this 14th day of April, 1981, a copy of the foregoing Memorandum of Protestants was delivered to: H. Emslie Parks, Esquire, Suite 1012, 409 Washington Avenue, Towson, Maryland 21204.

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a ruling in its favor. In this case, BP's own evidence, though adequate, was equivocal... there is frequently such a middle ground wherein it is neither arbitrary, capricious or illegal to say yes, nor arbitrary, capricious or illegal to say no. The decision was in that discretionary range of the Board and was not compelled either way as a matter of law. BP amply met its burden of production. It did not, however, meet its burden of persuasion for the obvious reason that it failed to persuade those whom it needed to persuade. It lost a fair judgment call and from that there can be no successful appeal. Those who would use precedent carefully must learn to distinguish between that minimal quantity of evidence permitting fair debate, looking in one direction, and the massively greater quantity and quality of evidence necessary to foreclose fair debate, looking in the other direction."

It is only necessary to recall the ridiculous appraisal evidence tendered on behalf of the applicant as his sole evidence relating to the affect upon the surrounding neighborhood to perceive the absence in this case of "the massively greater quantity and quality of evidence necessary to foreclose fair debate." The erection of this Washington Monument in the vicinity of a historic home and in a neighborhood known for its bucolic vistas is peculiarly objectionable given the availability of sites in residential, conservation, industrial and business zones in which radio towers are also permitted as special exceptions in which a tower would raise none of the problems it raises here. The application for special exception can be and should be denied.

George W. Liebmann, The Keyser Building, 207 E. Redwood Street, Baltimore, Maryland 21202, 752-5887

RE: PETITION FOR SPECIAL EXCEPTION BEFORE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY No. 80-203-X

OPINION

This case comes before the Board on an appeal from a decision by the Zoning Commissioner which denied a special exception for a transmitting tower project to be erected on the Petitioner's property. This tower project would consist of a 480 foot self supporting tower, a 20 foot antenna and a building for transmitting equipment which is to be located at the base of the tower. The subject property is located on the east side of Granite Road 330 feet south of Marriottsville Road in the Second Election District of Baltimore County, and is zoned R.C. 3. A transmitting tower is a permitted use in an R.C. 3 zone if it meets the requirements as set out in Section 502.1 of the Baltimore County Zoning Regulations, which states as follows:

- "Before any Special Exception shall be granted, it must appear that the use for which the Special Exception is requested will not:
a. Be detrimental to the health, safety, or general welfare of the locality involved;
b. Tend to create congestion in roads, streets or alleys therein;
c. Create a potential hazard from fire, panic or other dangers;
d. Tend to overcrowd land and cause undue concentration of population;
e. Interfere with adequate provisions for schools, parks, water, sewerage, transportation or other public requirements, conveniences, or improvements;
f. Interfere with adequate light and air."

The Petitioner testified that his purpose in requesting the special exception was to provide communication with his fleet of buses now being used to transport school children, some with disabilities, so that should a bus break down on the road help could be dispatched quickly. This service is now being provided on a short term basis (30 day cancellation clause in lease) by equipment installed on the U.M.B.C. tower on Wilkens Avenue. The Petitioner presented evidence of his desire to provide coverage out to the vicinity of Frederick, Maryland, and also to avoid the very crowded commercial transmitting frequencies now in general use. This means transmitting at very high

frequencies, which in turn dictates a 500 foot height for the antenna since at these frequencies straight line communications only are possible. If the Petitioner had opted for lower frequencies the height of the tower would have been greatly reduced, but the Board must take the proposal as presented.

The Petitioner addressed the issue of safety for the nearby residences as the principal issue of the case. Mr. Matthew Vlissides, a licensed professional engineer, reviewed the tower design and declared it safe barring a direct hit by a tornado or deliberate sabotage. Mr. Sol Hirsch, a professional meteorologist, confirmed that the wind speed expected in the area was well within the design limits of the tower as described by Mr. Vlissides.

Protest of this project comes from the People's Counsel and adjacent property owners, however, neither the County nor the Protestants provided expert testimony to counter this evidence, and the Board is generally satisfied that the 480 foot tower would meet the requirements of the Baltimore County Zoning Regulations with the exception that the soil upon which the tower would be built was not examined to see what, if any, modifications would be needed to the design of the tower standard base.

The Board notes that the project consists of more components than the tower only. Testimony concerning the 20 foot antenna mounted on the top of the tower and on the equipment building at the tower base was very slight. Regarding the antenna, Mr. Vlissides stated that he had not reviewed the design and the Board is left with the question of whether the antenna would pose a safety problem for nearby residences under severe weather conditions when mounted 480 feet high on the tower. Similarly, we know little of the equipment building, the need for the size proposed, the threat, if any, to the surrounding neighborhood, particularly from high voltage transmitting equipment. We know little of the means of connecting the transmitting equipment to the tower and its safety aspects.

The Petitioner also attempted to address the adjacent property owners' concern that the tower project would significantly decrease property values in the neighborhood. The Board finds the testimony and report by Mr. Brian McGraw, a real estate appraiser, incredible. The study by Mr. McGraw attempted to show that similar

properties near towers in the County were not affected in resale value. However, the premise that Mr. McGraw proposed of excluding improved properties because differences in the improvements were too great to be compared was so faulty that the Board rejects his conclusions. The Board notes that the entire property assessment and property tax system in this State is based on comparing improved properties on exactly the basis that Mr. McGraw's is impossible. Many other difficulties were similarly found in Mr. McGraw's testimony, but the Board will not belabor this matter.

Again, however, neither the County nor the Protestants presented credible expert testimony that property values would in fact be adversely affected. The Board is left with only the neighbors' feelings on the matter, one neighbor (a former tower technical) feeling no detrimental effect by the tower and the great majority of the remaining neighbors feeling severely aggrieved by the proposal as likely reducing the value of their property. One neighboring Protestant, who holds a 2nd class FCC license and related military experience in radio communications, testified that he was concerned that the tower structure might interfere with radio and television reception in the neighborhood. The Board, however, does not find great weight with his testimony in that we are not convinced that sufficient factual data was presented as a basis for his conclusion.

The question before the Board then turns on the legal maxim as to which party has the burden of proving its case. The Petitioner's lengthy argument, after reviewing Maryland cases, concludes with the proposition that the Board should grant the special exception unless the opponents present sufficient contrary evidence because the County Council decreed that transmitting towers are "proper uses of land" in R.C. zones. See Sections 1A02.2.B.31 and 502 of the Baltimore County Zoning Regulations. The Petitioner cites Turner v. Hammond, 270 Md. 41, 54, 310 A, 2d 543 (1973), and many similar cases for the proposition that special exception uses are provided for as part of the comprehensive zoning plan and that such uses share "the presumption that... it is in the interest of the general welfare and, therefore, valid." The Court pointed out that such uses are to be permitted "absent any fact or circumstance negating the presumption."

Taken by itself, this indicates that the burden falls on the Protestants to provide sound evidence of harm to the community, which the Board, in this case, has found not to have been given. The Board, however, believes that the burden falls on the Protestants only after the Petitioner has adduced testimony to show that the proposed use meets the standards prescribed by the zoning ordinance. Section 502.1 of the Baltimore County Zoning Regulations makes this clear. It states that "Before any Special Exception shall be granted, it must appear that the use for which the Special Exception is requested will not: a) Be detrimental to the health, safety, or general welfare of the locality involved; etc." [Emphasis added] A special exception need not benefit the community at large, although the applicant for such use must show that it would not harm or disturb neighboring uses. Rockville Fuel and Feed v. Bd. of Appeals of City of Gaithersburg, 257 Md. 183 (1970). As stated in B. P. Oil Co. v. County Bd. of Appeals of Montgomery County, 42 Md. App. 576 (1979): "An applicant must meet both the production burden (producing legally sufficient evidence to satisfy required criteria) and the persuasion burden (convincing the Board to so find in the applicant's favor)". This the Petitioner has failed to do.

The Board finds that the Petitioner did not provide sufficient credible evidence on the safety aspects of the 20 foot antenna, the tower base design as applied to this site, the equipment building, and the connecting waveguide or cable. Nor was any credible evidence received regarding real property values near the proposed use. Again, Section 502.1 states very clearly that "Before any Special Exception shall be granted, it must appear that the use for which the Special Exception is requested will not: a) Be detrimental to the health, safety, or general welfare of the locality involved;" [Emphasis added] Testimony of Mr. McGraw, Petitioner's real estate appraiser, in no way addressed the effect of such a large structure, located amid a group of individual homes, upon their before and after value, or their general welfare. Lacking any direct factual testimony otherwise, the Board finds it inconceivable that the erection of such a large structure in close proximity to these homes could be anything except a detriment to

the general welfare of these homes.

The Board is quite mindful of the high cost to any party appearing before it of retaining expert witnesses. We do not expect that separate experts should be retained to testify on every design detail. We are also aware that the County technical staff will review the detailed design before a building permit is issued. The Board, however, feels that it cannot transfer its responsibility to review the application and be satisfied that the proposal meets the Baltimore County Zoning Regulations merely by saying that the building permit process would likely catch deficiencies the Board finds in testimony presented. Perhaps an example would illustrate this point. The Board asked Mr. Vlissides, the Petitioner's tower expert, whether soil samples were taken at the site and whether he could testify that the "standard" base design presented for the tower would, in fact, apply. He testified that he had not reviewed soil samples and after some discussion, it was pointed out that this design "detail" would be accomplished, after the special exception was granted, in conjunction with Baltimore County's building permit review. If the samples showed rock (for which the area is widely noted; hence, the name Granite), the Petitioner would design a new and different base to accommodate the requirement, submit same to the County technical staff and presumably erect a safe tower. The Board, however, is left with little or nothing on which to base its legislatively mandated decision that the special exception will not be detrimental to health, safety and welfare, etc., as required by Section 502.1 of the Baltimore County Zoning Regulations, as obviously, if the base presented is insufficient, the Board cannot find the structure built upon it will be safe. Where the adequacy of important components of a proposal are called into question before the Board or where major components of a proposal inherently cry for explanation, the Board must be presented with sufficient credible evidence upon which it can base its findings. It is not sufficient that the County's technical staff will review the proposal at a later time. We gratefully leave, however, to the County staff its review of details of the proposal prior to issuing a building permit. For these reasons, the Board will deny the special exception and affirm the finding of the Zoning Commissioner.

ORDER

For the reasons set forth in the foregoing Opinion, it is this 16th day of June, 1981, by the County Board of Appeals, ORDERED that the special exception petitioned for, be and the same is hereby DENIED.

Any appeal from this decision must be in accordance with Rules B-1 thru B-12 of the Maryland Rules of Procedure.

COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY

John V. Murphy

John A. Miller

William T. Hackett

RE: PETITION FOR SPECIAL EXCEPTION for a wireless transmitting tower and receiving structure 500' feet in height including a control house E/S of Granite Road, 330' S. of Marriottsville Road 2nd District Arthur R. Shaw, Jr., et ux Petitioners IN THE CIRCUIT COURT FOR BALTIMORE COUNTY AT LAW

PETITION FOR APPEAL

Arthur R. Shaw, Jr., and Dorothy B. Shaw, Appellants, by H. Emslie Parks and Leland S. Van Koten, their attorneys, respectfully represent unto Your Honor:

- 1. That the Appellants filed on this date an Order of Appeal from the decision of the County Board of Appeals of Baltimore County dated June 16, 1981, under Appeal No. 80-203-X, wherein the Board disapproved Appellants' application to erect a wireless transmitting tower and receiving structure 500' in height including a control house on the east side of Granite Road, 330' south of Marriottsville Road in the 2nd District, Baltimore County, Maryland.
2. That the decision of the Board was arbitrary, capricious and unreasonable.
3. That the decision was contrary to the weight of evidence before the Board.
4. That the decision was not supported by substantial evidence.
5. That the decision was based upon errors of law.
6. And for such other and further reasons as will be presented at the hearing of this Appeal.

WHEREFORE, Appellants pray that this Honorable Court issue an Order reversing the decision of the County Board of Appeals of Baltimore County.

H. Emslie Parks

Leland S. Van Koten

I HEREBY CERTIFY that on this 17th day of June, 1981 I have mailed a copy of the within Petition for Appeal to County Board of Appeals of Baltimore County, Room 219, Court House, Towson, Md., 21204, John W. Hessian, III, Esquire, People's Counsel for Baltimore County, County Office Bldg., Towson, Md. 21204, and to George W. Liebmann, Esquire, The Keyser Bldg., 207 E. Redwood St., Baltimore, Md. 21202, Attorney for the Protestants.

Leland S. Van Koten

RE: PETITION FOR SPECIAL EXCEPTION for a wireless transmitting tower and receiving structure 500' in height including a control house E/S of Granite Road, 330' S. of Marriottsville Road 2nd District Arthur R. Shaw, Jr., et ux Petitioners IN THE CIRCUIT COURT FOR BALTIMORE COUNTY AT LAW

ORDER OF APPEAL

MR. CLERK:

Please enter an appeal on behalf of Arthur R. Shaw, Jr. and Dorothy B. Shaw, applicants, from the decision of the County Board of Appeals of Baltimore County dated June 16, 1981, in the matter of Appeal No. 80-203-X.

H. Emslie Parks

Leland S. Van Koten

I HEREBY CERTIFY that on this 17th day of June, 1981, I have mailed a copy of the within Order of Appeal to County Board of Appeals of Baltimore County, Room 219, Court House, Towson, Md. 21204, John W. Hessian, III, Esquire, People's Counsel for Baltimore County, County Office Bldg., Towson, Md. 21204, and to George W. Liebmann, Esquire, The Keyser Bldg., 207 E. Redwood Street, Baltimore, Md. 21202, attorney for the Protestants.

Leland S. Van Koten

RE: PETITION FOR SPECIAL EXCEPTION
for a wireless transmitting
tower and receiving structure
500' in height including a control
house
E/S of Granite Road, 330' S. of
Marriottsville Road
2nd District
Arthur R. Shaw, Jr., et ux,
Petitioners
Zoning File No. 80-203-X

IN THE
CIRCUIT COURT
FOR
BALTIMORE COUNTY
AT LAW
Misc. Docket No. 13
Folio No. 207
File No. M-7557

CERTIFICATE OF NOTICE

Mr. Clerk:
Pursuant to the provisions of Rule B-2(d) of the Maryland Rules of Procedure,
William T. Hackett, John V. Murphy and John A. Miller, constituting the County Board
of Appeals of Baltimore County, have given notice by mail for the filing of the appeal to
to the representative of every party to the proceeding before it; namely, H. Emslie Parks,
Esq., Suite 402, 305 W. Chesapeake Avenue, Towson, Md. 21204, Counsel for the
Petitioners; Mr. and Mrs. Arthur R. Shaw, Jr., 6311 Windsor Mill Rd., Baltimore, Md.
21207, Petitioners; Mr. Charles M. Schevker, 10101 Marriottsville Rd., Randallstown, Md.
21133, Protestant; Mr. Homer Seidel, Jr., 10012 Marriottsville Rd., Randallstown, Md.
21133, Protestant; Mr. Michael S. Dean, 10017 Marriottsville Rd., Randallstown, Md. 21133,
Protestant; Mr. Barry Smith, 3615 Granite Rd., Woodstock, Md. 21163, Protestant;
George W. Liebman, Esq., The Keyser Building, 207 E. Redwood St., Baltimore, Maryland
21202, Counsel for Protestants; Mr. Charles Walter, 3517 Granite Rd., Woodstock, Md.
21163; Ms. Jane Phipps, 3613 Granite Rd., Woodstock, Md. 21163; Mr. Arnold Jablon,
President, Hemwood Heights Comm. Assoc., Inc., 3717 Lanamer Rd., Randallstown, Md.
21133; and John W. Hession, III, Esq., Court House, Towson, Md. 21204, People's Counsel
for Baltimore County, a copy of which Notice is attached hereto and prayed that it may be
made a part thereof.

June Holmen
County Board of Appeals of Baltimore County
Rm. 219, Court House, Towson, Md. 21204

Arthur R. Shaw, Jr., et ux
Case No. 80-203-X

I HEREBY CERTIFY that a copy of the foregoing Certificate of Notice has
been mailed to H. Emslie Parks, Esq., Suite 402, 305 W. Chesapeake Ave., Towson, Md.
21204, Counsel for the Petitioners; Mr. and Mrs. Arthur R. Shaw, Jr., 6311 Windsor Mill
Rd., Baltimore, Md. 21207, Petitioners; Mr. Charles M. Schevker, 10101 Marriottsville
Rd., Randallstown, Md. 21133, Protestant; Mr. Homer Seidel, Jr., 10012 Marriottsville
Rd., Randallstown, Md. 21133, Protestant; Mr. Michael S. Dean, 10017 Marriottsville
Rd., Randallstown, Md. 21133, Protestant; Mr. Barry Smith, 3615 Granite Rd., Woodstock,
Md. 21163, Protestant; George W. Liebman, Esq., The Keyser Building, 207 E. Redwood
St., Baltimore, Md. 21202, Counsel for Protestants; Mr. Charles Walter, 3517 Granite Rd.,
Woodstock, Md. 21163; Ms. Jane Phipps, 3613 Granite Rd., Woodstock, Md. 21163;
Mr. Arnold Jablon, President, Hemwood Heights Comm. Assoc., Inc., 3717 Lanamer Rd.,
Randallstown, Md. 21133; and John W. Hession, III, Esq., Court House, Towson, Md. 21204,
People's Counsel for Baltimore County, on this 7th day of July, 1981.

June Holmen
County Board of Appeals of Baltimore County

cc: J. Howell
K. Reigel
Files

RE: PETITION FOR SPECIAL EXCEPTION * IN THE
Arthur R. Shaw, Jr., et ux * CIRCUIT COURT
Zoning Case No. 80-203-X * FOR
* BALTIMORE COUNTY
* AT LAW
* Misc. Docket No. 13
* Folio No. 207
* File No. M7557

ANSWER TO PETITION FOR APPEAL

Michael Dean, Lawrence Phipps, Jane Phipps, The Village of
Kings Park Community Association, and The Hemwood Heights
Community Association, Protestants below and Appellees herein,
answer the Petition for Appeal heretofore filed by the Appellant
viz:

1. That the Appellees admit the allegations made and
contained in the first paragraph of said Petition.
2. That the Appellees deny the allegations made and
contained in the second through sixth paragraphs of said Petition
and state affirmatively that the decision of the County Board of
Appeals of Baltimore County herein was proper and justified by
the evidence before it and that the decision of the Board should
therefore be sustained as being lawfully and properly made.

George W. Liebman
The Keyser Building
207 E. Redwood Street
Baltimore, Maryland 21202
752-5887

7/10/81

Certificate of Service

I HEREBY CERTIFY that on this 10th day of July, 1981, a
copy of the foregoing Answer to Petition for Appeal was mailed
to H. Emslie Parks, Esquire, 409 Washington Avenue, Towson,
Maryland 21204, John W. Hession, III, Esquire, Room 223 Court
House, Towson, Maryland 21204, and the Administrative Secretary,
County Board of Appeals of Baltimore County, Room 219 Court House,
Towson, Maryland 21204.

RECEIVED
BALTIMORE COUNTY
JUL 13 1981
COUNTY BOARD
OFFICE

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 45,
September Term, 1980

EASTERN OUTDOOR ADVERTISING CO.

MAYOR & CITY COUNCIL OF BALTIMORE

Gilbert, C.J.
Wilner,
Weant,
JJ.

PER CURIAM

Filed: September 25, 1980

Seeking to erect a 14 foot by 48 foot single-faced,
illuminated signboard at 6811 Harford Road in Baltimore City,
the appellant, Eastern Outdoor Advertising Company (Eastern),
applied to the Board of Municipal and Zoning Appeals for the
appropriate permit. Because the property upon which Eastern
proposed to erect the signboard is zoned B-2-2,¹ a classifica-
tion that allows a wide variety of business and commercial
uses, the signboard is permitted as a conditional use if ap-
proved by the Board.² The Board, however, disapproved
Eastern's application, having found that "the proposed use
would menace and endanger the public health, security, general
welfare and morals of the Community." Thereafter, Eastern
noted a timely appeal to the Baltimore City Court, which af-
firmed the Board's decision in an oral opinion rendered on 11
December 1979. It is from this affirmation that the instant
appeal has been taken.

For the reasons explained herein, we agree with
Eastern that "[t]he decision of the Board of Municipal and
Zoning Appeals was arbitrary and capricious in that it was un-
supported by substantial evidence"; therefore, the judgment
of the Baltimore City Court will be reversed. In the light
of this conclusion, we find it unnecessary to discuss the
merits of Eastern's accompanying argument, i.e., "[t]he de-
cision of the Board . . . was based upon errors of law."

¹ See Baltimore City Code art. 30, § 6.2-1.

² See Baltimore City Code art. 30, § 10.0-3c.

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As recently as 10 July 1980, this Court resolved
two cases which are very similar to the one now before us,
i.e., *Mayor of Baltimore v. Foster & Kleiser*, ___ Md. App.
___, 416 A.2d 762 (1979). In *Foster*, we adopted the opinion
of the trial judge (Wilner, J.), who cogently summarized cer-
tain principles relevant to the cases before him, as well as
to the case at bar. These principles are as follows. First,

"[i]t is well settled by many decisions in
this State that the court will not substi-
tute its discretion for that of the Board
in zoning cases. The duty of the Board is
to exercise the discretion of experts.
The court, although it may not arrive at
the same conclusion, will not disturb a
decision of the Board on review, if the
Board has complied with all legal require-
ments of notice and hearing and the record
shows substantial evidence to sustain the
finding."

Foster, 416 A.2d at 764 (quoting *Aaron v. Mayor of Baltimore*,
207 Md. 401, 406 (1955)). Second,

"an applicant for a billboard in a first or
second commercial use district, or indus-
trial use district, is entitled to a permit
unless the Board finds from the evidence
produced before it, or on investigation,
that the proposed use would endanger the
public health, safety, security or morals;
and, . . . the action of the Board, af-
firmative or negative, is entitled to such
respect by the courts that it will be set
aside only if the attacker meets 'the
heavy burden of overcoming the presumption
of constitutionality of legislative action'
by showing that the action of the Board in
the exercise of its original jurisdiction
was arbitrary, capricious or illegal."

Foster, 416 A.2d at 764-65 (quoting *Gilman v. Mayor of Balti-
more*, 205 Md. 557, 564-65 (1954)) (footnote omitted). Third,

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"[i]t is arbitrary and unlawful for the Board to make an es-
sential finding without supporting evidence"; and that, of
course, makes the question of evidentiary sufficiency a proper
one for judicial review." *Foster*, 416 A.2d at 765 n. 1
(quoting *Aaron*, 207 Md. at 406).

Judge Wilner then examined the evidence upon which
the Board had based its decision. Coincidentally, the evi-
dence before the Board in *Foster* is very similar, both in form
and in substance, to the evidence that was before the Board in
the case *sub judice*; the evidence in the latter instance being:
(1) Memoranda from the City Fire Department and the Depart-
ment of Transit and Traffic expressing no objection to the
proposed signboard. (2) A memorandum from the Division of
Industrial Hygiene Investigations stating that the proposed
signboard "apparently, will pose no public health hazard . . ."
(3) A memorandum from the Bureau of Community Hygiene Balti-
more City Health Department stating that "there would appear
to be no health hazard involved in the [erection of the pro-
posed signboard] provided the area under and around [it] is
kept clean and free of nuisances to the neighborhood." (4)
A letter from the City Department of Planning asserting that
the sign would be "visible from the houses facing Woodring
Avenue and Northway Drive to the south." It opposed the
erection of the signboard because of what it considered to
be its excessive height and because of its "proximity to the
dwellings to the east." (5) Letters from various local

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EXHIBIT A

politicians requesting that the Board disapprove Eastern's application because the authors supported the community's opposition to the signboard. (6) A letter from the Harford Road-Belair Road Community Organization expressing opposition to the signboard because signs of this type are "aesthetically offensive and a detracting factor to the value of the nearby residential area." (7) The testimony of the President of the Woodring Improvement Association wherein opposition to the proposed signboard was voiced because the Association did not "want any more signs especially in that location."

As Judge Wilner concluded in Foster,

[n]one of this, separately or cumulatively, suffices to support or justify a finding that the sign would "menace and endanger the public health, security, general welfare and morals." There is not a shred of credible evidence to that effect. That a sign will be visible is hardly a reason to ban it; visibility, indeed, is the whole purpose of the sign.

416 A.2d at 766, and,

[t]he City Council, by permitting billboards as a conditional use, has legislatively determined that, as a general rule, they do not menace or endanger the public health, safety, general welfare, or morals within the area of their permitted use. The Board has a limited amount of discretion to deny the use if there is substantial evidence to show that, notwithstanding the underlying legislative conclusion, a particular structure would, in fact, have such an effect. But it may not thwart the legislative will based upon unspecific and unsupported protestations and concerns.

Id. at 767.

the retarded, pregnant girls in Baltimore City, and other students with health problems, as well as students without medical problems (T. 5-9).

Arthur R. Shaw, III, the son of Appellants and the Vice President of Shaw Bus Company, testified concerning the importance of two-way radio communications to his company and the history of problems in achieving adequate communications from existing tower locations. Shaw Bus Company has used antennas atop the downtown Baltimore Hilton Hotel, on Windsor Mill Road, and most recently has used an antenna on a tower at the University of Maryland Baltimore County campus. Although the latter antenna location has resulted in improved communications, the Shaw Bus Company's use of the tower may be terminated by the University at any time on 30 days' notice (T. 9-13).

The history of antenna problems was confirmed by Mr. Charles Suit, an electronics technician who has serviced the radio system operated by the bus company and who is familiar with these problems (T. 72-77). Mr. Ronald Sisk, an official of the School for the Deaf, testified that while two-way radio communications are not a legal requirement for the school buses transporting children who attend that institution, he considers such communications to be "essential" (T. 62-72).

Mr. Matthew Vlissides, a licensed professional engineer with many years of experience in tower construction, testified that he had reviewed the plans for the tower and that the plans meet all applicable engineering standards and all of the requirements of the BOCA Basic Building Code which is in effect in Baltimore County (T. 86-125F).

The proposed tower is manufactured by Unarco-Rohn, Inc., one of the largest tower manufacturers in the United States. The witness testified that he had personal experience with hundreds of identical towers in the United States and abroad and that, to the best of his knowledge, such a tower had never failed (T. 89, 1188). In fact, Mr. Vlissides testified that he had heard of only one failure of a self-supporting tower of any type anywhere in the world and that this resulted from a direct hit by a tornado (T. 104).

RE: PETITION FOR SPECIAL EXCEPTION : IN THE CIRCUIT COURT
for a wireless transmitting tower and receiving structure 500' in height including a control house : FOR BALTIMORE COUNTY
E/S of Granite Road, 330' S. of : AT LAW
Marriottsville Road :
2nd District : Misc. Docket No. 13
Arthur R. Shaw, Jr., et ux, : Folio No. 207
Petitioners- Appellants :
Zoning Case No. 80-203-X : File No. M-7557

ANSWER TO PETITION FOR APPEAL

The People's Counsel for Baltimore County, Protestant below and Appellee herein, answers the Petition for Appeal heretofore filed by the Appellant, viz:

1. That the Appellee admits the allegations made and contained in the first paragraph of said Petition.
2. That the Appellee denies the allegations made and contained in the second through sixth paragraphs of said Petition and states affirmatively that the decision of the County Board of Appeals of Baltimore County herein was proper and justified by the evidence before it and that the decision of the Board should therefore be sustained as being properly and legally made.

AND AS IN DUTY BOUND, etc.,

John W. Hession, III
People's Counsel for Baltimore County
Peter Max Zimmerman
Deputy People's Counsel
Rm. 223, Court House
Towson, Maryland 21204
494-2188

I HEREBY CERTIFY that on this 8th day of April, 1981, a copy of the foregoing Answer to Petition for Appeal was mailed to H. Emslie Parks, Esquire, and Leland S. Van Koten, Wright & Parks, 409 Washington Avenue, Towson, Maryland 21204;

Mr. Vlissides testified that before the tower was in distress, winds would have to average for a one-hour period 112 miles per hour up to 300 feet and 122 miles per hour from 300 to 500 feet. Also, before being in distress, the tower could withstand gusts of up to 135 miles per hour up to 300 feet and 146 miles per hour from 300 to 500 feet. As an added safety factor, the tower is designed to withstand these wind loads with a 1/4 inch coating of heavy glaze ice on every exposed surface (T. 91-95).

Mr. Sol Hirsch, an experienced meteorologist, testified that the highest gusts which have ever been measured at the weather monitoring station at Baltimore-Washington International Airport were 80 miles per hour on two occasions in the early 1950's. At 33 feet above ground level, these would be equivalent to 67 miles per hour. Mr. Hirsch testified that winds at the site of the proposed tower would probably be slightly less than at BWI and that the tower site would certainly not be subject to any higher winds than BWI. Mr. Hirsch testified that according to estimates prepared by the National Bureau of Standards, the expected 100 year maximum winds are gusts of 74 miles per hour at 33 feet and 119 miles per hour at 500 feet, with the maximum expected one hour sustained winds being 63 miles per hour at 33 feet and 88 miles per hour at 500 feet. The comparable maximums expected in the next 300 years are gusts of 85 miles per hour at 33 feet and 128 miles per hour at 500 feet, with maximum sustained winds of 66 miles per hour at 33 feet and 97 miles per hour at 500 feet (T. 126-137).

Mr. Hirsch testified that heavy ice normally does not form during periods of high winds and that it would be virtually impossible for heavy glaze ice to form in winds which approached the maximum expected velocities since the water would blow off the tower before it had a chance to freeze (T. 154-5). Mr. Hirsch further testified that a tornado would do more damage to an enclosed structure such as a house than to an open structure such as the proposed tower (T. 158-9).

The combination of the engineering and meteorological testimony thus indicates that the proposed tower is designed to withstand conditions which

and to George W. Liebmann, Esquire, The Keyser Building, 207 E. Redwood Street, Baltimore, Maryland 21202, with a copy delivered to the Administrative Secretary, County Board of Appeals of Baltimore County, Rm. 219, Court House, Towson, Maryland 21204.

Peter Max Zimmerman
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APPELLANTS' MEMORANDUM OF LAW

STATEMENT OF FACTS

This matter is before the Court on an appeal from a denial by the County Board of Appeals of Baltimore County (hereinafter the "Board"), of Appellants' application for a Special Exception to permit the construction of a wireless transmitting and receiving tower at a location southeast of the intersection of Granite and Marriottsville Roads. The subject property is zoned R.C. 3, the zoning having been changed from D.R. 2 by the County Council subsequent to the hearing before the Zoning Commissioner but prior to the hearing before the Board. Wireless transmitting and receiving towers are permitted by special exception in both R.C. 3 and D.R. 2 zones.

The property which is the subject of this appeal is the residence of Appellants and has been for eighteen years (T. 191-192). Appellants testified that they intend to continue living on the property regardless of the decision on this case (T. 192, 194-5). The closest residence to the site of the proposed tower is that of the Appellants. The photographs which were introduced into evidence, both as Petitioners' exhibits and as People's Counsel's exhibits, indicate that the Appellants' residence is at least as large and well maintained as the others in the neighborhood and shown on the photographs.

Appellant Arthur R. Shaw, Jr., is the President of Shaw Bus Company, which operates a fleet of 38 school buses. The services provided by Shaw Bus Company include transportation of children who attend the School for the Deaf in Frederick, children who attend the Rosewood State School for

are much more severe than any which will likely exist in the Baltimore area in the next 300 years.

Mr. Vlissides testified that any heavy ice which formed on the tower would either slide down the tower itself or fall directly underneath the tower (T. 95-96). He testified that the tower would be equipped with devices to prevent climbing on the tower, and Mr. Shaw stipulated that he intended to install fencing around the tower and would be willing to have the special exception conditioned upon the provision of such fencing (T.120-121). Mr. Vlissides testified that the tower would actually reduce the possibility of lightning striking any nearby structures (T. 96). Mr. Vlissides stated that the proposed tower would not, in his opinion, pose any threat to the health or safety of residents of the surrounding community (T. 119).

Mr. Charles Suit, the radio technician whose testimony was previously mentioned, stated that transmissions from the tower would not cause interference with radio or television reception by the residents of neighboring properties (T. 76-77).

Mr. Brian McGraw, a real estate appraiser, testified that in his opinion the construction of the tower would not have an adverse effect on the value of neighboring properties. He indicated that the sales price of property in the vicinity of similar towers in western Baltimore County had not been affected by the proximity of such towers. Although counsel for protestants cross-examined Mr. McGraw concerning the extent of his research into the effect of towers upon the assessed valuations and subsequent sales prices of properties which were near towers, it is important to note that the protestants did not produce any affirmative evidence that the proximity to a tower had ever caused a reduction in assessed valuation or a reduction in the sales price of any property either in Baltimore County or elsewhere (T. 159-183).

Mr. Earl Holt, a resident of the neighborhood, testified that although he would have a clear view of the tower from his house, he did not think that it would reduce the value of his property and that he had no objection to the construction of the tower. Mr. Holt further testified that he had

worked for WBAL in the vicinity of that station's tower for a number of years and confirmed that there was no danger posed by ice blowing from a tower (T. 186-190).

No representative of any governmental agency appeared to testify that there was anything about the proposed tower which would be contrary to the public interest. A representative of the Office of Planning and Zoning did testify as a witness for the People's Counsel, but confined his testimony to the identification of various photographs.

The only testimony in opposition to the special exception came from residents of the area, who testified that they thought the tower would be an eyesore, that they were concerned about the possibility of their children climbing on the tower, that they were concerned about the safety of the tower, that they considered it to be unjustified to place a "commercial use" such as the proposed tower in a residential area and that they thought the presence of the tower would cause a reduction in the value of their property (T. 197-212, 218-231). One neighboring resident, who holds a 2d class FCC license and had some military experience in radio communication testified that he was concerned that the tower structure might interfere with radio and television reception in the neighborhood. This witness conceded, however, that he had no actual experience with tower structures and their effect upon radio and television reception and further testified that he had not used his FCC license in connection with his employment (T. 197-212).

With respect to the testimony of the Protestants, the Board found as follows:

"[N]either the County nor the Protestants presented credible expert testimony that property values would in fact be adversely affected. The Board is left with only the neighbors' feelings on the matter, one neighbor (a former tower technician) feeling no detrimental effect by the tower and the great majority of the remaining neighbors feeling severely aggrieved by the proposal as likely reducing the value of their property. One neighboring Protestant, who holds a 2nd class FCC license and related military experience in radio communications, testified that he was concerned that the tower structure might interfere with radio and television reception in the neighborhood. The Board, however, does not find great weight with his testimony in that we are not convinced that sufficient factual data was presented as a basis for his conclusion." Opinion of the Board, 3.