

AMENDED PETITION (2012)

AND

BOARD OF APPEALS ORDER (2013)

AND

ADMINISTRATIVE LAW JUDGE'S
ORDER (2012)

AND

RELATED DOCUMENTS (2012-2013)

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BALTIMORE COUNTY
BOARD OF APPEALS

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2495

September Term, 2013

BACK RIVER, LLC, ET AL.

v.

BALTIMORE COUNTY,
MARYLAND, ET AL.

Zarnoch,
Arthur,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: December 30, 2014

This appeal is the second appeal before this Court concerning the retention of a wireless telecommunications tower in Baltimore County.

In 2002, landowner Back River LLC and its tenant Sprint PCS (hereinafter collectively referred to as "Sprint")¹ constructed a cell tower on a commercially-zoned property. In an administrative proceeding before the County Board of Appeals, Sprint requested variances to permit noncompliance with a local zoning ordinance that required the tower to be "set back at least 200 feet from any other owner's residential property line." Baltimore County Zoning Regulations § 426.6.A.1. The Board rejected that request, a circuit court affirmed the decision, and this Court ultimately affirmed the judgment in an unreported opinion: *Sprint PCS v. Baltimore County*, No. 47, Sept. Term 2004 (filed Aug. 3, 2005).

In 2012, Sprint filed a petition for special hearing, asserting a new legal theory under which the existing tower was actually in compliance with the setback regulations. An administrative law judge ruled otherwise and also held that the new petition was barred under the doctrine of res judicata. Sprint appealed to the Board of Appeals, which dismissed the appeal on res judicata grounds. The circuit court affirmed that decision. Because the Board's determination was legally correct, we also affirm.

¹ During the course of this series of zoning cases, Sprint merged with Nextel Communications in 2005 to form Sprint Nextel Corporation. *See, e.g., In re Sprint Corp. ERISA Litig.*, 443 F. Supp. 2d 1249, 1256 (D. Kan. 2006).

FACTUAL AND PROCEDURAL BACKGROUND

A. The 1998 Zoning Regulations

In 1998, the County Council of Baltimore County enacted Bill 30-1998 ("An Act concerning Zoning – Wireless Telecommunications Towers and Antennas"). The act amended the Baltimore County Zoning Regulations ("BCZR") by establishing guidelines for the regulation of certain towers and antennas. Part of the express intent of the County Council was to ensure that any new wireless telecommunications towers would be located in commercial zones and would be "[l]ocated and designed to minimize [] visibility from residential and transitional zones." BCZR § 426.2.B.

To accomplish that purpose, the regulations imposed certain "setback" requirements² that restricted the placement of wireless telecommunications towers:

§ 426.6 Requirements for wireless communications towers.

A. Setbacks

1. If a tower is located in a residential zone, the tower shall be set back at least 200 feet from any other owner's residential property line.
2. If a tower is located in a transitional zone, the tower shall be set back at least 200 feet from any residential zone.
3. If a tower is located in a medium or high intensity commercial zone the tower shall be set back from an adjoining

² As used in the BCZR, the term "setback" is defined as the "required minimum horizontal distance between the building line . . . and the related front, side or rear property line." BCZR § 101.1.

property line a distance equal to the setback required for other structures in the zone. However, if the property adjoins a residential zone, the tower shall be set back at least 200 feet from the residential zone line.

4. A structure housing equipment for a tower shall meet the minimum setback requirements from any other owner's property or zone line.

The Act also authorized the Zoning Commissioner or the County Board of Appeals to "grant a variance to a height or area requirement, including any setback, for a tower or structure housing equipment for a tower[.]" in accordance with the overall standards for the granting of variances. BCZR § 426.11. The Commissioner and the Board are empowered to grant variances "only in cases where special circumstances or conditions exist that are peculiar to the land or structure which is the subject of the variance request and where strict compliance with the Zoning Regulations for Baltimore County would result in practical difficulty or unreasonable hardship." BCZR § 307.1.

B. Sprint's Petition for Variances

As of 2001, the property known as 810 Back River Neck Road in eastern Baltimore County was owned by Back River LLC. The surrounding area is heavily wooded. The property is located in close proximity to tributaries of the Chesapeake Bay. Most of the neighborhood falls within the Chesapeake Bay Critical Area and, accordingly is subject to significant restrictions from environmental regulations. *See generally* Md. Code (2000, 2012 Repl. Vol.), Natural Resources Art., §§ 8-1801 *et seq.*; Code of Maryland Regulations ("COMAR") 27.01; Baltimore County Code §§ 33-2-101 *et seq.*

In 2001, the parcel covered roughly 4.3 acres, in the shape of a rectangle about 223 feet in width and about 768 feet in length. A one-story commercial building stood at the east end of the property, with a retail storefront facing Back River Neck Road. The area behind that building was used for storage and other commercial purposes. The property was zoned as "Manufacturing, Light" or "M.L.," a medium-intensity, commercial classification that permits certain industrial, retail, transportation, storage, and other related uses. *See* BCZR § 253.1. Operating a wireless telecommunications tower on M.L. property is permitted by right, subject to the setback requirements. *See* BCZR §§ 253.1.B.23, 426.5.D.

Back River LLC leased part of the property to Sprint PCS, a telecommunications provider. Sprint PCS had selected the property as a potential location for a cell tower to fill a gap in its cellular coverage network. The two companies planned to construct a 115-foot tower near the west end of the property. The three adjoining properties to the north, west, and south, were each zoned under a residential zoning classification "R.C. 20," meaning "Resource Conservation – Critical Area." *See* BCZR § 1A05.³

In October 2001, Back River LLC and Sprint PCS (collectively "Sprint") filed a petition seeking a number of variances to accommodate construction of the proposed tower. Specifically, Sprint sought relief from BCZR § 426.6.A.3, to permit setbacks for the

³ In general, permitted uses of R.C. 20 property include residential uses as well as natural resources, agricultural, recreational, institutional, and other public or quasi-public uses. *See* BCZR § 1A05.2. A special exception is required to use R.C. 20 property for a wireless telecommunications tower. *See* BCZR §§ 1A05.2.C.8, 426.5.D.

proposed tower of 148 feet from the northern property line, 75 feet from the western property line, and 75 feet from the southern property line, each in lieu of the required 200 feet "from the residential zone line." In addition, Sprint requested variances to permit setbacks for equipment cabinets supporting the proposed tower, of 40 feet each from the west and south property lines, in lieu of the 125 feet for those structures required by BCZR § 426.6.A.4.

After a hearing, the Zoning Commissioner for Baltimore County granted the requested variances. The Commissioner reasoned that compliance with the zoning regulations would not be possible on the site. In his January 4, 2002, order granting the variances, he wrote: "Although the property contains in excess of 4.0 acres in area, it is but 223 feet wide. Section 426.6 of the B.C.Z.R. requires a 200-foot setback from the nearest property line to the tower. In view of the width of the property, this setback cannot be maintained." Nonetheless, the Commissioner reasoned that the narrowness of the property made compliance uniquely difficult, and thus he concluded that variances from the setback requirements were appropriate.

The Office of People's Counsel filed a timely appeal from that decision.

C. The 2002 Amendment to the Zoning Regulations

In March 2002, while the appeal of the variance decision was pending, the County Council enacted Bill 17-2002 ("An Act concerning Wireless Telecommunications Towers – Setbacks"). The stated purpose of the act was to "revis[e] the setback requirements for wireless telecommunications towers" by repealing and reenacting § 426.6.A of the BCZR.

As amended, the regulation provided:

§ 426.6 Setback requirements for wireless telecommunications towers.

A. Setbacks

1. A tower shall be set back at least 200 feet from any other owner's residential property line.
2. A structure housing equipment for a tower shall meet the minimum setback requirements from any other owner's property or zone line.

The amendment took effect on May 5, 2002. In effect, the amendment simplified the setback requirements by combining subsections (1) through (3) into a single subsection. Those previous subsections had drawn distinctions between towers that were located in residential zones, towers that were located in transitional zones, and towers that were located in medium or high-intensity commercial zones. In each instance, however, the previous subsections permitted the tower if it were set back at least 200 feet from either a "residential property line" (in the case of a tower in a residential zone) or a "residential zone line" (in the case of a tower outside of a residential zone). Perhaps because the laborious distinctions were largely immaterial, the 2002 amendment replaced the three subsections with a single, new subsection that required towers, wherever they were located, to be set back at least 200 feet from a "residential property line."

On May 7, 2002, two days after the adoption of the amended setback requirements, the Baltimore County Department of Environmental Protection and Resource Management requested that Sprint change its site plan to minimize its environmental impact on nearby

bodies of water. Subsequently, Sprint revised its site plan, by relocating the proposed tower 60 feet to the east. Sprint submitted a revised variance request to the Board of Appeals, referring to the new setback regulations as they had been amended and renumbered by Bill 17-2002. With the administrative appeal still pending, Sprint then constructed the tower at its own risk.

D. Reversal of Order Granting Variances (“Back River I”)

The Baltimore County Board of Appeals conducted a de novo hearing on Sprint’s variance petition on September 25, 2002, and January 21, 2003. The Board issued an opinion on May 14, 2003, denying the requested variances. The Board rejected Sprint’s arguments that “special circumstances or conditions exist[ed] that [were] peculiar to the land” (BCZR § 307.1) and that the property’s shape made it “unique” under the meaning established by *Cromwell v. Ward*, 102 Md. App. 691 (1995). The Board specified that it was “not denying Sprint the right to erect a telecommunications tower in the . . . area,” but “only saying that there may be a more appropriate piece of property where the tower could be erected and not require the variances that would be necessary on the instant property.”

Subsequently, Sprint petitioned for judicial review of the Board’s decision in the Circuit Court for Baltimore County. The circuit court affirmed the decision on February 5, 2004. Sprint appealed to the Court of Special Appeals, and this Court affirmed that judgment in an unreported opinion: *Sprint PCS v. Baltimore County*, No. 47, Sept. Term 2004 (filed Aug. 3, 2005).

Both the circuit court and this Court held that the Board's conclusion – namely, that the property possessed no “unique” characteristics that would justify variance relief – was supported by substantial evidence. Judge Adkins explained: “[I]f we were to hold that a variance must be granted, simply because a property cannot accommodate one otherwise permitted use without an area variance, we would be permitting ‘the exception to swallow the rule.’” *Sprint PCS*, slip op. at 30-31.

D. Subsequent Developments

Despite the denial of Sprint's request for a variance, the tower remained on the property over the years that followed while the owners attempted to cure the setback deficiencies by acquiring land from the adjacent properties. In February 2008, Back River LLC purchased portions of the properties to the north and to west of the tower. With the additional acreage (approximately 0.6 additional acres), the tower is now located more than 200 feet from the northern property line and more than 200 feet from the western property line. However, Back River LLC was unable to purchase any of the land to the south of the tower. The tower continues to stand approximately 75 feet from the southern property line.

In May 2008, Sprint filed a petition for special hearing to permit a transfer of the portions of the property zoned R.C. 20 (*i.e.*, the property that had been purchased from the two adjacent parcels) into the property zoned M.L.; the transfer, if approved, would have had the effect of incorporating the newly-acquired property into the commercially-zoned property, thereby moving the “residential property line” farther away from the tower. Sprint

also filed a petition for special exception to increase the height of the existing tower from 115 feet to 125 feet. At the parties' request, consideration of those petitions was postponed, and a hearing was never rescheduled.

In November 2008, the Baltimore County Department of Permits and Development Management issued a citation to Back River LLC "for violations under [BCZR] § 426.6.A.1, failure to provide and maintain [a] 200 ft. set back from another's residential property line[.]" In January 2009, the County's Code Enforcement Hearing Officer issued a civil penalty of \$9,200.00 for the zoning violation, which Sprint paid.⁴

E. Sprint's Amended Petition for Special Hearing ("Back River II")

In May 2012, Sprint filed an amended petition for special hearing, in which Sprint requested additional relief: "To confirm that an existing cellular tower is in compliance with setback and all other applicable zoning regulations[.]"⁵ Both the Office of People's Counsel and Baltimore County opposed the petition.

⁴ Findings of fact from the Code Enforcement Hearing Officer indicate that Back River LLC had reached an "agreement with family members [who owned the property to the south] to purchase [the] final piece of real estate needed to meet [the] set back requirement," but that the sale had not been finalized. The record here includes no indication that the sale and transfer were ever completed.

⁵ Beginning with the 2012 amended petition and continuing through this appeal, Sprint has been represented by Lawrence E. Schmidt. Mr. Schmidt was the Zoning Commissioner whose ruling was reversed by the Board of Appeals in the 2002 decision that both the circuit court and this Court later upheld.

The hearing was conducted before the Office of Administrative Hearings for Baltimore County.⁶ Sprint advanced the new theory that the location of the tower complied with BCZR § 426.6, as it had been amended in 2002 to require that a tower be “set back at least 200 feet from any other owner’s residential property line.” Sprint presented testimony that no residence was currently located on the residentially-zoned property 75 feet south of the tower. A witness for Sprint purported to opine that the zoning regulations require a 200-foot setback from an adjacent property line only if that property has actually been improved with a dwelling and is currently used as a residence.

In an opinion issued on August 2, 2012, the Administrative Law Judge denied Sprint’s petition. The ALJ determined that the placement of the tower did not comply with the zoning regulations and also that the doctrine of res judicata barred Sprint from obtaining special hearing relief after the prior denial of its variance petition.

Sprint appealed the denial of its petition to the Board of Appeals. Baltimore County and the Office of People’s Counsel jointly moved to dismiss the appeal on the grounds of res judicata. The Board of Appeals did not hear testimony, but instead accepted memoranda and considered oral arguments from the parties at a hearing on December 4, 2012. The Board

⁶ In 2010, the County Council established the Office of Administrative Hearings, and authorized the administrative law judges of that Office to conduct zoning hearings and to exercise the powers formerly vested in the Zoning Commissioner. See Baltimore County Code §§ 3-12-101 *et seq.*

considered exhibits, including copies of the 2002 legislation and this Court's opinion in the prior variance case.

Sprint argued that it was not precluded from raising its claim, because (Sprint contended) it was advancing a legal theory (regarding the 2002 amendments) that had somehow not been available at the time of the administrative and judicial appeals from its variance petition from 2002 through 2005. Sprint's primary contention was that, in the prior proceedings, "neither the Board of Appeals, the Circuit Court, nor the Court of Special Appeals considered the impact of [the] change in law" that occurred while the prior administrative appeal was pending in 2002.

In an opinion and order dated April 19, 2013, the Board of Appeals concluded that res judicata barred Sprint's petition from bringing its petition for special hearing after the denial of the variance petition, because "the end result being [] sought as well as the underlying facts which are contained in both avenues of relief are the same[.]"⁷ The Board further rejected Sprint's argument that a change of circumstances after the initial litigation justified an exception to the rule of res judicata.

After examining the 2002 amendment, the Board expressly rejected Sprint's argument that the current version of the law "bears little resemblance" to the law in effect at the time of the initial variance proceeding before the Zoning Commissioner. Although the 2002

⁷ Although the Board's opinion noted that Back River LLC had received a code enforcement citation for violating the setback requirements of BCZR § 426.6.A.1, the Board's analysis focused only on the preclusive effect of the variance decisions.

amendment changed the setback requirement from 200 feet from the “residential zone line” in former § 426.6.A(3) to 200 feet from the “residential property line” in amended § 426.6.A(1), the Board reasoned that the change made no substantive difference:

The terms ‘property line’ and ‘zoning line’ do refer to different things, but here the distinction is not relevant because the tower is not set back 200' from either the RC 20 “zone line” or the “property line” of the adjacent parcel. . . . [E]ven if the new version of the law were deemed slightly changed, its current terminology still bars [Sprint] from its present request for relief no matter what label that request for relief has taken on.

Accordingly, the Board granted the County’s motion to dismiss Sprint’s appeal.

Sprint petitioned for judicial review of the Board’s decision in the Circuit Court for Baltimore County. After another hearing, the circuit court issued an order on January 10, 2014, denying the petition for judicial review and affirming the decision of the Board of Appeals. Finally, Sprint filed a timely appeal of that judgment to this Court.

SCOPE OF REVIEW

Sprint has submitted four questions for our review, which we now quote verbatim:

- I. Did the Board properly apply the current setback requirements to the property at issue?
- II. Did the Board err in dismissing Sprint’s petition for special hearing as barred by res judicata, considering that the Board refused to hear evidence necessary to analyze whether Back River I and Back River II present different causes of action?
- III. Does the Board’s failure to conduct a de novo hearing and fully explain its reasons for its decision constitute reversible error?

IV. Is the circuit court's failure to issue a written decision reversible error pursuant to the Land Use Article of the Annotated Code Section 4-405?

The fourth question concerns an isolated procedural issue; the first three questions are closely interconnected.

The scope of our review of an agency's decision is defined by the record. "[I]n examining the record made below, we do not engage in an independent analysis of the evidence, . . . and we proceed from the premise that an agency's decision is prima facie correct and presumed valid[.]" *Montgomery Cnty. v. Butler*, 417 Md. 271, 284 (2010) (citations and quotation marks omitted). Ordinarily, "[o]ur role in reviewing the final decision of an administrative agency, such as the Board of Appeals, is 'limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.'" *Critical Area Comm'n for Chesapeake & Atl. Coastal Bays v. Moreland, LLC*, 418 Md. 111, 122-23 (2011) (quoting *Maryland Aviation Admin. v. Noland*, 386 Md. 556, 571 (2005)). "When reviewing the decision of a local zoning body, such as the Board, we evaluate directly the agency decision, and, in doing so, we apply the same standards of review as the circuit court[.]" *Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel for Baltimore Cnty.*, 407 Md. 53, 77 (2008).

Judicial review of an agency action typically concerns the narrow question of whether or not the agency order can be sustained on the agency's findings and for the reasons stated by the agency. See *Armstrong v. Mayor & City Council of Baltimore*, 410 Md. 426, 443,

461-62 (2009) (quoting *Trinity Assembly*, 407 Md. at 77-78). In general, it is improper for the reviewing court to search the record for alternative grounds to sustain the agency's decision other than those reasons relied upon by the agency. See *Anselmo v. Mayor & City Council of Rockville*, 196 Md. App. 115, 128 (2010).

The Board summarized its conclusion as follows: "As this Board is not swayed by the Petitioners' argument that this case involves an exception to the doctrine of res judicata, and somehow involves the application of new law that would change the outcome of prior decisions in this matter, the Motion to Dismiss filed by Baltimore County and joined by People's Counsel is GRANTED." By its own terms, the decision currently under review is not a denial of special hearing relief, but a dismissal of Sprint's appeal on the grounds of res judicata.⁸ When the Board interpreted BCZR § 426.6, it did so within the narrow context of rejecting Sprint's argument that a significant "change in law" had occurred after the original litigation. Accordingly, it would be inappropriate for this Court to conduct an unbridled examination of the zoning regulations outside of the res judicata issue.

In *Seminary Galleria, LLC v. Dulaney Valley Improvement Ass'n, Inc.*, 192 Md. App. 719 (2010), this Court considered the question of "[w]hether an administrative agency's determination of the applicability of the doctrine of *res judicata* should be assessed pursuant

⁸ Sprint's brief evidently concedes as much, by correctly stating: "Although the Board analyzed the amendment of BCZR § 426.6 in its written opinion, its[] decision granting Baltimore County's Motion to Dismiss was based upon the application of the doctrine of *res judicata*." Appellants' Br. at 17.

to the substantial evidence standard of review[.]” *Id.* at 722. The *Seminary* case concerned the preclusive effect of the denial of a petition for special hearing (and alternatively for variances) on a subsequent petition to legitimize the same use on the same property. The appellant contended that an administrative ruling on res judicata was “a mixed question of law and fact” that required review for reasonableness under the substantial evidence test. *Id.* at 734.

Our opinion recognized that the default standard of review of an administrative agency’s decision is narrow and highly deferential. *Id.* at 733. Nevertheless, we held that the issue of whether res judicata barred the second special hearing petition was a question of law and that it was appropriate to conduct a plenary, de novo review of the Board’s legal conclusion on that issue. *Id.* at 734. In doing so, we also “reject[ed] the appellant’s implied assertion that the agency was required to resolve any disputed factual issue in th[e] case in order to determine whether the doctrine of *res judicata* was applicable.” *Id.* at 722-23.

Accordingly, we will consider de novo the following questions, which we consolidate and restate in this form:

- I. Did the Board err in dismissing Sprint’s appeal from the denial of Sprint’s petition for special hearing as barred by res judicata?
- II. Is the circuit court’s failure to issue a written decision reversible error pursuant to Md. Code (2012), § 4-405 of the Land Use Article?

As explained below, the answer to both questions is, no. Because we determine that the Board’s legal conclusion was correct and also that the circuit court was not required to

issue a written opinion, it is unnecessary to remand to either body to receive additional evidence or to provide more detailed reasoning.

DISCUSSION

I.

A. The Doctrine of Res Judicata

“[I]t is crystal clear that a final judgment of a circuit court affirming a decision of an administrative agency . . . is entitled to full preclusive effect.” *Esslinger v. Baltimore City*, 95 Md. App. 607, 621 (1993); *see also Stavelly v. State Farm Mut. Auto. Ins. Co.*, 376 Md. 108, 116 (2003) (holding that, under principles of res judicata, earlier agency determination that is affirmed by Court of Special Appeals binds agency in later controversy between same parties).

A long and uninterrupted line of Maryland cases has established that a circuit court judgment affirming a decision by a local zoning body will bar a subsequent attempt to relitigate the matter, where there is only a slight distinction in the form of the second action. *See Fertitta v. Brown*, 252 Md. 594, 599 (1969) (prior determination that particular use of property violated zoning ordinance barred later action seeking declaratory relief to legitimize same use even if prior determination is unsound); *Alvey v. Hedln*, 243 Md. 334, 340 (1966) (appellants barred from second attempt to allege mistake in original zoning of land even though appellants were “attempting to get a different type of commercial classification than in the first case”); *Whittle v. Bd. of Zoning Appeals of Baltimore Cnty.*, 211 Md. 36, 48-49

(1956) (prior adverse ruling on permit application barred later permit application that attached additional conditions); *Bensel v. Mayor & City Council of Baltimore*, 203 Md. 506, 508-17 (1954) (denial of permit for nonconforming use barred subsequent action seeking to enjoin City from interfering with nonconforming use); *Mayor & City Council of Baltimore v. Linthicum*, 170 Md. 245, 249-50 (1936) (denial of prior application to allow proposed use of lot disposed of questions in subsequent application based on different theory); *see also Century I Condo. Ass'n, Inc. v. Plaza Condo. Joint Venture*, 64 Md. App. 107, 113-14 (1985) (earlier decision governing use exceptions acted as res judicata in later case involving building permit for same structure).

Generally, the doctrine of res judicata precludes a party from raising a claim in a second litigation “if there is a final judgment in a previous litigation where the parties, the subject matter and causes of action are identical or substantially identical as to issues actually litigated and as to those which could have or should have been raised in the previous litigation.” *Cochran v. Griffith Energy Servs., Inc.*, 426 Md. 134, 140 (2012) (quoting *R & D 2001, LLC v. Rice*, 402 Md. 648, 663 (2008)). Res judicata, or claim preclusion, “ensures that courts do not waste time adjudicating matters which have been decided or *could have been* decided fully and fairly.” *Anne Arundel Cnty. Bd. of Educ. v. Norville*, 390 Md. 93, 107 (2005) (emphasis in original). For this reason, the final judgment in a prior litigation will bind the parties even if a ruling in the original litigation is found later to be in error. *Powell v. Breslin*, 430 Md. 52, 64-65 (2013).

As the Court of Appeals has summarized, the doctrine of res judicata embodies three elements:

(1) the parties in the present litigation are the same or in privity with the parties to the earlier litigation; (2) the claim presented in the current action is identical to that determined or that which could have been raised and determined in the prior litigation; and (3) there was a final judgment on the merits in the prior litigation.

Rice, 402 Md. at 663.

In this case, Sprint concedes that the first and third elements are present: the parties to its special hearing petition are substantially identical to the parties to the original action, which concluded in a final judgment on the merits. Sprint argues only that the claim presented in its current action could not have been raised and determined in the prior litigation.

B. Identity of Claims

To determine whether a case involves the same claims that were or could have been decided in earlier litigation, Maryland has adopted the "transaction test," set forth in § 24 of the Restatement (Second) of Judgments. *See Kent Cnty. Bd. of Educ. v. Bilbrough*, 309 Md. 487, 499-500 (1987). "Under the transaction test, what factual grouping constitutes a 'transaction' and what groupings constitute a series of connected 'transactions' are to be determined 'pragmatically, giving weight to such considerations as whether facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or

usage.” *Boyd v. Bowen*, 145 Md. App. 635, 656 (2002) (quoting *Bilbrough*, 309 Md. at 498). Under this approach, “if the two claims or theories are based upon the same set of facts and one would expect them to be tried together ordinarily, then a party must bring them simultaneously.” *Norville*, 390 Md. at 109. The modern view is that the dimensions of a claim are measured in factual terms, “regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the [litigant]; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights.” *Bilbrough*, 309 Md. at 497-98 (quoting Restatement (Second) of Judgments § 24, cmt. a).

Under that approach, we must conclude that the claim raised in Sprint’s 2012 petition for special hearing (“[t]o confirm that an existing cellular tower is in compliance with setback and all other applicable zoning regulations”) is substantially identical to a claim that could have been raised and determined in the earlier litigation. When Sprint came before the Board in 2002, Sprint sought variances from the same setback regulations to permit retention of the same cell tower in the same location. The two petitions involve a single transaction: Sprint’s attempt to secure permission from the local zoning bodies to retain a wireless telecommunications tower on the property.

Appellees in this case have pointed to no Maryland authority specifically holding that a property owner’s petition seeking to confirm compliance with zoning regulations involves the “same claim,” for res judicata purposes, as an earlier petition seeking variances from the

same zoning regulations. Nonetheless, that holding is compelled by the reasoning under comparable circumstances in three cases: *Jack v. Foster Branch Homeowners Ass'n No. 1, Inc.*, 53 Md. App. 325, 334 (1982), which reasoned that, under the transaction approach, a request for modification, reduction, or waiver of zoning regulations presents the same cause of action as an earlier petition for variance from the same zoning regulations; *Esslinger*, 95 Md. App. at 618, which adopted the transaction approach and held that claims for declaratory relief to allow a nonconforming use on a property presented the same claim as earlier zoning action seeking a permit for the same use; and *Seminary Galleria*, 192 Md. App. at 741-42, which held that even though a property owner's second special hearing petition involved a different zoning regulation from the regulation involved in the first, both petitions involved the same claim for approval of the same use.

In *Jack*, this Court considered the preclusive effect of a prior denial of a variance petition. The property owner in that case, Dr. Joseph Jack, operated a professional office at his residence, but did not furnish the off-street parking spaces required by a local zoning ordinance. *Jack*, 53 Md. App. at 327. Jack's application for variances was ultimately denied in a judgment of a circuit court. *Id.* at 330. A year later, Jack attempted to legitimize the use of his property through a different provision of the local zoning ordinance, by applying for a modification, reduction, or waiver of the parking requirements. *Id.*

On review of a circuit court's denial of the second application on grounds of res judicata, this Court reasoned:

[I]f the transactional analysis espoused by the American Law Institute is applied, *Restatements (Second) of Judgments*, § 24 (1982), the appellees would prevail. Here, the "transactions" would be attempts to secure permission to operate with less than eight off-street parking spaces, and would be the same in each proceeding.

Jack, 53 Md. App. at 334. Nevertheless, we noted that the rule for determining the identity of claims was, at that time, the "same evidence" test. *Id.* (citing *MPC, Inc. v. Kenny*, 279 Md. 29 (1977)). Because this Court reasoned that the evidence necessary to sustain the variance action was not identical to the evidence necessary to support the second action, we held that res judicata did not bar Jack's claims. *Id.* at 334-36.

A few years later, however, the Court of Appeals endorsed the transactional approach when it decided *Bilbrough*. In adopting § 24 of the Restatement (Second) of Judgments, the Court expressed concern that "sole reliance on the same evidence or required evidence analysis to determine if the same claim is involved in two actions may improperly narrow the scope of a 'claim' in the preclusion context." *Id.* at 494.

Accordingly, the analysis evolved when this Court decided *Esslinger*. The property owner in that case, Donald Esslinger installed a free-standing satellite dish on his property. *Esslinger*, 95 Md. App. at 610. The City's Zoning Board denied three separate applications for a special exception to permit him to erect or retain the satellite dish. The denial of the first application was ultimately affirmed by a circuit court, and the denial of the last application was ultimately affirmed by this Court. *Id.* at 610-12. Later, Esslinger instituted an action pursuant to 42 U.S.C. § 1983, in which he alleged that the City's refusal to allow

him to erect and maintain a satellite receiving dish violated various constitutional rights. *Id.* at 613-14.

Much like the property owner in *Jack*, Esslinger argued that res judicata did not apply to the second action under the "same evidence" test. On review, however, we rejected that position, because the Court of Appeals had since approved of the transactional approach. *See Esslinger*, 95 Md. App. at 617 (citing *Bilbrough*, 309 Md. at 494, 498). We explained:

Under the "transaction" approach, it is clear that the claim in the 1987 zoning case is identical to the present claim. Indeed, it is undisputed that both arise from precisely the same transaction, i.e., Esslinger's attempt to place a free-standing satellite dish on his property. The facts of the two actions are thus related in "space, origin and motivation." Both involve Esslinger's request for and the Zoning Board's denial of a conditional use permit to allow the same satellite dish on the same property. The only difference between the 1987 zoning action and the 1992 civil rights action is that the latter protests a 1989 Zoning Board decision not to grant Esslinger a conditional use permit so that he could *erect* the dish and the former involved a 1986 Zoning Board decision not to grant Esslinger a conditional use permit so that he could *retain* the same dish. Maryland courts have long recognized that such small differences in the posture of the zoning request do not prevent application of *res judicata*.

Esslinger, 95 Md. App. at 618-19 (footnote omitted).

Accordingly, we held that res judicata barred Esslinger's claims for declaratory and injunctive relief, because he could have asserted those claims as the basis for overturning the original zoning decision. *Id.* at 620-24.

This Court further explained that "[b]oth § 24 of the Restatement and the Court of Appeals in approving the transactional test . . . make it clear that '[e]quating claim with

transaction' is 'justified only when the parties have ample procedural means for fully developing the entire transaction in the one action going to the merits to which the plaintiff is ordinarily confined.'" *Id.* at 619 (quoting *Bilbrough*, 309 Md. at 499). We reasoned that Esslinger could have obtained declaratory and injunctive relief from the circuit court in the earlier litigation, but that he could not have joined a claim for monetary damages to a petition for judicial review of the original zoning actions. *Esslinger*, 95 Md. App. at 623-24. "Accordingly, although Esslinger's claims for injunctive and declaratory relief[were] barred by *res judicata*, his claims for damages [were] not barred by *res judicata* since the latter could not have been asserted in the circuit court action reviewing the initial zoning case." *Id.* at 624.

In the instant case, the claim raised in Sprint's petition is not a claim for monetary relief, but one for relief of a declaratory nature. See *Antwerpen v. Baltimore Cnty.*, 163 Md. App. 194, 200 (2005) ("[a] request for special hearing is, in legal effect, a request for a declaratory judgment"). Under the reasoning of *Esslinger*, Sprint possessed sufficient procedural means to pursue a declaratory remedy when the circuit court reviewed the earlier zoning decision. Thus, *res judicata* bars the attempt to seek declaratory relief upon the same legal theory that a party could have asserted during a circuit court's review of a prior zoning case. See *Esslinger*, 95 Md. App. at 624.

This Court's more recent opinion in *Seminary Galleria* fortifies the conclusion that the claims raised in Sprint's two petitions are identical for the purposes of *res judicata*. In

that case, the property owner, Seminary, created 14 new parking spaces in a residentially-zoned portion of its property, without obtaining a permit. *Seminary Galleria*, 192 Md. App. at 723. Seminary then sought retroactive approval of the construction of the parking spaces, by filing a petition for special hearing and alternatively for a variance. *Id.* at 724. The Board of Appeals entered a final order denying the first request, and then Seminary filed a slightly different petition. *Id.* at 726-27. Seminary attempted to differentiate the new petition by introducing a new legal theory: that another section of the BCZR actually required Seminary to furnish the additional parking and that Seminary should be allowed to meet those minimum parking requirements to the extent possible. *Id.* at 727. The Board of Appeals held that Seminary was not precluded from bringing the second petition, and then it approved the parking plan. *Id.* at 729-30.

On review, this Court disagreed with that decision and held that Seminary was precluded from raising the claim in its second petition. We first concluded that the Board's final order in the first petition was entitled to preclusive effect, noting that "[t]he issue of whether the 14 parking spaces could remain was actually litigated" in the first litigation, and "[t]he ruling was necessary to – indeed, the essence of – the Board's decision" in the first case. *Id.* at 736. Despite the slight distinctions in Seminary's two requests, we reasoned that, "[i]n both cases, Seminary's request for relief was the retroactive approval of the same 14 spaces it had constructed in the [residential] zone." *Id.* at 741. The dispositive issue was that, "[w]ith reasonable diligence, Seminary could have discovered and asserted in support

of the original [] filing” the same evidence and legal theory that it raised in its later filing. *Id.* at 741-42. In other words, “Seminary’s failure to accurately and contemporaneously survey the Galleria in connection with its first application to approve the additional spaces [was] not a reason to consider a second application seeking the same relief.” *Id.* at 742.⁹

Sprint nonetheless contends that *res judicata* is inapplicable here. In support of that position, Sprint advances a number of overlapping arguments that fall into two general categories: (1) that, as a factual matter, the 2002 amendment to the applicable zoning regulations *was not* considered at the time of the earlier variance proceedings; and (2) that, as a legal matter, Sprint *could not* have asserted its current theory to obtain relief at the earlier proceedings. Sprint’s first argument involves an erroneous characterization of the record; the second argument involves an erroneous interpretation of the law.

C. Prior Consideration of the Amended Regulation

During Sprint’s original variance action, the Zoning Commissioner, the Baltimore County Board of Appeals, the Circuit Court for Baltimore County, and the Court of Special Appeals (in addition to each of the parties, including Sprint) all independently agreed that

⁹ The *Seminary* Court did not expressly apply either the “same evidence” test or the transactional approach. *See Seminary Galleria*, 192 Md. App. at 741. Instead, the Court focused on the availability of the evidence and legal theory during the earlier litigation. The Court reasoned that the result was controlled by prior case law that precludes successive zoning applications as a general matter in the absence of any substantial change in circumstances. *See id.* at 740 (citing *Alvey v. Hedin*, 243 Md. 334 (1966); *Chatham Corp. v. Beltram*, 243 Md. 138 (1966); *Woodlawn Area Citizens Ass’n v. Bd. of Cnty. Comm’rs for Prince George’s Cnty.*, 241 Md. 187 (1966)).

the placement of the tower violated the existing zoning regulations. Each of these prior decisions “hinged on the presumption” (Appellants’ Br. at 5) that the BCZR required that the tower be set back 200 feet from each of the three property lines to the north, west, and south. Sprint now posits that, under its new interpretation of the 2002 amendment, this presumption must have been mistaken.

The foundation of Sprint’s position is Sprint’s contention that “it is apparent that the Board of Appeals, the Circuit Court, and the Court of Special Appeals each failed to consider the impact of th[e] change in the law” that allegedly resulted from the 2002 amendment. Appellants’ Br. at 9-10. Sprint suggests that those prior administrative and judicial determinations were reviewed under the language of the earlier, 1998 regulation that predated the 2002 amendment: “Given the absence of any specific language stating, ‘the law has been amended since this case was instituted’ or ‘Bill 17-02 has been enacted’; it is apparent that this amendment to the law (and most importantly, its impact on this case) was never considered by any of the administrative and judicial bodies that considered Sprint’s variance petition in *Back River I.*” Appellants’ Br. at 10.

This theory of the record is fundamental to Sprint’s appeal. It is also incorrect.

To illustrate how and why Sprint’s theory is incorrect, some facts bear repeating. At the 2001 hearing, before the Zoning Commissioner, Sprint originally requested variances under the zoning regulations that had been enacted by the 1998 bill. In particular, Sprint requested variances from § 426.6.A.3, which had required that, “if the [commercially-zoned]

property adjoins a residential zone, the tower shall be set back at least 200 feet from the residential zone line"; and a variance from § 426.6.A.4, which had required "a structure housing equipment for a tower shall meet the minimum setback requirements from any other owner's property or zone line."

While an appeal was pending before the Board of Appeals, Baltimore County amended § 426.6.A.4. The amendment, which took effect on May 5, 2002, re-codified former subsections A.1, A.2., and A.3 into a single standard in a new subsection A.1: "A tower shall be set back at least 200 feet from any other owner's residential property line." The amendment also renumbered former subsection A.4 (concerning setbacks from the equipment structures supporting a tower) as current subsection A.2.

After the effective date of the 2002 amendment, Sprint relocated the proposed tower site an additional 60 feet from the western property line. Subsequently, Sprint submitted a memorandum to the Board of Appeals that included its revised variance requests. The very first page of Sprint's 2002 memorandum explained: "the Baltimore County Council adopted Bill 17-2002 which revised BCZR § 426 such that the references within BCZR § 426.6.A for setbacks, which are the subject of Sprint's Petition for Variance, have been re-numbered." In the same memorandum, Sprint notified the Board of its requested variances from subsections A.1 and A.2, for reduced setbacks to the neighboring property lines, "in light of the revisions to BCZR § 426 pursuant to Bill 17-2002[.]" In other words, in Sprint's

memorandum to the Board of Appeals, Sprint presumed that the 2002 amendments governed the appeal.

On September 25, 2002, more than four months after the effective date of the 2002 amendment, the Board of Appeals conducted a hearing to consider Sprint's revised variance requests. During the administrative appeal, the Board was required to apply the updated regulations. *See Scrimgeour v. Fox Harbor, LLC*, 410 Md. 230, 240-41 (2009); *Layton v. Howard Cnty. Bd. of Appeals*, 399 Md. 36, 38 (2007) (re-affirming that, under the rule established by *Yorktown Corp. v. Powell*, 237 Md. 121 (1964), a "legislated change of pertinent law, which occur[ed] during the ongoing litigation of a land use or zoning case, generally, shall be retrospectively applied").¹⁰

The text of the Board's 2003 opinion, in which the Board rejected Sprint's variance request, confirms that the Board considered the setback regulation as it had been amended and renumbered in 2002. The Board specifically noted that Sprint had originally requested variances under subsections A.3 and A.4, but that Sprint itself later revised its plan and requested variances under the renumbered subsections A.1 and A.2. The Board's opinion includes no references to the term "residential zone line," from the 1998 version of the regulation. Instead, employing the language of the 2002 amendment, the Board referred only

¹⁰ The *Yorkdale* rule, which "provides for the retrospective application of changes to statutes that impact land use issues made during the course of litigation in land use and zoning cases" (*see Layton*, 399 Md. at 51), affects not only the Board of Appeals, but also the circuit court and the appellate courts. *See id.* at 69.

to the required 200-foot setbacks from each “property line” to the north, west, and south. In short, the Board did exactly what it was required to do in 2002: it evaluated Sprint’s revised variance requests with reference to the setback requirements of the zoning regulation in effect at the time – the 2002 amendments.¹¹

In Sprint’s 2003 petition for judicial review, Sprint also informed the circuit court of the 2002 amendment, and Sprint quoted in full the updated sub-sections 426.6.A.1 and A.2, under the heading “Applicable Zoning Regulations.” Similarly, in Sprint’s 2004 appellate brief in its unsuccessful appeal to the Court of Special Appeals, Sprint again stated its requests for variances from subsections A.1 and A.2 “in light of the revisions of BCZR § 426 pursuant to Bill 17-2002[.]” The appendix to Sprint’s brief even included the full text of the regulation, expressly as amended by “Bill No. 17-2002.”

This Court’s unreported opinion, authored by Judge Adkins, accurately cited the number of the subsection at issue. *Sprint PCS*, slip op. at 8 (citing “BCZR 426.6.A.1,” and explaining that, in contrast to the factors considered for standard setbacks under the BCZR, “a wireless telecommunications tower on such a site must satisfy a greater setback – at least

¹¹ In an unconvincing exercise in sophistry, Sprint now contends that the Board’s use of the phrase “property line” reveals that the Board actually must have been considering the location of the “residential zone line” under the pre-2002 legislation. Sprint theorizes that Zoning Commissioner had (imprecisely) referred to a “property line” in describing the setback required from the “residential zoning line” under the pre-2002 requirements. Sprint then theorizes that, in referring to the “property line,” the Board of Appeals was not employing the language of the 2002 amendment (which refers to the “residential property line”), but was replicating the Zoning Commissioner’s erroneous formulation of the pre-2002 legislation. We reject Sprint’s convoluted argument.

200 feet from any residential boundary"). Later, the opinion even quoted the amended language: "The ML zone permits cellular towers by right, subject to a 200 foot setback requirement 'from any other owner's residential property line.' BCZR § 426.6(A)(1)." *Sprint PCS*, slip op. at 31.¹²

Contrary to Sprint's contentions, the reality is that, during the *Back River I* proceedings from 2002 through 2005, the Board and the reviewing courts considered *only* the setback requirements of the amended regulation. The term "residential zoning line" from the repealed version of BCZR § 426.6.A.3 was absolutely inconsequential in the variance review proceedings from 2002 to 2005. The obvious reason why the Board and the courts found it unnecessary to extensively discuss "the impact of this change in law" (Appellants' Br. at 9-10) was that the law did not change during the course of those proceedings. There was no mistake or oversight here (at least none by the reviewing bodies).

Sprint unsuccessfully attempts to draw an analogy between this case and *Gertz v. Anne Arundel County*, 339 Md. 261 (1995). In that case, the Court of Appeals held that an adverse

¹² In its memorandum to the Board of Appeals in *Back River II*, Sprint incorrectly asserted that this Court failed to cite the language of the 2002 regulation. In the same memorandum, Sprint argued that this Court "mistakenly described the setback requirements as they existed under the law then in effect." Sprint now admits that this Court's opinion quoted the correct regulation. Nonetheless, Sprint goes on to misquote this Court's earlier opinion, altering and re-ordering the Court's words in a thoroughly unpersuasive effort to establish that this Court was actually applying the pre-2002 requirements. Appellants' Br. at 10 n.6. Anyone with an elementary ability to read the English language could determine that this Court's earlier opinion proceeded on the supposition that the 2002 amendments, and not the earlier the legislation, governed the outcome of the case.

judgment against Anne Arundel County in an earlier contempt action involving the County and a property owner did not bar the County from proceeding in a later injunctive action against the property owner, where the second action was based on an emergency ordinance passed after the first case. *Id.* at 270. The Court explained that the rule of res judicata did not apply: "When the contempt action was litigated, the County had no right to proceed against Gertz under the Ordinance because it had not yet been enacted." *Id.* In the instant case, by contrast, Sprint had every right to raise claims based on the regulation that took effect several months before the de novo hearing. More precisely, from 2002 through 2005, Sprint did in fact bring a claim based on the amended regulation.

In sum, Sprint alleges that each of the administrative and judicial bodies that denied its variance petition in 2003, 2004, and 2005 erroneously "applied the old law when analyzing the variance issue." Appellants' Br. at 11. Sprint stakes out that position even though Sprint had revised its variance request to reflect the current law, even though Sprint informed each reviewing body of the 2002 amendment while contending that variances were needed, even though none of the written opinions applied the repealed subsection 426.6.A.3, even though none of those opinions used the term "residential zone line" or other language from that repealed sub-section, even though the Board and this Court both cited the amended subsection 426.6.A.1, and even though the Board and this Court employed the language of the 2002 amendment in referring to the required 200-foot setbacks from the three adjacent "property lines." Sprint's argument is, unarguably, incorrect.

In the midst of making its res judicata determination in this case, the Board of Appeals accepted at face value Sprint's suggestion that the applicable regulation had changed after the 2002 proceedings. Nonetheless, the Board expressly rejected Sprint's argument that the 2002 amendment significantly changed the setback requirements as applied to the property. The Board concluded that the distinction between the two versions of the regulation was "not relevant because the tower is not set back 200' from either the RC 20 'zone line' or the 'property line' of the adjacent parcel." The Board added: "even if the new version of the law were to be deemed slightly changed, its current terminology still bars [Sprint] from its present request for relief[.]"

Ordinarily, a degree of deference should be accorded to an administrative agency's interpretation and application of the statute that it is tasked with administering. *See Bd. of Physician Quality Assurance v. Banks*, 354 Md. 59, 68-69 (1999). Specifically, the Court of Appeals has recognized that the Baltimore County Board of Appeals has considerable expertise in interpreting the BCZR. *Marzullo v. Kahl*, 366 Md. 158, 173 & n.11 (2001); *see id.* at 173-74 (holding that Court of Special Appeals erred by failing to give proper deference to Board's presumed expertise in construing the BCZR). For this reason, the Office of People's Counsel argues that this Court should uphold the Board's decision by deferring to the Board's interpretation of the BCZR amendment. On the other hand, Sprint asserts that the Board's interpretation of the regulations deserves no deference and, in any event, that a

remand is needed to allow the Board to re-analyze "the question of whether the phrase 'residential property line' amounts to a material change" in law. Appellants' Br. at 31.

The answer to both parties is that there was no change in the applicable law between the 2002 review proceedings and the current action. It was unnecessary for the Board to analyze the difference between the 1998 language and the 2002 language, because the 1998 language was never an issue in the prior administrative and judicial appeals. Accordingly, there is no reason to defer to the Board's answer to a legal question that should not have been considered, nor any reason to remand to allow the Board to provide a more detailed explanation on this inconsequential issue.

D. Availability of Sprint's New Legal Theory at Earlier Proceedings

The applicable law has not changed since the Board of Appeals reviewed Sprint's revised variance requests in 2002. Some time in the past decade, however, Sprint retained a new attorney and developed a new theory of that regulation. Sprint now contends that it could not have presented this argument to the Board in *Back River I*. Before analyzing whether Sprint could have asserted this claim in the earlier proceeding, it is necessary to describe, briefly, Sprint's current theory.

In 2002, the proposed site of the tower was within 200 feet of each of the property lines to the north, west, and south. These three property lines coincided with the zoning lines, which divided the commercially-zoned (M.L.) land from the adjoining residentially-zoned (R.C. 20) land. The 2002 amendment revised the language of the applicable setback

requirements from “the tower shall be set back at least 200 feet from the residential zone line” (former BCZR § 426.6.A.3), to “[a] tower shall be set back at least 200 feet from any other owner’s residential property line.” BCZR § 426.6.A.1.

Sprint contends that BCZR § 426.6.A.1, under its plain meaning, incorporates a “residential use requirement.” Sprint argues: “The clear purpose of the amended regulation was to keep cell towers away from dwellings. A 200 foot setback is required only when property within 200 feet of a tower is owned by another *and has a dwelling thereon.*” Appellants’ Br. at 14. Under this interpretation, the regulation does not require that a tower be set back any distance from an adjoining residentially-zoned property, as long as no one currently resides in a dwelling on that property.¹³

Sprint further asserts that, at the time of the review of its variance petition, the neighboring R.C. 20 properties to the north and west were vacant, but the property to the south was improved with a dwelling. In addition, Sprint proffered to the Board of Appeals in *Back River II* that, if it had been permitted to adduce evidence, its witnesses would have testified that the dwelling no longer stands on the property to the south. The Board took no testimony and made no factual findings on this disputed fact. Because the Board purported

¹³ Sprint has drawn our attention to a pair of administrative decisions issued by the Deputy Zoning Commissioner for Baltimore County, which Sprint argues support its interpretation of BCZR § 426.6.A.1. One decision was expressly limited to the facts of the subject property, while the other decision involved split-zoned property. Even if these decisions were indistinguishable, we would see no reason why the Board of Appeals, let alone this Court, would be bound to follow them.

to dismiss an appeal after considering only legal issues, we shall assume, *arguendo*, that Sprint made accurate representations to the Board about the existence of the house on the southern property. See *Antwerpen*, 163 Md. App. at 203 (explaining that, where Board of Appeals ruled only on motion to dismiss and did not take evidence, this Court would assume that appellant's proffer to Board was correct).

Moreover, we shall take no position here on the correctness or incorrectness of Sprint's interpretation of BCZR § 426.6.A.1. The only relevant issue for our analysis is whether Sprint could have made the legal argument during the earlier proceeding. Under Sprint's theory, there was only one adjacent "residential property line" in 2002, the property line south of the tower. No setbacks would have been required from the property lines of the unimproved, residentially-zoned properties to the north and west of the tower. Thus, through only an ordinary degree of diligence (indeed, simply by examining the regulation and the site plan), Sprint could have realized that, under what Sprint now calls the "plain meaning" of the regulation, two of the requested variances would no longer be needed. Because the property itself was approximately 223 feet wide, Sprint could have revised its proposal by relocating the tower more than 200 feet north of the southern residential property line. Finally, Sprint could have argued before the Board that, as an alternative to variance relief, the Board should determine that no setbacks were required from the adjacent, vacant, residentially-zoned properties.

These two procedural means (revising the variance requests in light of the amended regulations and asking the Board to determine that variances were not legally necessary under the regulations) were not only available to Sprint. Sprint actually employed both mechanisms after the effective date of the amendment. When Sprint submitted its 2002 memorandum to the Board, Sprint revised its variance requests "in light of the revisions to BCZR § 426 pursuant to Bill 17-2002." At the same time, Sprint also argued that "setback variances for the equipment cabinets [were] not legally necessary since they [did] not qualify as 'structures' . . . as that term is defined by the BCZR." There is no merit to Sprint's contention that "treating the facts as separate trial units would not [sic] conform to the party's expectations because [Sprint's] rights under the new law could not have been litigated in the initial action." Appellants' Br. at 24.

Sprint argues here that it did not possess the procedural means to change its theory in the context of a *de novo* review of the variance petition. Sprint submits: "Although the Board's hearing was a *de novo* proceeding, the new theory (special hearing) could not have been considered because of the relief sought (variance) in the case then at issue." Appellants' Br. at 22. Sprint further argues that the transaction approach cannot be applied to this case, because (Sprint claims) it lacked the means to obtain relief during review of the variance petition. Appellants' Br. at 18-19.

In making these arguments, Sprint conflates the relief requested with a particular process to obtain that relief. The specific remedy requested in Sprint's 2012 petition was not

the hearing itself, but official confirmation that certain setbacks were not required from adjacent, unimproved properties. If Sprint believed that the language of the 2002 amendment somehow eliminated some of the setback requirements from adjacent properties, Sprint could have and should have presented those arguments in the earlier proceeding so that the Board could have resolved all issues in a single piece of litigation.¹⁴

Sprint attempts to place the issue under a technical lens rather than a pragmatic one, by contending: "Petitioners could not have been permitted to introduce a new petition for special hearing when only a petition for variance was under consideration during the appellate proceedings at the Board." Appellants' Br. at 22-23. Sprint attempts to distinguish *Cassidy v. Cnty. Bd. of Appeals of Baltimore Cnty.*, 218 Md. 418 (1958). In *Cassidy*, the Court of Appeals rejected an appellant's argument that the County Board of Appeals lacked jurisdiction to grant a special exception to a property owner because the public notice had mentioned only reclassification of the property. *Id.* at 421-25. The Court reasoned that, despite different standards of proof in the two petitions, the actual notice to the public substantially complied with the requirements, because the method of notice for both types

¹⁴ There are many possible reasons why Sprint did not make such an argument. Perhaps the interpretation did not occur to Sprint's attorneys at the time, or perhaps the attorneys considered that interpretation to be untenable. Perhaps they saw no benefit in moving back the boundaries of the unoccupied residential properties on the north and the west, because Sprint had already constructed the tower, at its own risk, 75 feet from the (then-occupied) residential property to the south. Whatever Sprint's reasons for declining to present this theory at the time, those restrictions were self-created, and not imposed by the agencies or the courts.

of petition was identical, and because the notice clearly apprised the public of the character of the proposed action. *Id.* at 424-25.¹⁵

Sprint argues that *Cassidy* should be distinguished. Sprint contends that the only way to confirm whether or not the BCZR required setbacks from unimproved properties was through a petition for special hearing, but that additional public notice would have been required before granting that relief. But even assuming that additional notice would have been required for Sprint to introduce its theory, such an obstacle was purely temporary. Given the four months that elapsed between the effective date of the amendment in May 2002 and the Board's de novo hearing, Sprint had ample time to cure any defective notice. At most, the Board would have been required to post additional notice on the property and to publish notice in two newspapers of general circulation for 15 days before hearing the matter. *See* BCZR § 500.7.

Neither the Baltimore County Zoning Regulations nor the Rules of Practice and Procedure issued by the Baltimore County Board of Appeals outline a specific procedure for amending a petition at the Board level. If Sprint had argued that the 2002 zoning amendment drastically changed the nature of the setback requirements at issue in the case, then the Board

¹⁵ Although Sprint mentioned the issue of public notice in a single page of its appellate brief, almost all of the substance of Sprint's argument on this issue was first presented in a 12-page section of a reply brief. This Court has no obligation to address the additional arguments that were not presented in the original brief. *See, e.g., Chang v. Brethren Mut. Ins. Co.*, 168 Md. App. 534, 550 n.7 (2006); *see also May v. Air & Liquid Systems Corp.*, 219 Md. App. 424, 440 & n.12 (2014).

could have selected an appropriate course of action: dismissing the case without prejudice to allow a new petition to be filed, remanding the case back to the Zoning Commissioner, staying the appeal to allow the Zoning Commissioner to conduct a special hearing before consolidating the appeal, or simply issuing notice and resolving the matter at the de novo hearing. We do not speculate as to which procedure would have been most appropriate. At most, a few additional steps would have been required before the exact remedy could be granted.¹⁶

In sum, the time to present Sprint's theory that the BCZR required no setbacks from the vacant, adjacent properties was during the 2002 litigation, not in the separate, multi-year litigation that Sprint commenced in 2012. It cannot be disputed that both of Sprint's claims seeking approval for the cell tower were so closely related in space, origin, and motivation that the claims formed a convenient trial unit. *See Esslinger*, 95 Md. App. at 618. Therefore, Sprint is precluded from bringing substantially the same claim that the Board and the reviewing courts could have resolved in the earlier litigation, if only Sprint had presented its argument at that time. *See Seminary Galleria*, 192 Md. App. at 741-42 (holding that res judicata barred special hearing petition, because "[w]ith reasonable diligence, [petitioner]

¹⁶ As explained previously, in *Esslinger*, 95 Md. App. at 623-24, this Court held that res judicata bars a litigant from raising claims for declaratory relief based upon legal theories that he or she could have asserted in a prior judicial review of an administrative decision. *Esslinger* focused on the circuit court's power to grant that particular remedy, rather than the Board's power. Thus, even if the Board in 2002 could not have granted special hearing relief, the circuit court could have granted equivalent declaratory relief in 2003.

could have discovered and asserted in support of the original [] filing its current argument”); *see also Alvey*, 243 Md. at 340 (res judicata barred second rezoning application “because any of the testimony relied upon in the [second] case as to this question could and should have been presented in the first case”); *Whittle*, 211 Md. at 49 (res judicata barred second rezoning application because “all the information which could have been produced should have been produced [in the first case] and the second case cannot be decided on testimony whi[c]h might have been introduced in the first case”); *Linthicum*, 170 Md. at 249 (holding that prior judgment regarding proposed use of property “dispose[d] of all questions [] presented [in second case], for they were all involved in the general question of exclusion of use, whether they were actually raised or not”).

II.

A. Issuance of Written Opinion by Circuit Court

Sprint’s final contention is that the circuit court erred when it affirmed the decision of the Board of Appeals without issuing a written opinion. Sprint directs our attention to § 4-405(a) of the Land Use Article, which mandates that a circuit court must “file a written order and opinion embodying the reasons for its decision” after conducting judicial review of certain zoning decisions by a board of appeals. Sprint further argues that the circuit court’s order failed to include its reasons, and thus that the case should be remanded with instructions that the circuit court issue a separate opinion.

These contentions are misguided. As the Office of People's Counsel correctly points out, the provision cited by Sprint is inapplicable to this case. Baltimore County is a charter county that has adopted home rule under Article XI-A of the Maryland Constitution. *See, e.g., Hope v. Baltimore Cnty.*, 288 Md. 656, 659-60 (1980); *see also Falls Rd. Cmty. Ass'n, Inc. v. Baltimore Cnty.*, 437 Md. 115, 136, 141 n.28 (2014). Section 4-405(a) of the Land Use Article is codified within a division that expressly does not apply to zoning matters in charter counties. *See* Md. Code (2012), § 1-401(a) of the Land Use Article.¹⁷

Judicial review over zoning cases in a charter county is governed by the Express Powers Act, currently codified in Title 10 of the Local Government Article. Under that Act, each charter county is authorized to establish a board of appeals with jurisdiction over zoning exception cases and other matters. *See* Md. Code (2013 Repl. Vol.), Local Government Art., § 10-305(a)-(b). In such cases, the county board of appeals is required to file an opinion that must include factual findings and the grounds for the decision. *Id.* § 10-305(c). There is no corresponding requirement that the circuit court issue its own separate opinion when reviewing a decision by a board of appeals. *See id.* § 10-305(d).

In addition, § 10-324(a) of the Local Government Article empowers a charter county to enact local laws providing for the right to seek review in the circuit court of any other

¹⁷ Section 1-401 of the Land Use Article is titled "Charter counties; limited application of division." Subsection (a) reads: "General limited application. Except as provided in this section, this division does not apply to charter counties." Subsection (b) lists a number of exceptions (*i.e.* certain provisions that do apply to charter counties), but that list does not include § 4-405.

matter arising under local zoning laws. Section 604 of the Baltimore County Charter grants parties a right to obtain judicial review of decisions of the board of appeals by appealing to the circuit court. These provisions include no requirement that the circuit court file a separate opinion when reviewing zoning cases.

Sprint commenced the instant case by filing a petition for special exception and special hearing in 2008. The administrative law judge ultimately considered only the petition for special hearing, and then Sprint appealed to the county board of appeals and to the circuit court. Neither § 10-305 nor § 10-324 of the Local Government Article requires that the circuit court must embody its reasons in a written opinion. Thus, the circuit court's order affirming the decision of the board of appeals was not deficient. Sprint's request for a remand to the circuit court has no statutory basis.

CONCLUSION

For the reasons stated in this opinion, we affirm the judgment of the circuit court, which affirmed the decision of the Board of Appeals. Our ruling is based upon a de novo legal conclusion that, even if Sprint's factual proffers to the Board were accurate and even if Sprint's interpretation of the zoning regulations were correct, res judicata would still bar Sprint's present claim. Accordingly, there is no reason to remand for further proceedings to resolve any remaining factual or legal dispute. *See Seminary Galleria*, 192 Md. App. at 723, 742 (affirming circuit court's judgment reversing Board's zoning decision on grounds of res

judicata, without remand); *Antwerpen*, 163 Md. App. at 203-04, 210 (affirming circuit court's judgment affirming Board's decision on purely legal grounds, without remand).

**JUDGMENT OF THE CIRCUIT
COURT FOR BALTIMORE COUNTY
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**

2/7/14

IN THE MATTER OF:

BACK RIVER, LLC, et al

FOR JUDICIAL REVIEW OF THE
DECISION OF THE
COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

BACK RIVER, LLC, Owner
SPRINT NEXTEL, Lessee
810 BACK RIVER NECK ROAD
15th Election District
6th Councilmanic District
Board of Appeals Case No.: 08-531-SPHX

* IN THE
* CIRCUIT COURT
* FOR
* BALTIMORE COUNTY
*
* Case No.: 03-C-13-4769
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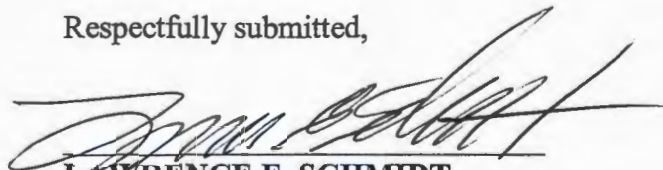
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NOTICE OF APPEAL

Dear Sir or Madam Clerk:

Pursuant to Maryland Rules 8-201 and 8-202, please enter this Notice of Appeal on the docket on behalf of Back River, LLC and Sprint Nextel, by and through its attorneys, Lawrence E. Schmidt and Smith, Gildea & Schmidt, LLC, in the Court of Special Appeals from the Circuit Court's Order entered January 17, 2014 denying Petitioner's Petition for Judicial Review and affirming the Opinion of the Baltimore County Board of Appeals dated April 19, 2013. A copy of the Circuit Court's Order, Circuit Court docket and the Opinion of the Board of Appeals are attached hereto.

Respectfully submitted,



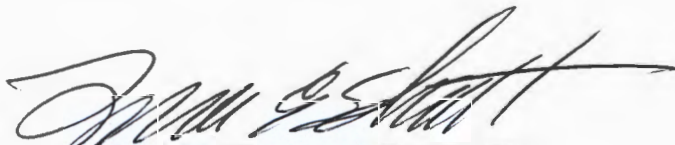
LAWRENCE E. SCHMIDT
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204
(410) 821-0070
Attorney for Back River, LLC and Sprint Nextel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of **February, 2014**, a copy of the foregoing Notice of Appeal was mailed first-class pre-paid postage to:

Adam Rosenblatt, Esquire
Assistant County Attorney
Baltimore County Office of Law
111 W. Chesapeake Avenue
Suite 105
Towson, MD 21204

Carole DeMilio, Esquire
People's Counsel for Baltimore County
105 W. Chesapeake Avenue
Suite 204
Towson, MD 21204

A handwritten signature in black ink, appearing to read "Lawrence E. Schmidt", written over a horizontal line.

LAWRENCE E. SCHMIDT

SMITH, GILDEA & SCHMIDT LLC

MICHAEL PAUL SMITH
DAVID K. GILDEA
LAWRENCE E. SCHMIDT
MICHAEL G. DEHAVEN
RAY M. SHEPARD
JASON T. VETTORI
DAVID W. TERRY*

*LICENSED IN MO, IL, AR ONLY

CHRISTOPHER W. COREY
LAUREN M. DODRILL
CHARLES B. MAREK, III
NATALIE MAYO
ELYANA TARLOW

of counsel:

DAVID T. LAMPTON

February 7, 2014

Via Hand Delivery

Julie L. Ensor, Clerk
Circuit Court for Baltimore County
County Courts Building
401 Bosley Avenue
Towson, MD 21204

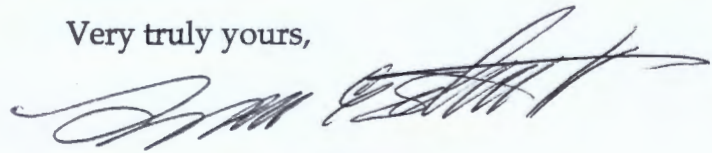
Re: In the Matter of: Back River, LLC
For the Judicial Review of the Decision of the Board of Appeals of Baltimore County
Case No. 03-C-13-4769

Dear Ms. Ensor,

Enclosed for filing in the above referenced matter please find one (1) original and two (2) copies of a Notice of Appeal. Please date stamp the copies and return the same to the courier. I have also enclosed a check in the amount of \$110.00 which covers the fee for this appeal.

Please contact me should you have any questions.

Very truly yours,



Lawrence E. Schmidt

LES/amf
Enclosures

cc: Adam Rosenblatt, Esquire
Carole DeMilio, Esquire
Krysundra Cannington, Board of Appeals of Baltimore County
Back River, LLC
Sprint Nextel

RECEIVED AND FILED
2014 FEB - 7 P 3:00
CLERK OF CIRCUIT COURT
BALTIMORE COUNTY

RECEIVED
FEB 11 2014
BALTIMORE COUNTY
BOARD OF APPEALS

1/10/14

Back River, LLC, et al.
Petitioners,

v.

Baltimore County, Maryland, et al.

Respondents.

* IN THE
* CIRCUIT COURT
* FOR
* BALTIMORE COUNTY
* Case No.: 03-C-13-~~9392~~
4769

* * * * *

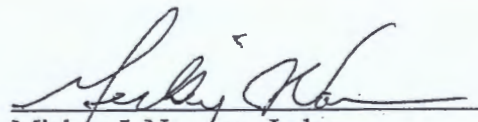
ORDER

On April 26, 2013, Petitioner filed a Petition for Judicial Review (Paper # 1000), and, on September 6, 2013, Petitioner filed a Memorandum (Paper # 9000). On October 7, 2013, Respondent People's Counsel for Baltimore County filed a Memorandum (Paper # 10000). On October 10, 2013, Respondent Baltimore County, Maryland filed a Memorandum (Paper # 11000). On October 24, 2013, Petitioner filed a Reply Memorandum (Paper # 10001).

On December 16, 2013, the parties appeared before the Court for a hearing. All parties were represented by counsel. After considering the relevant papers, and the arguments of counsel, it is this 10th day of January 2014, by the Circuit Court for Baltimore County, hereby:

ORDERED, that Petitioner's Petition for Judicial Review (Paper # 1000) is **DENIED**; and it is further,

ORDERED, that the Opinion of the Baltimore County Board of Appeals, dated April 19, 2013, is **AFFIRMED**.


Mickey J. Norman, Judge
Circuit Court for Baltimore County

cc:
Court file

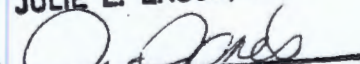
Lawrence E. Schmidt, Esquire, Smith, Gilda & Schmidt, LLC, 600 Washington Avenue, Suite 200, Towson, Maryland 21204

Adam Rosenblatt, Assistant County Attorney, Baltimore County Office of Law, 111 West Chesapeake Avenue, Suite 105, Towson, Maryland 2120

Carole DeMillo, Esquire, People's Counsel for Baltimore County, 105 West Chesapeake Avenue, Room 204, Towson, Maryland 21204

True Copy Test

JULIE L. ENSOR, Clerk

Per 
Assistant Clerk

FILED JAN 17 2014

7/12/13

IN THE CIRCUIT COURT
FOR BALTIMORE COUNTY

PETITION OF:
BACK RIVER, LLC

FOR JUDICIAL REVIEW OF THE OPINION OF
THE BOARD OF APPEALS
OF BALTIMORE COUNTY
JEFFERSON BUILDING - ROOM 203
105 W. CHESAPEAKE AVENUE
TOWSON, MARYLAND 21204

CIVIL ACTION
NO. : 03-C-13-004769

IN THE MATTER OF:
BACK RIVER, LLC - LEGAL OWNER/
PETITION FOR SPECIAL HEARING AND
SPECIAL EXCEPTION
FOR PROPERTY LOCATED AT
W/S OF BACK RIVER NECK ROAD, 207' S OF
POTTERY FARM ROAD
(810 BACK RIVER NECK ROAD)

SPRINT NEXTEL, CONTRACT PURCHASER/
LESSEE

3RD ELECTION DISTRICT
2ND COUNCILMANIC DISTRICT

BOARD OF APPEALS CASE NO.: 08-531-SPHX

* * * * *

**PROCEEDINGS BEFORE THE ADMINISTRATIVE LAW JUDGE
AND THE BOARD OF APPEALS OF BALTIMORE COUNTY**

TO THE HONORABLE, THE JUDGE OF SAID COURT:

And now comes the Board of Appeals of Baltimore County and, in answer to the Petition for Judicial Review directed against it in this case, herewith transmits the record of proceedings had in the above-entitled matter, consisting of the original papers on file in the Department of Permts, Approvals and Inspections and the Board of Appeals of Baltimore County:

RECEIVED AND FILED
2013 JUL 12 P 3:06
CLERK OF CIRCUIT COURT
BALTIMORE COUNTY

ENTRIES FROM THE DOCKET OF THE BOARD OF APPEALS AND
DEPARTMENT OF PERMITS, APPROVALS AND INSPECTIONS
OF BALTIMORE COUNTY

No. 08-531-SPHX

May 9, 2008	Petition for Special Hearing to permit a non-density transfer filed by James R. Michal, Esquire on behalf of Back River, LLC.
May 23, 2008	Petition for Special Exception to permit a tower at a height of 125' in a RC.20 zone filed by James R. Michal, Esquire on behalf of Back River, LLC.
August 5, 2008	Certificate of Posting.
August 7, 2008	Certificate of Publication.
August 13, 2008	ZAC Comments.
August 20, 2008	Deputy Zoning Commissioner convened for hearing.
August 21, 2008	Interoffice Memorandum from Thomas Bostwick, Deputy Zoning Commissioner to file.
March 20, 2012	Letter to W. Carl Richards, Jr., Supervisor of Zoning Review Office from Lawrence E. Schmidt, Esquire on behalf of Back River, LLC regarding the history of this matter.
May 17, 2012	Amended Petition for Special Hearing to permit a non-density transfer and lot line adjustment between adjacent tracts of land; and to confirm that an existing cellular tower is in compliance with setback and all other applicable zoning regulations; and
May 30, 2012	Entry of Appearance filed by People's Counsel for Baltimore County.
June 28, 2012	Certificate of Publication in newspaper
June 30, 2012	Certificate of Posting.
July 10, 2012	ZAC Comments.
July 20, 2012	Hearing held before Administrative Law Judge John E. Beverungen.

Exhibits submitted at the hearing before the Administrative Law Judge:

Petitioner's Exhibits No.:

- 1 – Findings of Fact and Conclusions of Law issued by Zoning Commissioner in Case No 02-159-A dated 1/4/02 wherein the requested relief was granted with conditions.
- 2 – Opinion and Order of the Board of Appeals for Baltimore County in Case No. 02-159-A dated 5/14/03 wherein the requested relief was denied.
- 3 – Memorandum and Order of Court issued by Circuit Court for Baltimore County in Civil Action No. 03-C-03-008657 (Board of Appeals Case No: 02-159-A) dated 2/5/04 wherein the decision of the Board of Appeals was affirmed.
- 4 – Unreported Opinion of the Court of Special Appeals of Maryland *Sprint PCS, et al v. Baltimore County, Maryland* dated 8/3/05 wherein the decision of the Circuit Court for Baltimore County in Civil Action No. 03-C-03-008657 was affirmed.
- 5 – Curriculum Vitae of Mitchell J. Kellman
- 6 – Site Plan
- 7 A to G – Photographs of subject property
- 8 – County Council Bill No. 30-98 Zoning – Wireless Telecommunications Towers and Antennas
- 9 – County Council Bill No. 17-02 Wireless Telecommunications Towers – Setbacks
- 10 A – Deed dated 2/12/08 between Back 50, LLC “Grantor” and Back River, LLC “Grantee”
- 10 B – Deed dated 2/20/08 between Elsie Luciano, Michael Luciano, Jr. and Maria Luciano “Grantors” and Back River, LLC “Grantees”

People's Counsel's Exhibits No:

- 1 – Zoning Map (5 pages)

Baltimore County's Exhibits No:

- 1 – Findings of Fact and Conclusion of Law Final Order of the Code Enforcement Hearing Officer in Civil Citation No: C00052984 dated 1/7/09.

July 30, 2012	Petitioner's Closing Memorandum in Lieu of Closing Argument filed by Lawrence E. Schmidt, Esquire on behalf of Back River, LLC.
July 30, 2012	Memorandum of People's Counsel for Baltimore County filed.

July 30, 2012 Post Hearing Memorandum filed by Adam Rosenblatt, Assistant County Attorney and Assistant to the Director of Department of Permits, Approvals and Inspections on behalf of Baltimore County, Maryland.

August 2, 2012 Opinion and Order of Administrative Law Judge wherein the Petition for Special Hearing relief was DENIED and the Petition for Special Exception was dismissed as moot.

August 24, 2012 Notice of Appeal filed by Lawrence E. Schmidt, Esquire, on behalf of Back River, LLC, Petitioners.

December 4, 2012 Board convened for hearing.

Exhibits submitted at hearing before the Board of Appeals:

Baltimore County's Exhibit No.

- 1 – Findings of Fact and Conclusions of Law issued by Zoning Commissioner in Case No 02-159-A dated 1/4/02 wherein the requested relief was granted with conditions.
- 2 – Opinion and Order of the Board of Appeals for Baltimore County in Case No. 02-159-A dated 5/14/03 wherein the requested relief was denied.
- 3 – Memorandum and Order of Court issued by Circuit Court for Baltimore County in Civil Action No. 03-C-03-008657 (Board of Appeals Case No: 02-159-A) dated 2/5/04 wherein the decision of the Board of Appeals was affirmed.
- 4 – Unreported Opinion of the Court of Special Appeals of Maryland *Sprint PCS, et al v. Baltimore County, Maryland* dated 8/3/05 wherein the decision of the Circuit Court for Baltimore County in Civil Action No. 03-C-03-008657 was affirmed.
- 5 – Findings of Fact and Conclusion of Law Final Order of the Code Enforcement Hearing Officer in Civil Citation No: C00052984 dated 1/7/09.

People's Counsel's Exhibit No.

- 1 – County Council Bill No. 17-02 Wireless Telecommunications Towers - Setbacks
- 2 – County Council Bill No. 30-98 Zoning Wireless Telecommunications Towers and Antennas

December 18, 2012	Memorandum Regarding Res Judicata filed by Adam Rosenblatt, Assistant County Attorney and Assistant to the Director of Department of Permits, Approvals and Inspections.
December 18, 2012	Memorandum of People's Counsel for Baltimore County.
December 18, 2012	Memorandum in Opposition to Motion to Dismiss filed by Lawrence E. Schmidt, Esquire on behalf of Petitioners, Back River, LLC.
January 16, 2013	Board convened for Public deliberation.
April 19, 2013	Final Opinion and Order issued by the Board in which the Motion to Dismiss filed by Adam Rosenblatt, Assistant County Attorney and Assistant to the Director of Department of Permits, Approvals and Inspections was GRANTED and the Petition for Special Hearing was DISMISSED with prejudice.
April 26, 2013	Petition for Judicial Review filed in the Circuit Court for Baltimore County by Lawrence E. Schmidt, Esquire on behalf of Back River, LLC, Petitioners
May 6, 2013	Response to Petition for Judicial Review filed by People's Counsel for Baltimore County
May 13, 2013	Copy of Petition for Judicial Review received from the Circuit Court for Baltimore County by the Board of Appeals.
May 13, 2013	Certificate of Compliance sent to all parties and interested persons.
July 12, 2013	Transcript of testimony filed.
July 12, 2013	Record of Proceedings filed in the Circuit Court for Baltimore County.

Record of Proceedings pursuant to which said Order was entered and upon which said Board acted are hereby forwarded to the Court, together with exhibits entered into evidence before the Board.

Sunny Cannington

Sunny Cannington, Legal Secretary
Board of Appeals for Baltimore County
The Jefferson Building, Suite 203
105 W. Chesapeake Ave.
Towson, Maryland 21204
410-887-3180

c: Lawrence E. Schmidt, Esquire
Michael Lutz, Representative/Back River, LLC
Steve Boyd, Esquire, Representative/Sprint Nextel, Inc
Mitchell Kellman/Daft, McCune & Walker, Inc.
Carl Maynard
Carole S. Demilio, Deputy People's Counsel
Adam Rosenblatt, Assistant County Attorney
Lawrence M. Stahl, Managing Administrative Law Judge
John E. Beverungen, Administrative Law Judge
Arnold Jablon, Director/PAI
Andrea Van Arsdale, Director/Planning
Lionel VanDommelen, Chief of Code Enforcement/PAI
Michael Mohler, Chief Administrator
Thomas Bostwick, Deputy Legal Counsel to the Baltimore County Council
Nancy C. West, Assistant County Attorney
Michael Field, County Attorney

5/13/13

IN THE CIRCUIT COURT
FOR BALTIMORE COUNTY

PETITION OF:
BACK RIVER, LLC

FOR JUDICIAL REVIEW OF THE OPINION OF
THE BOARD OF APPEALS
OF BALTIMORE COUNTY
JEFFERSON BUILDING – ROOM 203
105 W. CHESAPEAKE AVENUE
TOWSON, MARYLAND 21204

CIVIL ACTION
NO. : 03-C-13-004769

IN THE MATTER OF:
BACK RIVER, LLC – LEGAL OWNER/
PETITION FOR SPECIAL HEARING AND
SPECIAL EXCEPTION
FOR PROPERTY LOCATED AT
W/S OF BACK RIVER NECK ROAD, 207' S OF
POTTERY FARM ROAD
(810 BACK RIVER NECK ROAD)

SPRINT NEXTEL, CONTRACT PURCHASER/
LESSEE

3RD ELECTION DISTRICT
2ND COUNCILMANIC DISTRICT

BOARD OF APPEALS CASE NO.: 08-531-SPHX

RECEIVED AND FILED
2013 MAY 13 A 11:38
CLERK OF CIRCUIT COURT
BALTIMORE COUNTY

* * * * *

CERTIFICATE OF COMPLIANCE

Madam Clerk:

Pursuant to the Provisions of Rule 7-202(d) of the *Maryland Rules*, the Board of Appeals of Baltimore County has given notice by mail of the filing of the Petition for Judicial Review to the representative of every party to the proceeding before it; namely:

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Ave, Ste 200
Towson, MD 21204

Michael Lutz, Representative
Back River, LLC
806 Back River Neck Road
Baltimore, MD 21221

Steve Boyd, Esquire, Representative
Sprint Nextel, Inc
6450 Sprint Parkway
Overland Park, KS 66251

Mitchell Kellman
Daft, McCune & Walker, Inc.
200 E. Pennsylvania Ave
Towson, MD 21286

Carl Maynard
1546 Denton Road
Baltimore, MD 21221

Peter M. Zimmerman, Esquire
Carole S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Ste 204
105 W. Chesapeake Avenue
Towson, MD 21204

Adam Rosenblatt, Assistant County Attorney
Dept of Permits, Approvals and Inspections
111 W. Chesapeake Avenue
Towson, MD 21204

Lawrence M. Stahl
Managing Administrative Law Judge
The Jefferson Building, Suite 103
105 W. Chesapeake Avenue
Towson, MD 21204

Arnold Jablon, Director
Dept of Permits, Approvals and Inspections
111 W. Chesapeake Avenue, Suite 105
Towson, MD 21204

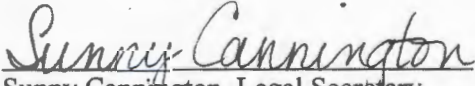
Andrea Van Arsdale, Director
Department of Planning
The Jefferson Building, Ste 100
105 W. Chesapeake Avenue
Towson, MD 21204

Nancy C. West, Assistant County Attorney
Baltimore County Office of Law
The Historic Courthouse
400 Washington Avenue
Towson, MD 21204

Michael Field, County Attorney
Baltimore County Office of Law
The Historic Courthouse
400 Washington Avenue
Towson, MD 21204

A copy of said Notice is attached hereto and prayed that it may be made a part hereof.

I **HEREBY CERTIFY** that on this 13th day of May, 2013 a copy of the foregoing Certificate of Compliance has been mailed to the individuals listed above.


Sunny Cannington, Legal Secretary
Board of Appeals for Baltimore County
The Jefferson Building, Suite 203
105 W. Chesapeake Avenue
Towson, Maryland 21204
410-887-3180



Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

May 13, 2013

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Ave, Ste 200
Towson, MD 21204

Peter M. Zimmerman, Esquire
Carole S. Demilio, Esquire
Office of People's Counsel
The Jefferson Building, Ste 204
105 W. Chesapeake Avenue
Towson, MD 21204

Adam Rosenblatt
Assistant County Attorney
Permits, Approvals and Inspections
111 W. Chesapeake Avenue
Towson, MD 21204

RE: Petition for Judicial Review
Circuit Court Case No.: 03-C-13-004769
In the Matter of: Back River, LLC
Board of Appeals Case No.: 08-531-SPHX

Dear Counsel:

Notice is hereby given, in accordance with the Maryland Rules that a Petition for Judicial Review was filed on April 26, 2013 by Lawrence E. Schmidt, Esquire, on behalf of Back River, LLC, in the Circuit Court for Baltimore County from the decision of the County Board of Appeals rendered in the above matter. Any party wishing to oppose the petition must file a response with the Circuit Court for Baltimore County within 30 days after the date of this letter, pursuant to the Maryland Rules.

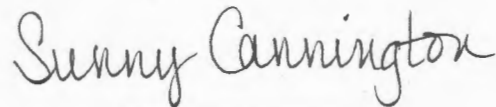
In accordance with the Maryland Rules, the Board of Appeals is required to submit the record of proceedings of the Petition for Judicial Review within 60 days. Lawrence E. Schmidt, Esquire, on behalf of Back River, LLC, having taken the appeal, are responsible for the cost of the transcript of the record and the transcript must be paid for in time to transmit the same to the Circuit Court within the 60 day timeframe as stated in the Maryland Rules.

CourtSmart was the official record of the hearings before the Board. The disk(s) will be copied by this office and provided to you for transcription. The transcriptionist must meet the requirements set forth in Maryland Rule 16-406d(B) which states: "*a stenographer, court reporter, or transcription service designated by the court for the purpose of preparing an official transcript from the recording.*" The Board of Appeals can assist in obtaining a qualified transcriptionist upon request.

Please be advised that the ORIGINAL transcripts must be provided to the Board of Appeals no later than July 1, 2013 so that they may be transmitted to the Circuit Court with the record of proceedings, pursuant to the Maryland Rules.

A copy of the Certificate of Compliance has been enclosed for your convenience.

Very truly yours,



Sunny Cannington
Legal Secretary

Multiple Original Cover Letter
Enclosure

cc: Michael Lutz, Representative/Back River, LLC
Steve Boyd, Esquire, Representative/Sprint Nextel, Inc
Mitchell Kellman/Daft, McCune & Walker, Inc.
Carl Maynard
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Office of Planning
Arnold Jablon, Director/Permits, Approvals and Inspections
Michael Field, County Attorney

5/6/13

PETITION OF **BACK RIVER LLC**
FOR JUDICIAL REVIEW OF THE
DECISION OF THE COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

* IN THE
*
* CIRCUIT COURT

IN THE CASE OF **BACK RIVER LLC**, LEGAL
OWNER/PETITION FOR SPECIAL HEARING ON
PROPERTY LOCATED AT 810 BACK RIVER NECK
ROAD; SW BACK RIVER NECK ROAD 33' SE
POTTERY FARM ROAD

*
* FOR
*

15th Election District, 6th Councilmanic District

* BALTIMORE COUNTY

Case No. 08-531-SPH
Before the County Board of Appeals

* Case No. 03-C-13-004769

* * * * *

RESPONSE TO PETITION FOR JUDICIAL REVIEW

PEOPLE'S COUNSEL FOR BALTIMORE COUNTY, in accordance with Maryland Rule 7-204, submits this response to the Petition for Judicial Review filed by BACK RIVER LLC and states that it intends to participate in this action for Judicial Review. The undersigned participated in the proceeding before the County Board of Appeals.

Peter Max Zimmerman

PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

Carole S. Demilio

CAROLE S. DEMILIO
Deputy People's Counsel
The Jefferson Building
105 West Chesapeake Avenue, Suite 204
Towson, MD 21204
(410) 887-2188

RECEIVED

MAY 6 2013

BALTIMORE COUNTY
BOARD OF APPEALS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of May, 2013, a copy of the foregoing Response to Petition for Judicial Review was mailed to Adam Rosenblatt, Esquire, Assistant County Attorney, 111 West Chesapeake Avenue, Towson, Maryland 21204 and Lawrence Schmidt, Esquire, Smith, Gildea & Schmidt, 600 Washington Avenue, Suite 200, Towson, Maryland 21204, Attorney for Petitioner(s) and County Board of Appeals, 105 West Chesapeake Avenue, Suite 203, Towson, Maryland 21204.

Patricia M. Zimmerman

CAROLE S DEMILIO
Deputy People's Counsel for Baltimore County



Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

May 2, 2013

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Ave, Ste 200
Towson, MD 21204

Re: Petition for Judicial Review
In the Matter of: Back River, LLC
Board of Appeals Case No: 08-531-SPHX
Circuit Court Case No: to be determined

Dear Mr. Schmidt:

I am in receipt of your request for transcript in the above referenced matter. Please be advised that we have sent the recording to the typist listed below.

The typist has been instructed to contact you by phone upon receipt of the recording. She will be able to provide you with the estimated cost, required deposit, and projected completion date.

Please direct all payments and questions regarding the transcript to the typist listed below.

Very truly yours,

Sunny Cannington
Sunny Cannington

Typist:	Debbie Eichner
Telephone #:	410-404-2110
Mailing Address:	8101 Bletzer Road, Baltimore, MD 21222

BALTIMORE COUNTY, MARYLAND
Board of Appeals of Baltimore County

Phone: 410-887-3180

Fax: 410-887-3182

To: Debbie

From: Sunny Cannington, Legal Secretary

Date: May 2, 2013

Re: Transcripts for appeal to Circuit Court
In the Matter of: Back River, LLC
Case No: 08-531-SPHX

The attached is the recording from Case Number 08-531-SPHX. The Board members who sat on this case are Lawrence S. Wescott, Panel Chairman; Wendy Zerwitz, took exhibits; Andrew M. Belt, operated Courtsmart.

I have prepared a letter to the attorney requesting the transcript, a copy of which is enclosed. Below is the attorney's information so that you may contact him.

Please be advised that this matter is on appeal to the Circuit Court for Baltimore County. I do not have the exact due date at present and will inform you of the due date when it has been derived.

Please note the below listed attorney, Carole S. Demilio, Esquire, Deputy People's Counsel for Baltimore County, and Adam M. Rosenblatt, Assistant County Attorney were present at the hearing before the Board. I have enclosed a copy of the address list for your convenience in the event anyone else spoke on the record.

Should you have any questions or problems, please do not hesitate to contact me.

Thank you.


Sunny Cannington

Attorney Information:

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204
Phone: 410-821-0070

4/26/13

RECEIVED

MAY 13 2013

BALTIMORE COUNTY
BOARD OF APPEALS

PETITION OF:

BACK RIVER, LLC
810 BACK RIVER NECK ROAD

FOR JUDICIAL REVIEW OF THE DECISION OF THE
BOARD OF APPEALS OF BALTIMORE COUNTY
Jefferson Building, Suite 203
105 W. Chesapeake Avenue
Towson, MD 21204

IN THE CASE OF:
BACK RIVER, LLC
810 Back River Neck Road

15th Election District
6th Councilmanic District

Developer: Back River, LLC
Board of Appeals Case No. 2008-0531-SPH

* IN THE
* CIRCUIT COURT
* FOR
* BALTIMORE COUNTY

* Case No.: C-13-4269

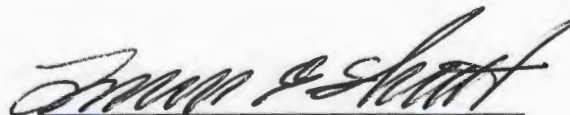
RECEIVED AND FILED
2013 APR 26 P 1:02
CLERK OF CIRCUIT COURT
BALTIMORE COUNTY

* * * * *

PETITION FOR JUDICIAL REVIEW

Petitioners, Back River, LLC, by and through their attorney, Lawrence E. Schmidt and Smith, Gildea & Schmidt, LLC, requests judicial review of the Opinion of the County Board of Appeals dated April 19, 2013, a copy of which is attached hereto, in the above referenced matter. Petitioners were parties below and fully participated in the proceedings.

This Petition is filed pursuant to Rule 7-202 and 7-203(b) of the Maryland Rules of Procedure.



LAWRENCE E. SCHMIDT
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204
(410) 821-0070
Attorney for Petitioners

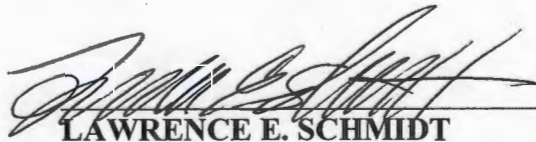
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of April, 2013, a copy of the foregoing Petition for Judicial Review was delivered to:

Carole DeMilio, Esquire
People's Counsel for Baltimore County
105 West Chesapeake Avenue, Room 204
Towson, MD 21204

Theresa R. Shelton
County Board of Appeals of Baltimore County
105 W. Chesapeake Avenue, Suite 203
Towson, MD 21204

Adam M. Rosenblatt, Esquire
Baltimore County Department of Permits, Approvals and Inspection
111 West Chesapeake Avenue, Suite 105
Towson, MD 21204


LAWRENCE E. SCHMIDT

SMITH, GILDEA & SCHMIDT LLC

MICHAEL PAUL SMITH
DAVID K. GILDEA
LAWRENCE E. SCHMIDT
D. DUSKY HOLMAN
MICHAEL G. DEHAVEN
RAY M. SHEPARD
JASON T. VETTORI

LAUREN M. DODRILL
CHARLES B. MAREK, III
NATALIE MAYO
ELYANA TARLOW
REBECCA G. WYATT
of counsel:
JAMES T. SMITH, JR.

April 26, 2013

Sent Via Hand Delivery

Julie Ensor, Clerk of Court
County Courts Building
401 Bosley Avenue
Towson, MD 21204

Re: Back River, LLC - 810 Back River Neck Road
Case No.: unknown

Dear Ms. Ensor:

Enclosed for filing please find one (1) original and four (4) copies of a Petition for Judicial Review in connection with the above matter. Please date-stamp the copies and return the same to my courier.

Please do not hesitate to call me if you have any questions regarding this matter. With kind regards, I remain

Very truly yours,

Lawrence E. Schmidt/amf
Lawrence E. Schmidt

LES/amf
Enclosures

cc: Carole Demilio, Esquire, People's Counsel for Baltimore County
Adam Rosenblatt, Esquire, Department of PAI
Theresa Shelton, Board of Appeals
Steve Boyd, Esquire, Sprint Nextel
Michael Lutz, Back River, LLC
Mitch Kellman, Draft, McCune, Walker, Inc.

RECEIVED
APR 29 2013

BALTIMORE COUNTY
BOARD OF APPEALS

4/19/13

RE: PETITION FOR SPECIAL HEARING
810 Back River Neck Road
15th Election & 6th Councilmanic Districts
Legal Owner: Back River LLC
Petitioner(s)

* BEFORE THE
* BOARD OF APPEALS
* FOR
* BALTIMORE COUNTY
* Case No.: 2008-0531-SPH

OPINION

This case comes before the Baltimore County Board of Appeals as a de novo hearing on an appeal of the decision of the Administrative Law Judge denying a Petition for Special Hearing filed by the Petitioners for the property located at 810 Back river Neck Road in Eastern Baltimore County. The Petitioner has requested the following relief: 1. To determine that an existing cell tower is compliant with the current setback regulations; 2. To approve a non-density transfer of land into the subject property from the north and west. The Baltimore County Office of Law and Office of People's Counsel has moved for dismissal of the Petitioner's appeal on the grounds of *res judicata*. Memorandum were submitted by all parties and oral arguments were heard by this Board on December 4, 2012. Lawrence E. Schmidt of Smith, Gildea & Schmidt LLC appeared on behalf of the Petitioners, Adam Rosenblatt, of the Baltimore County Office of Law appeared for Baltimore County, and Carole S. Demilio appeared on behalf of People's Counsel. The Motion to Dismiss was publicly deliberated on January 16, 2013.

BACKGROUND

The dispute at issue dates back to January 4, 2002, when former Zoning Commissioner Lawrence E. Schmidt issued a written Order granting the Petitioner a variance from BCZR § 426 to construct a cell tower in the location where it is still presently situated. (Baltimore County, Ex. 1) The case was appealed to the Board of Appeals, which reversed the decision and

denied the variances and the Circuit Court and Court of Special Appeals, both of which affirmed the Board of Appeals. (Baltimore County, Ex. 2, 4) In 2009, the Baltimore County Code Enforcement Hearing Officer issued an Order finding the Petitioner in violation of BCZR § 426.6.A.1 for failing to maintain a 200 foot setback "from another owner's residential property line" and issued a civil penalty which was not appealed. (Baltimore County Ex. 5) In the proceeding before this Board, the Petitioner contends that the cell tower, is in compliance with the BCZR and never actually required a setback variance. The County as well as People's Counsel contends that the Petitioner's current argument is barred by *res judicata*, thus resulting in their filing of the Motion to Dismiss presently before the Board.

FACTS

The facts involved in the matter are derived from related past legal decisions on the issue and a change in the wording of BCZR § 426.6A, which governs the setback requirements for Wireless Communications Towers in Baltimore County. Prior to May 5, 2002, of BCZR § 426.6A read as follows:

1. If a tower is located in a residential zone, the tower shall be set back at least 200 feet from any other owner's residential property line.
2. If a tower is located in a transitional zone, the tower shall be set back at least 200 feet from any residential zone.
3. If a tower is located in a medium or high intensity commercial zone, the tower shall be set back from an adjoining property line a distance equal to the setback required for other structures in the zone. However, if the property adjoins a residential zone, the tower shall be set back at least 200 feet **from the residential zone.**

In 2002, Bill 17-20 amended the law governing these setbacks to require that a "tower shall be setback at least 200 feet from **any other owner's residential property line.**" BCZR § 426.6A(1) (emphasis added). (People's Counsel Ex. 1) This Bill became effective on May 5,

2002, and presently governs the setbacks for Wireless Communication Towers today. It is this change in of BCZR § 426.6A which the Petitioner basis its argument in the instant petition.

Bill 17-20 became effective four (4) months after Petitioner's original request for variance was granted, thus the pre-May 5, 2002 version of of BCZR § 426.6A was controlling at that time. The change occurred before the Board of Appeals conducted *de novo* hearings and denied the variances on May 14, 2003, and before the Court of Special Appeals affirmed the Board on August 3, 2005.

ARGUMENT

The doctrine of *res judicata* provides that "a judgment on the merits in a previous suit between the same parties or their privies precludes a second suit predicated upon the same cause of action." *Seminary Galleria, LLC v. Dulaney Valley Improvement Ass'n, Inc.*, 192 Md.App. 719, 734-737 (2010). *Res judicata* acts as "an absolute bar, not only as to all matters which were litigated in the earlier case, but as to all matters which *could have been* litigated." *Id.* (citing *Whittle v. Bd. of Zoning Appeals*, 211 Md. 36, 49 (1956) (emphasis in original)). In *Whittle*, the Court of Appeals stressed that successive litigation of zoning petitions is discouraged because it "would be arbitrary for the board to arrive at opposite conclusions on substantially the same state of facts and the same law." 211 Md. at 45. The doctrine applies to the administrative decisions reached by the County Board of Appeals *Batson v. Shiflett*, 325 Md. 684, 705 (1992).

It is clear from the record of the prior proceeding involving this matter, it was not until the recent hearing before Baltimore County A.L.J. John E. Beverungen, that the Petitioners' raised the argument that in light of the 2002 statutory change to BCZR § 426.6A(1) a variance was not required to keep the cell tower at issue in its current location. The Petitioners, while

acknowledging the basic tenets of *res judicata*, opine that the request for relief now set before the Board, falls into an exception to the general prohibitions of *res judicata*.

Petitioners first contend that *res judicata* should not apply due to the fact that the manner of relief now being sought is A Request For Special Hearing and not a Request for Variance. As the end result being and sought as well as the underlying facts which are contained in both avenues of relief are the same, the Board is not convinced that changing the name of the proceeding circumvents the constraints of *res judicata*.

Additionally, Petitioners contend that *res judicata* should not apply to the instant petition due to the fact that the law "changed" after the original request for variance went before the Zoning Commissioner. Petitioners state that "the version of the regulation under consideration in the instant matter bears little resemblance to the law in effect when the earlier matter was filed and considered by the Commissioner." This Board does not agree with this assertion. Petitioners' primary argument is that the regulation at issue was amended in 2002 (Bill 17-02) to provide that a "cell tower" shall be set back at least 200' from any other owner's **residential property line.**" (emphasis added). The former regulation provided that the set back was 200' from an adjoining "**residential zone line.**" (emphasis added). Petitioners contend that "residential zone" is a defined term in BCZR § 101, while the newer phrasing – which became effective after the Zoning Commissioner's decision in the original variance case, 02-159-A, of a "residential property line" is different. Petitioners opine that a "residential property line" exists only when the property in question is improved with a dwelling.

For the Petitioners argument to prevail this Board must be convinced that the language used in Bill 17-02 possesses a different meaning than the language found in the law prior to 2002. Thus, the prior use of the terms "residential zone line" must differ from the meaning

intended in the terms "residential property line" found in the current law. As pointed out by ALJ Beverungen in his review of the matter, A "zone line" is a boundary that separates land into different zoning classifications. These lines are drawn by governmental authorities, who have the "power to alter zone lines from time to time" when in the public's interest. Offutt v. Baltimore County, 204 Md. 551, 557 (1954). Zone lines are not required to be divided along a "property line." In actuality "split-zoned" properties, are often encountered in zoning matters. A "property line" is a boundary establishing the limits of land owned by any particular person. Neither of these terms is defined in Webster's Dictionary (See BCZR § 101.1) or Black's Law Dictionary, for that matter. When a term is not defined in a statute, or dictionary, principles of statutory construction dictate that it be given its "ordinarily understood" meaning. Comptroller v. J/Port, Inc., 184 Md. App. 608, 632 (2009).

The terms "property line" and "zoning line" do refer to different things, but here the distinction is not relevant because the tower is not set back 200' from either the RC 20 "zone line" or the "property line" of the adjacent parcel. Consequently, the Board finds that the present version of the law enacted by Bill 17-02 in 2002 is unambiguous on its face and requires no further interpretation beyond its plain meaning. Additionally, the Board finds that even if the new version of the law were to be deemed slightly changed, its current terminology still bars the Petitioner from its present request for relief no matter what label that request for relief has taken on.

CONCLUSION

As this Board is not swayed by the Petitioners' argument that this case involves an exception to the doctrine of res judicata, and somehow involves the application of new law that

would change the outcome of prior decisions in this matter, the Motion to Dismiss filed by Baltimore County and joined by People's Counsel is GRANTED.

ORDER

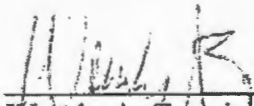
IT IS THEREFORE, this 19th day of April, 2013 by the Board of Appeals for Baltimore County,

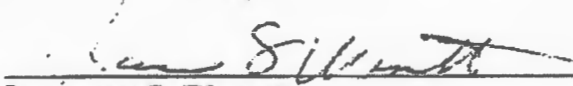
ORDERED, that the Motion to Dismiss Appeal filed by Baltimore County's Department of Permits, Approvals and Inspections in Case No.: 08-531-SPHX be and is hereby GRANTED; and it is further

ORDERED, that the appeal in Case No.: 08-531-SPHX, be and is hereby DISMISSED WITH PREJUDICE.

**BOARD OF APPEALS
OF BALTIMORE COUNTY**


Andrew M. Belt, Chairman


Wendy A. Zerwitz


Lawrence S. Wescott



Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

April 19, 2013

Lawrence E. Schmidt, Esquire
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Carole S. Demilio, Deputy People's Counsel
Office of People's Counsel
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Towson, MD 21204

Adam Rosenblatt, Assistant County Attorney
Dept. of Permits, Approvals and Inspections
111 W. Chesapeake Avenue
Towson, MD 21204

RE: *In the Matter of: Back River, LLC – Petitioner/Legal Owner*
Case No.: 08-531-SPH

Dear Counsel:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **with a photocopy provided to this office concurrent with filing in Circuit Court. Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Theresa Shelton/kc

Theresa R. Shelton
Administrator

TRS/klc
Enclosure
Multiple Original Cover Letters

c:	Michael Lutz, Representative/Back River, LLC	Steve Boyd, Esquire, Representative/Sprint Nextel, Inc
	Mitchell Kellman/Daft, McCune & Walker, Inc.	Carl Maynard
	Lawrence M. Stahl, Managing Administrative Law Judge	John E. Beverungen, Administrative Law Judge
	Arnold Jablon, Director/PAI	Andrea Van Arsdale, Director/Planning
	Lionel VanDommelen, Chief of Code Enforcement/PAI	Michael Mohler, Chief Administrator
	Thomas Bostwick, Deputy Legal Counsel to the Baltimore County Council	
	Nancy C. West, Assistant County Attorney	Michael Field, County Attorney

12/18/12

RECEIVED

DEC 18 2012

BALTIMORE COUNTY
BOARD OF APPEALS

IN RE:
PETITIONS FOR SPECIAL HEARING
AND SPECIAL EXCEPTION
W/S Back River Neck Road,
207' S of Pottery Farm Road
(810 Back River Neck Road)
15th Election District
5th Council District

BEFORE THE
BOARD OF APPEALS OF
BALTIMORE COUNTY

Case No. 08-531-SPHX

Back River, LLC
Petitioner

MEMORANDUM REGARDING RES JUDICATA

Baltimore County, Maryland, by undersigned counsel, submits this Memorandum in furtherance of its Motion to Dismiss and hereby demonstrates that the above-captioned petition is barred by res judicata:

INTRODUCTION

On December 4, 2012 this matter appeared before the Board of Appeals on a *de novo* appeal from an Office of Administrative Hearings Order denying the requested relief. Petitioner seeks in relevant part:

"To confirm that an existing cellular tower is in compliance with setback and all other applicable zoning regulations."

Unfortunately for the Petitioner, the window for raising this argument has long been shut, and the Board of Appeals is barred by well settled legal principles from entertaining the Petitioner's request for an interpretation that the cell tower can stand in its existing location. Quite simply, this portion of the petition cannot even be considered because it is legally barred by res judicata.

BACKGROUND

This dispute dates back to January 4, 2002, when former Zoning Commissioner Lawrence E. Schmidt (now counsel for the Petitioner) issued a written Order granting the

Petitioner a variance from BCZR § 426 to construct a cell tower in the location in which it continues to stand today. *See* BC Ex. 1. The case was appealed to the Board of Appeals, which reversed the decision and denied the variances (BC Ex. 2), and the Circuit Court and Court of Special Appeals, both of which affirmed the Board of Appeals. *See* BC Exs. 3-4. In 2009, the Baltimore County Code Enforcement Hearing Officer issued an Order finding the Petitioner in violation of BCZR § 426.6.A.1 for failing to maintain a 200 foot setback “from another owner’s residential property line” and issued a \$9,200.00 civil penalty, which was paid by the Petitioner without any appeal. *See* BC Ex. 5. Now, for the first time, Petitioner argues that the cell tower, all along, has been in compliance with the BCZR and never even required the setback variance that they unsuccessfully sought in various legal forums. This argument is barred by res judicata.

FACTS

The facts relevant to this SPH Petition are undisputed. The facts are drawn from a series of past legal decisions and a change in the wording of BCZR § 426.6A, which governs the setback requirements for Wireless Communications Towers in Baltimore County. Until May 5, 2002, the law read as follows:

11. If a tower is located in a residential zone, the tower shall be set back at least 200 feet from any other owner’s residential property line.
22. If a tower is located in a transitional zone, the tower shall be set back at least 200 feet from any residential zone.
33. If a tower is located in a medium or high intensity commercial zone, the tower shall be set back from an adjoining property line a distance equal to the setback required for other structures in the zone. However, if the property adjoins a residential zone, the tower shall be set back at least 200 feet **from the residential zone**.

See People’s Counsel Ex. 1 (emphasis added).

In 2002, Bill 17-02 simplified the law governing these setbacks to require that a "tower shall be setback at least 200 feet from **any other owner's residential property line.**" BCZR § 426.6A(1) (emphasis added); *see also* People's Counsel Ex. 2. The Bill became effective on May 5, 2002, and continues to govern the setbacks for Wireless Communication Towers ("cell towers") today. This change in the law lies at the heart of Petitioner's argument in the instant petition, so its timing and discussion throughout the various legal decisions in this case are the facts that are relevant to whether this petition is barred by res judicata.¹

Bill 17-02 became effective four (4) months after Mr. Schmidt granted Petitioner the variance, so the language in § 426.6A that was presented to Mr. Schmidt as Zoning Commissioner in 2002 is different from the language that Mr. Schmidt is interpreting on behalf of his now client. However, the change occurred well before the Board of Appeals conducted *de novo* hearings and denied the variances on May 14, 2003 (BC. Ex. 2), and obviously before the Court of Special Appeals affirmed the Board on August 3, 2005 (BC. Ex. 4). Likewise, the law had changed well before the Baltimore County Code Enforcement Hearing Officer issued his January 7, 2009 final order determining that the tower violates the setback requirements "from another owner's residential property line." *See* BC Ex. 5.

There is no question that the Court of Special Appeals interpreted the current version of the setbacks provision of the BCZR when issuing their decision:

The ML Zone permits cellular towers by right, subject to a 200 foot setback requirement "**from any other owner's residential property line.**" BCZR 426.6(A)(1). Because the setback requirement could not be met, it was necessary for Sprint to prove grounds for a variance.

¹ Since the facts necessary to determining whether this Petition is barred by res judicata can all be found in prior legal decisions that were made Exhibits at the hearing it was entirely appropriate for the Board to deliberate with respect to the County's Motion prior to hearing testimony from the Petitioner or County witnesses.

See BC Ex. 4 at p. 31 (emphasis added).

Thus, it is beyond dispute that there has already been a legal interpretation that the version of the setbacks law governing the cell tower at stake in this petition for Special Hearing imposes a 200 foot setback from all neighboring properties, and that the setback cannot be met absent a variance. Indeed, the Court of Special Appeals echoed the Board of Appeals, which held quite clearly that variances are required for this tower to remain in the location it continues to stand today:

The Board is not denying Sprint the right to erect a telecommunications tower in the Holly Neck area. It is only saying that there may be a more appropriate piece of property where the tower could be erected **and not require the variances that would be necessary on the instant property.**"

See BC. Ex. 2, p. 6 (emphasis added).

There is no dispute that the cell tower in this case remains in the location that was reviewed by the prior administrative and judicial forums, nor is there any dispute that the argument set forth in this petition for Special Hearing (that the "existing cellular tower is in compliance with setback and all other applicable zoning regulations") was never presented in the prior zoning petitions or code enforcement proceedings and is being raised for the first time in this petition. Indeed, when faced with a code citation in 2009, representatives for the Petitioner explained, under oath, to the Code Enforcement Hearing Officer that they had been making efforts to purchase additional pieces of adjacent properties in an attempt to provide a 200 foot setback from any other owner's residential property line. *See* BC Ex. 5. Unfortunately, Petitioner was unable to acquire property from one of the adjacent owners and the tower therefore stands, to this day, less than 200 feet from a neighboring residential property line. *Id.*

Based on these facts, Baltimore County submits that the petition for Special Hearing is barred by res judicata.

ARGUMENT

I. Doctrine of res judicata

The doctrine of res judicata provides that “a judgment on the merits in a previous suit between the same parties or their privies precludes a second suit predicated upon the same cause of action.” *Seminary Galleria, LLC v. Dulaney Valley Improvement Ass’n, Inc.*, 192 Md.App. 719, 734-737 (2010). A point of crucial importance to this zoning petition is that res judicata acts as “an absolute bar, not only as to all matters which were litigated in the earlier case, but as to all matters which *could have been* litigated.” *Id.* (citing *Whittle v. Bd. of Zoning Appeals*, 211 Md. 36, 49 (1956) (emphasis in original)). In *Whittle*, the Court of Appeals stressed that successive litigation of zoning petitions is discouraged because it “would be arbitrary for the board to arrive at opposite conclusions on substantially the same state of facts and the same law.” 211 Md. at 45. The doctrine applies to the administrative decisions reached by the County Board of Appeals, as demonstrated by Mr. Schmidt’s successful use of the doctrine this past year in case number 11-051-SPH. *See also Batson v. Shiflett*, 325 Md. 684, 705 (1992).

II. Res judicata bars this Petition for SPH

As each of the prior orders indicate, Petitioner never argued that the tower complied with all applicable provisions of the BCZR until this petition for Special Hearing was presented to the Office of Administrative Hearings earlier this year. As the orders also demonstrate, Petitioner previously made a number of legal arguments in an effort to keep the cell tower within the 200 foot setback, and then even attempted to purchase property from neighboring owners in order to meet the 200 foot setback for cell towers. *See BC Ex. 5, p. 2.* Not until all else failed did

Petitioner retain a new attorney that generated an argument for keeping the tower in its current location without a variance or additional purchase of neighboring property.

Unfortunately for Petitioner, the window for raising this argument was shut years ago, and the Board of Appeals is now barred by well settled legal principles from reconsidering the decisions of the Board of Appeals, Court of Special Appeals, and Code Enforcement Hearing Officer. Quite simply, res judicata acts "as an absolute bar, not only as to all matters which were litigated in the earlier case, but as to all matters which *could have been* litigated." *Seminary Galleria, supra*.

III. If Petitioner wanted to make the argument that is now raised, there was a time and place to do so

When this res judicata motion was made to the Board at the December 4, 2012 hearing, Mr. Schmidt attempted to argue that there was no way for the Petitioner to raise the arguments that he now intends to raise in the prior, unsuccessful petition for variance. That is simply not the case. If Petitioner believed that the change in the wording of the law that was facilitated by Bill 17-02 made the variance unnecessary, there were several options available to the Petitioner at that time.

First, Petitioner could have dismissed the petition for variance without even presenting the case to the CBA. If there was no longer a need for a variance, they could have simply applied for the necessary permits and constructed the tower without issue.

Second, Petitioner could have continued to present their variance petition to the CBA but argued, and had the CBA determine, that the wording change made a variance no longer necessary.

Third, Petitioner could have filed a petition for Special Hearing and had that petition consolidated with the pending variance petition. The combined petition could have then

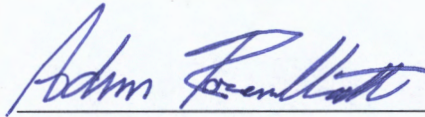
requested the Special Hearing relief that Petitioner now attempts to inappropriately raise after the fact, and could have been filed in the alternative to request a variance if the Board of Appeals disagreed with the argument that the tower was in compliance with the BCZR absent a variance. Indeed, this is the precise legal strategy that was successfully employed in a similar cell tower setback case in 2010. *See* 2010-0147-SPHA.

Of course, Petitioner did not pursue any of those avenues and instead chose to seek a variance from the Board of Appeals, Circuit Court and Court of Special Appeals, all after the law had changed to the language that continues to apply today. Even further, Petitioner again failed to argue that the cell tower, as it stands today, is in compliance with the BCZR when faced with a code enforcement action in 2009. Instead, Petitioner paid a civil penalty without appealing or challenging the hearing officer's finding of a violation. Having failed to raise an argument that could and should have been raised over the course of this litigation, Petitioner is now barred from re-litigating their request to maintain a cell tower in this location.

CONCLUSION

Wherefore, Baltimore County respectfully moves for an Order DISMISSING, with prejudice, the portion of this Petition that requests an interpretation that the "existing cellular tower is in compliance with setback and all other applicable zoning regulations." It is important for the Board to make clear that Petitioners cannot lose a legal battle at every level and then return to the Board arguing that the battle never should have occurred in the first place. It is in the interest of judicial economy to dismiss this petition.

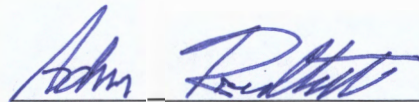
Respectfully submitted,



Adam M. Rosenblatt
Assistant to the Director and
Assistant County Attorney
Dept. of Permits, Approvals and Inspections
111 W. Chesapeake Avenue, Room 105
Towson, MD 21204
(410) 887-3353

CERTIFICATE OF SERVICE

I hereby certify on this 18th day of December, 2012 that a copy of this pleading was mailed to Lawrence Schmidt, 600 Washington Avenue, Towson, MD 21204, and hand delivered to Carol Demilio, Office of People's Counsel.



Adam M. Rosenblatt

12/18/12

RECEIVED

DEC 18 2012

BALTIMORE COUNTY
BOARD OF APPEALS

IN RE: PETITION FOR SPECIAL HEARING
W/s of Back River Neck Road, 270 feet +/- south of
centerline Pottery Farm Road

810 Back River Neck Road

15th Election District
6th Councilmanic District

Legal Owners: Back River, LLC, Michael Lutz,
Rep.

Petitioner: Back River, LLC

* BEFORE THE
* COUNTY BOARD OF APPEALS
* OF BALTIMORE COUNTY
*
* **Case No.: 2008-0531-SPH**
*

* * * * *

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

Back River, LLC and Sprint Nextel, Inc., hereinafter "Petitioners" by and through
Lawrence E. Schmidt and Smith, Gildea & Schmidt, LLC, their attorneys, submit this
Memorandum in Opposition to Motion to Dismiss and respectfully state:

Background

This matter comes before the County Board of Appeals of Baltimore County ("Board")
as a *de novo* hearing on an appeal of the decision of the Administrative Law Judge denying a
Petition for Special Hearing filed by Petitioners for the property located at 810 Back River Neck
Road in eastern Baltimore County. Within its petition, Petitioner requested the following relief:

1. To determine that an existing cell tower is compliant with the current setback regulations;
2. To approve a non-density transfer of lands into the subject property from the north and west; and,
3. For such other and further relief as the nature of its cause may require.

At the onset of the hearing, Baltimore County, through its Office of Law, moved for
dismissal of the appeal and consideration of the Petition on the grounds of *res judicata*. People's

Counsel for Baltimore County joined in that motion. Rather than receiving any evidence, the Board recessed its' hearing and directed the parties to submit written memoranda addressing the *res judicata* issue. On behalf of the Petitioners, this memorandum follows.

Petitioner avers that the Board cannot grant this motion without any factual findings upon which its legal conclusions might be based. The matter before the Board is *de novo*, thus the previous factual findings of the Administrative Law Judge are irrelevant. The Board has received no factual evidence. The only "evidence" presented to this point in the proceedings are certain exhibits (copies of previous Board/Court decisions and Bills of the County Council) offered during argument. Petitioner presents the following proffer of the testimony and evidence which would be presented by it, if permitted by the Board.¹

Back River LLC is the owner of a 5.0 (+/-) acre irregularly shaped property located at 810 Back River Neck Road in the Turkey Point community of eastern Baltimore County. The property is currently predominantly zoned ML (Manufacturing, Light).² The property has long been used for commercial/industrial/manufacturing purposes. The front of the property is improved with a large commercial building which is similar in style to a strip center type building. Various commercial tenants are housed therein. The property has two other large structures to the rear. These are also used for commercial purposes. There is also a large open area of the property used for boat and building material storage. The extreme rear of the site (which is virtually invisible from Back River Neck Road and adjacent properties) features the

¹ The proffered facts are contained not only in the "Background" section of this memorandum but also are stated throughout to support the arguments presented herein.

² As is shown on the County's current zoning map (attached as Exhibit A), the property lines of the subject property are not aligned precisely with the zone lines. This fact is evidence that a "zoning line" is not the same thing as a "property line". The significance of this distinction will be discussed hereinafter. Because the lines are not aligned, a narrow strip of the property is zoned RC 20, which is the zoning of the adjacent tract.

cell tower at issue and related equipment. The surrounding properties are largely undeveloped and heavily wooded. Much of the neighborhood is in the Chesapeake Bay Critical Area, i.e. lands within 1,000 feet of the Bay and its tributaries. Thus, much of the neighborhood cannot be developed due to environmental constraints and regulations.

In 2001, Sprint Nextel contracted with Back River LLC to lease a small area of the rear of the site to construct a telecommunications tower. The zoning regulations then in effect had been promulgated in 1998 and set out the required setbacks for a tower in Baltimore County Zoning Regulation (BCZR) section 426.6. That section required a sequenced analysis of three characteristics of the subject property and adjacent properties in order to determine the setback required. First, the regulation required a determination of the zoning of the property on which the tower was to be located. Different setbacks were required if the tower was located on "residentially zoned" property, "transitionally zoned" property, or a "medium or high intensity commercial zoned" property. Because the property on which the tower was proposed was zoned ML (a "medium or high intensity commercial zone"), the second criteria to be applied was to determine whether the subject property adjoined a "residential zone." The surrounding properties were zoned RC 20 (a "residential zone", pursuant to the definition of that phrase in Section 101.1 of the BCZR). Because of the adjacent residential zone, the third test was then applied, i.e. the tower need be setback 200 feet from the "residential zone line". Thus, to emphasize, the then existing setback regulations were based upon, 1. the zoning of the subject property, 2. the zoning of adjacent properties, and 3. the location of the zone Residential line which, as indicated above, is not necessarily in the same location as the property line.

Because the abutting properties to the north, west and south were all zoned RC 20 and the residential zone line for each was less than 200 feet from the proposed tower's location, three

separate variances were requested. To the north/side (the Luciano property) a setback of 148 feet was requested, to the west/rear (the Back 50 LLC property) a setback of 75 feet was requested and to the south/side (the Julio property) a setback of 75 feet was requested. The Petitioners thus filed a Petition for Variance to approve these setbacks, all in lieu of the 200 feet required.³

After public hearing in 2001, the Zoning Commissioner issued an order on January 4, 2002 granting the variances. Sprint then constructed a 115 foot high tower in order to fill an immediate need and hole in its coverage network. Under its license with the Federal Communications Commission, Sprint is required to provide complete cellular service and the subject location was desperately needed to fill a hole in coverage in the Turkey Point community. The Commissioner's decision to grant the variance was no doubt influenced by the support that the request received from reviewing agencies of County government. Within their Zoning Advisory comments, the agencies expressed support for the variance. A timely appeal of the Commissioner's order was filed by People's Counsel and after a *de novo* hearing at the Board of Appeals ("Board"), the Petition was denied by order dated May 14, 2003. The Board denied the variances, holding that the property was not unique. The Board did not hold that the tower caused any detriment to the locale, but concluded that Petitioner's had failed to meet the uniqueness burden required by *Cromwell v. Ward*, 102 Md. App 691 (1995), and its progeny. An appeal to the Circuit Court was denied and that Court affirmed the decision of the Board to deny the requested variances. A further appeal to the Court of Special Appeals likewise affirmed the variance denial. Neither the Board nor reviewing courts held that the property was an inappropriate location for the tower, rather, their narrow decisions were restricted to a holding

³ These dimensions were later amended because the tower was slightly relocated on the site at the request of DEPS in order to minimize environmental impacts.

that the property was not unique and, thus, a variance could not be granted. Moreover, all of the decisions hinged on the presumption that a 200 foot setback was required.

While these appeals were ongoing, the regulations related to cell tower setbacks were amended by the County Council. Under Bill 17-02 (effective May, 2002), the three part test to determine cell tower setbacks was eliminated. The zoning of the property was no longer a consideration. Likewise, the zoning of adjacent properties was also no longer a factor. Finally, the location of the adjacent residential zone line was no longer relevant to determining setbacks. The new legislation replaced these three criteria with a single standard; any cell tower adjacent to "another owner's residential property line" had to be set back 200 feet from that line.

The new legislation was enacted by the Council prior to the Board's decision and (obviously) the affirming decisions by the Circuit Court and Court of Special Appeals. Nonetheless, it is beyond any serious dispute that neither the Board of Appeals, the Circuit Court, nor the Court of Special Appeals considered the impact of this change in the law. Neither the adoption of Bill 17-02, nor the new language to the regulation brought about by this legislation, was referenced in the written decisions of the Board, Circuit Court, and/or Court of Special Appeals. To the contrary, the Court of Special Appeals, in its opinion and order issued on August 3, 2005 mistakenly described the setback requirements as they existed under the law then in effect. Specifically, on page 8 of its opinion, the Court stated that the setback requirements were "primarily based upon three factors:" It then described those factors as, 1.) the zoning of the property on which the tower was located; 2.) the zoning of neighboring properties; and 3.) the use of the subject property.⁴

⁴ The Court of Special Appeals actually mis-stated the third requirement. It was not the "use of the subject property" which was a consideration, but the location of the residential zone line. The mis-statement had no effect in the Court's decision, as the issue before it was whether a variance

In the instant case, Petitioners have filed a Petition for Special Hearing relief (NOT A VARIANCE), presenting an unaddressed question of law and advocating an interpretation of the BCZR that would result in a finding that the tower is compliant with the current law. The theory now advocated by the Petitioners was not the subject of the prior proceedings, nor were the questions generated by this theory at all considered. As importantly, this question is based upon a different factual scenario.

Argument

The Special Hearing is not Barred by *Res judicata*

The doctrine of *res judicata* bars the litigation of a cause of action after it has already been litigated. *Gertz v. Anne Arundel County*, 339 Md. 261, 269 (1995); *DeLeon v. Slear*, 328 Md. 569, 580 (1992). It has been held that *res judicata* can apply in administrative (quasi judicial) proceedings and that the doctrine bars claims previously litigated and those claims that properly could have been litigated. *Batson v. Shiflett*, 325 Md. 684, (1992). The elements of *res judicata* are as follows:

(1) the parties in the present litigation should be the same or in privity with the parties to the earlier case; (2) the second suit must present the same cause of action or claim as the first; and (3) in the first suit, there must have been a valid final judgment on the merits by a court of competent jurisdiction. *DeLeon*, 328 Md. at 580.

In the instant case, the controversy is over the second element of *res judicata*: whether the claim in the instant matter is the same "claim" or "cause of action" that arose before the Zoning Commissioner in 2002. Maryland has adopted the transaction test of § 24 of the *Restatement (Second) of Judgments* as the test for determining whether two claims or causes of

should be granted and whether the uniqueness required was demonstrated. The Court held that because the property was not unique, no variance could be granted.

action are the same for purposes of *res judicata*. *Gertz*, 339 Md. at 269-270. The transaction test has been stated as follows:

What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage. *Id.* at 270.

In *Gertz*, Gertz and Anne Arundel County settled a grading permit dispute in 1985 by entering into a Consent Agreement that allowed Gertz to dispose of raw materials on his land. *Id.* at 264. In 1989, the County filed a petition for Contempt in Circuit Court challenging the nature of Gertz's activities under the Agreement. *Id.* Gertz was found not to be in contempt, as his land filling activity was determined to be farming (and not raw material disposal) and permissible under the agreement. Subsequently, on April 23, 1990, the County enacted an emergency ordinance that required Gertz to obtain a sanitary landfill permit to continue this use. *Id.* at 265. Soon thereafter Gertz filed a declaratory judgment claim and the County counter claimed. Gertz asserted that the County's counterclaim was barred by *res judicata*. On appeal, the Court of Appeals determined that *res judicata* did not bar the County's counterclaim because it was not the same claim presented in the 1989 action. *Id.* at 270.

The *Gertz* Court determined that it was significant that the conduct complained of by the County occurred at different times. *Id.* Additionally, the counterclaim addressed Gertz's failure to obtain a landfill permit following the enactment of the 1990 Ordinance, whereas the contempt action addressed Gertz's land filing activity in 1989 under the Consent Agreement. *Id.* Moreover, the *Gertz* Court noted that even though both of the County's claims related to the same land and activity, the County's claims originated from different sources. *Id.* The Court of Appeals explained:

Significantly, *the theory of liability in the instant action did not exist when the earlier suit was litigated*; thus, Gertz's argument that the counterclaim is barred because the County merely changed its legal theory is inapposite. Although *res judicata* generally bars a second suit based on a different legal theory applied to the same set of facts previously litigated, that rule does not apply here because it assumes that the second theory of liability existed when the first action was litigated. When the contempt action was litigated, the County had no right to proceed against Gertz under the Ordinance because it had not yet been enacted. *Id.* (emphasis added)

Furthermore, the *Gertz* Court determined that the County's two claims were motivated by different considerations. *Id.* In the contempt action, the County sought to enforce the Consent Agreement and to regulate Gertz's activity. *Id.* at 270-71. By contrast, the County's second claim was to enjoin Gertz's activities only until such time as he obtained a landfill permit in compliance with the new law. *Id.* at 271. In addition, the *Gertz* Court established that the County's two claims did not form a convenient trial unit because the County's rights under the ordinance did not exist until April 23, 1990, and therefore could not have been litigated in the contempt action in 1989. *Id.* Finally, treating the facts as separate trial units would not conform to the parties' expectations because in addition to the change in the law, the 1989 decision could not be seen as exempting Gertz from all future regulation. *Id.* Many of the same factors that existed in *Gertz* which precluded *res judicata* are also present here.

A. The law changed after the Zoning Commissioner's Hearing in the initial action.

Like *Gertz*, the law changed in the instant case and the origin of the two claims emanated from different sources. As noted above, the regulation considered by the Zoning Commissioner when he granted the petition for variance was significantly amended thereafter. The version of the regulation under consideration in the instant matter bears little resemblance to the law in effect when the earlier matter was filed and considered by the Commissioner.

Additionally, like *Gertz*, the two petitions are motivated by different considerations. In the petition for variance, the Petitioners sought approval of a lesser set back than was required under the zoning regulations. In the instant petition for special hearing, the Petitioners are seeking an interpretation of the BCZR to determine if the cell tower is in compliance with the applicable zoning regulations. The required elements of proof are significantly different. For a zoning variance to be granted, the applicant must demonstrate that the property is unique and that the petitioner would suffer a practical difficulty if the variance were denied. (BCZR § 307.1) Comparatively, pursuant to BCZR § 500.7, no such standard of review is imposed in considering special hearings. A special hearing has been likened to a declaratory judgment action wherein the Commissioner interprets the BCZR as is necessary for the proper enforcement of the zoning regulations. *Falls Road Community Association, et al. v. Baltimore County*, MD 203 Md. App. 425 (2012).

Finally, as will be further explained below, the two claims did not form a “convenient trial unit” and treating the facts as separate trial units would not conform to the party’s expectations because the Petitioner’s rights under the new law could not have been litigated in the initial action. Thus, applying the transactional test in accordance with the *Gertz* decision clearly establishes that *res judicata* does not bar the present petition.

B. As a matter of law, Petitioners could not amend the relief requested when the matter went before the Board.

It is anticipated that Baltimore County and People’s Counsel will contend that the theory presented in the instant Petition for Special Hearing should have been offered by the Petitioners during the course of the previous proceedings. Baltimore County and People’s Counsel claim that Petitioner should have amended the relief requested during the prior litigation. However, Petitioners were legally barred from amending their requested relief after the law was changed

while the matter was pending at the Board. The Court of Appeals has previously explained that while the Board conducts a de novo hearing, it nevertheless exercises appellate jurisdiction. *UPS v. People's Counsel*, 336 Md. 569, 587-91 (1994). Initial jurisdiction for any zoning matter in Baltimore County is vested in the Zoning Commissioner (now, the Office of Administrative Hearings.) The Petitioner's would certainly not have been permitted to introduce a new petition for special hearing when only a petition for variance was under consideration during the appellate proceedings at the Board. The Board has consistently held in prior cases that the introduction of a new "theory" under a new zoning petition requires a new filing to the Zoning Commissioner. Additionally, there is no requirement that the Petitioner had to abandon the variance case and request a remand to the Commissioner when they appeared before the Board. They could, and did, continue to litigate the case under the cause of action (i.e. theory) presented in the Petition for Variance. It was later (in this case) that, the Petitioner properly filed the new petition and presented a different cause of action.

The Board has long held that amendments materially changing the nature of the case on appeal to it are impermissible because of the well recognized and required notice requirements. That is, a Petition may not be amended at the Board if it adds an element which a citizen reasonably would find material in deciding whether to participate. *Cassidy v. Baltimore County Board of Appeals*, 218 Md. 418, 425-26 (1958) (the public must be apprised clearly of the *character of the action proposed* and have enough of a basis upon which it rests to enable them to intelligently prepare for the hearing). In this case, a member of the public may choose to participate in the special hearing case given its implication County-wide, but chose not to participate in the variance case which was relevant only to the property at 810 Back River Neck Road. The interpretation of "new" section 426.6.A requested by Petitioners in the instant case

affects any tower located in Baltimore County. To the contrary, a variance is site specific to the property at issue. Thus, such an amendment would violate requisite notice requirements. BCZR § 500.7 specifically requires that notice of petitions for special hearing be given to the public via the posting of the sign on the subject property and advertisement in a newspaper. Such notice requirement mandates that the posted sign “describe the action requested in the petition.” These notice requirements are not required while a matter is pending at the Board and are imposed when the case is first filed at the Zoning Commissioner level. Therefore, there would have been no “notice” to the public of the special hearing theory if an amendment was permitted at the Board.

Additionally, such an amendment is also prohibited because the new theory would escape the requisite review by the County’s Zoning Advisory Committee Agencies. *See* BCZR § 32-3-302; *see also* BCZR § 500.7. Once a hearing date before the Commissioner is established, a copy of the petition shall be forwarded to the Department of Planning and other County agencies for consideration and a written report containing recommendations on the proposed petition.

In sum, the amendment that the Office of Law and People’s Counsel contends should have been made could not have been made as it would change the essence of the relief requested. As importantly, the request is different and the standard of review is different. No notice would have been given to the public of the requested relief in the Petition for Special Hearing. The “cause of action” is not the same.

C. The underlying facts related to the property and neighborhood are different today than when the prior case was considered and the Petitioner’s “theory” of the case was unavailable at the time of the first case.

The underlying factual scenario (of which there is no evidence before the Board but which is proffered herein) is different today from when the variance was litigated. This change in

the factual scenario makes it so the relief requested under Petitioner's current theory was not available to Petitioner when this matter was winding its way through the Board, Circuit Court and Court of Special Appeals. This "unavailability of a claim" in the first case was expressly found in *Gertz* as a basis which precludes the application of *res judicata*. This holding was likewise stated in *Seminary Galleria v. Dulaney Valley Improvement Ass'n, et al.* 192 Md. App. 719 (2010), where the Court of Special Appeals held that a material change in the facts or law precludes the application of *res judicata*. This has been the consistent holding of the Appellate Courts. For example, in *Jack v. Foster Branch Homeowner's Ass'n No.1, et al.* 53 Md. App. 325 (1982) the Court of Special Appeals held that *res judicata* does not apply when there has been a change in the law or a material change in circumstance. The Court reasoned that *res judicata* did not apply since evidence necessary to sustain the second action was not the same as the evidence necessary to support the first.

Petitioner's argument (which this Board has failed to allow Petitioner to develop through its refusal to permit testimony) is that, under the current version of the setback statute, no setback is required to the Julio property because that property is not residentially developed. Petitioner avers that under the current law, a 200 foot setback is required only when an adjacent property within 200 feet of a tower is owned by another *and* has a dwelling thereon. Thus, in order for Petitioner to offer this argument, the Julio property cannot have a dwelling. Indeed, if he were to testify, Mitch Kellman (Petitioner's expert) would testify that the Julio property is currently vacant. This would likewise be confirmed by current photographs and tax records.

In the Court of Special Appeals decision, the Court recounted the facts as found in the prior case by the trier of fact, i.e. the Board of Appeals. The Court's opinion, on page 2, states that the Julio property (which was to the south of the subject site and zoned RC 20) is improved

with a dwelling.⁵ That residence is no longer present and the Julio property is currently unimproved. This change in the facts is the key factual distinction between the first case and the instant matter. In his expert opinion, Mr. Kellman would opine that the current regulations do not require a setback due to the absence of a dwelling on the Julio property. He would not have this same opinion if the residence on the Julio property still existed. The theory which was unavailable in 2002-2005 during the prior litigation is available today because of this change in the facts. The unimproved condition of the Julio property today (as opposed to the circumstances that existed previously) gives rise to a cause of action/theory of relief which was previously unavailable and never contemplated/considered by the Board and courts. This change in facts is precisely the type of distinction contemplated in *Gertz, Seminary Galleria* and the other cases cited.

It is also to be observed that after the Court of Special Appeals affirmed the variance denial, the Petitioner explored the possibility of obtaining additional property to the north, west and south of the subject property. This was done so that the Petitioner would own property which extended at least 200 feet in all directions from the tower. This would remove any doubt that the tower's location was permissible under the law. The lands contemplated to be acquired are undeveloped, largely wooded and have no development potential. Environmental constraints associated with the properties allowed the Petitioner to present a minimal monetary offer to those landowners. Indeed, acreage to the north/side (Luciano property) was acquired by Petitioner, as was acreage to the west/rear (Back 50 LLC). Collectively, these acquisitions cost the Petitioner the modest sum of \$4,000. These acquisitions (the approval of which are sought through another prong of the special hearing; i.e. to approve a non density transfer) mean that the petition for

⁵ The Court's verbatim opinion, in describing the subject property states, "[T]he southern boundary is bordered by RC20 property on which there is a residence."

variance doesn't apply (under any interpretation) to the side yard towards the north and rear yard towards the west. The special hearing theory presented by Petitioners is thus relevant only to the Julio property to the south.⁶ This is a change to the configuration and size of the subject property from the time of the prior case to the present.

D. *Res judicata* does not apply when an administrative agency's decision is based on an error of law.

Even if it is determined that an amendment would have been permissible, the Board's failure to take the new law into account was arbitrary and capricious and is a defense to *res judicata*. *Klein v. Colonial Pipeline Co.*, 55 Md. App. 324, 340 (1983); *Board of County Commissioners of Cecil County v. Racine*, 24 Md. App. 435, 443 (1978). *Res judicata* does not apply to decisions of administrative agencies where "there has been a substantial change of conditions or it is shown that the decision was a product of fraud, surprise, mistake or inadvertence." *Klein*, 55 Md. App. at 340 (quoting *Racine*, 24 Md. App. at 443). Furthermore, to avoid unfairness, *res judicata* does not apply when an administrative agency's decision is based on an error in law. *Klein*, 55 Md. App. at 341; *Racine*, 24 Md. App. at 452.

Here, the Board's Opinion made no mention of the change to the law. As noted previously, the Court of Special Appeals clearly applied the old regulation. *See Sprint, supra*. Accordingly, because the roles of the Circuit Court and the Court of Special Appeals were to review the decision of the Board, neither Court had an opportunity to account for the change in the law. Thus, to avoid unfairness, *res judicata* should not apply to the Board's legal error.

E. *In the initial action, Petitioners lacked ample procedural means for fully developing the entire transaction.*

In approving the transaction test, the Court of Appeals has made clear that "equating a

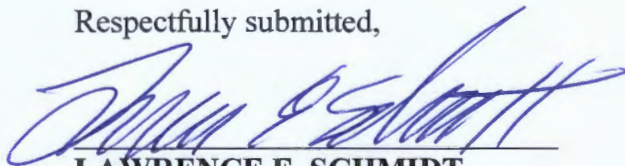
⁶ There has been no acquisition of any acreage from the Julio property.

claim with transaction is justified only when the parties have ample procedural means for fully developing the entire transaction.” *Esslinger v. Baltimore City*, 95 Md. App. 607, 619 (1993) (quoting *Restatement Second of Judgments*, §24 cmt. a (1982)). Part of being afforded ample procedural means in an initial action is also being afforded the opportunity to pursue all of one’s remedies in that action. *Esslinger*, 95 Md. App. at 619; see also *Restatement* §26(1)(c) (*res judicata* does not apply when a “plaintiff [is] unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action...and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief”).

Therefore, irrespective of the factors associated with the transactional test, Petitioner’s request for special hearing is not barred by *res judicata* since it could not have been asserted in the initial action.⁷

For all of the above reasons, Petitioner requests that the Motion to Dismiss filed by the Baltimore County Office of Law and the Office of People’s Counsel be DENIED and that this case be scheduled for a hearing on the merits of the Petition.

Respectfully submitted,



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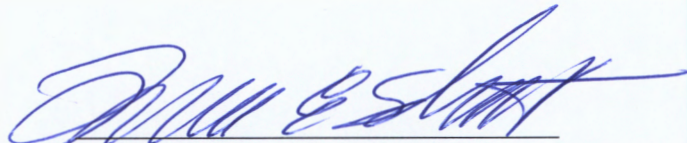
⁷ *Res judicata* also does not attach based upon the Code Enforcement proceeding through which the Petitioners were sanctioned. First, it is the Zoning Commissioner, not the Code Enforcement Hearing Officer, who has the authority to “interpret” the Zoning Regulations. (See BCC § 32-3-301). Second, Code Enforcement Hearing Officer Wisnom was not a quasi-judicial administrative body. Finally, a review of Wisnom’s written findings and order shows that he was not cognizant of the law change and thus did not consider it.

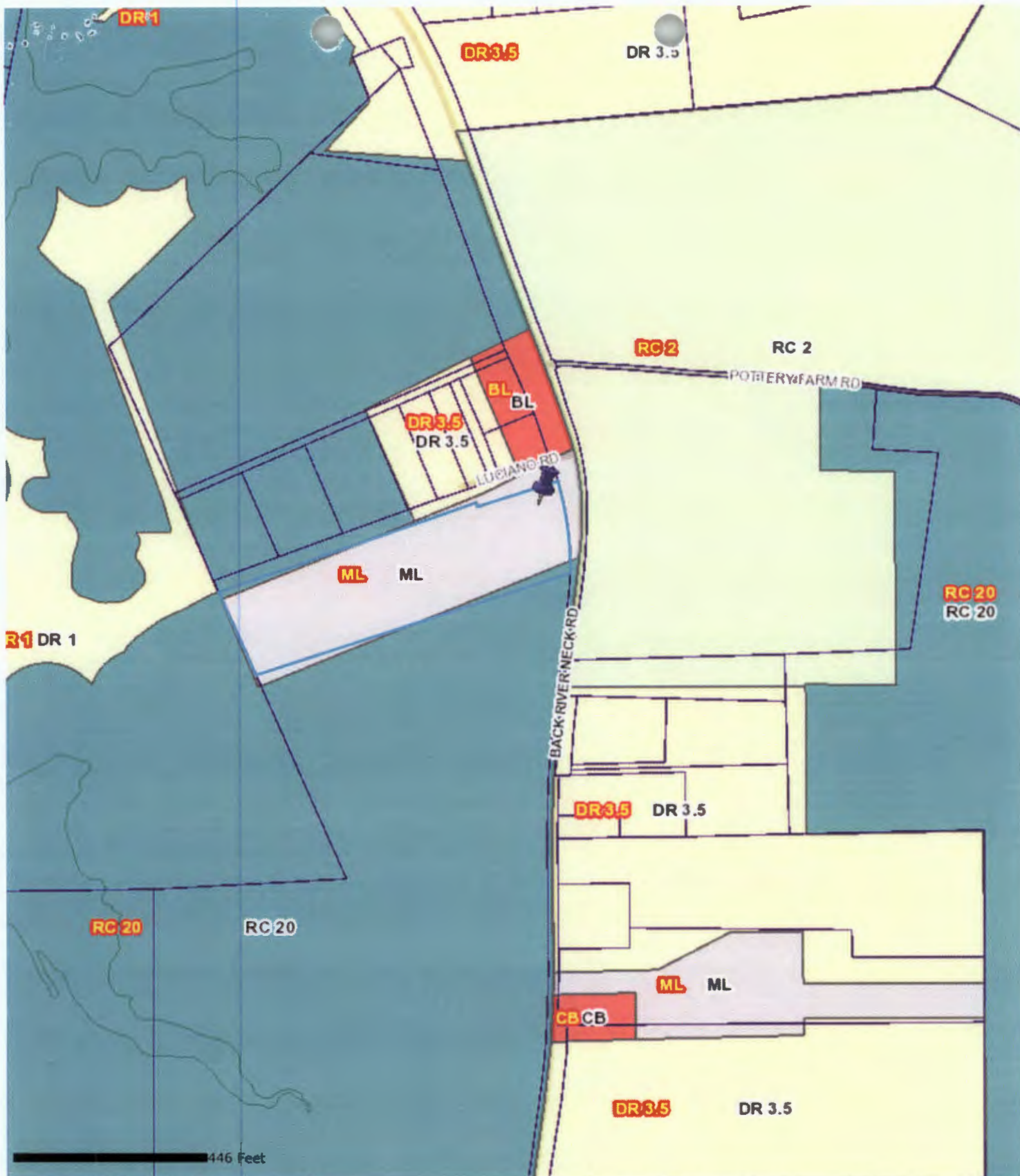
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this **18th** day of **December, 2012**, a copy of the foregoing Closing Memorandum in Lieu of Closing Argument was mailed first-class pre-paid postage to:

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LAWRENCE E. SCHMIDT



My Neighborhood Map

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Baltimore County
My Neighborhood



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DEC 18 2012

12/18/12
RE: PETITION FOR SPECIAL HEARING * BEFORE THE BOARD
AND SPECIAL EXCEPTION *
810 Back River Neck Road; WS of Back * OF APPEALS
River Neck Road, 270' S of Pottery Farm Rd *
15th Election & 6th Councilmanic Districts * FOR
Legal Owner(s): Back River, LLC
Contract Purchaser(s): Sprint Nextel * BALTIMORE COUNTY

BALTIMORE COUNTY
BOARD OF APPEALS

Petitioner(s) * 08-531-SPHX

* * * * *

MEMORANDUM OF PEOPLE'S COUNSEL
FOR BALTIMORE COUNTY

People's Counsel for Baltimore County hereby submits this Memorandum in support of the Motion to Dismiss the Amended Petition for Special Hearing.

Introduction and People's Counsel's Position

Petitioner Back River LLC (hereafter "Back River") filed a Petition for Variances in 2001 to construct a wireless communications cell tower on Back River Neck Road. The variances were approved by Zoning Commissioner Lawrence Schmidt but denied in a *de novo* appeal by the County Board of Appeals (CBA) and subsequently by the Circuit Court and the Court of Special Appeals (CSA). People's Counsel participated in the 2001 case at the CBA hearing and throughout the appeals. Back River erected the cell tower after the Zoning Commissioner decision and refused to take it down despite denials by the appellate courts. It remains on the site to this day. Our office and the community association requested enforcement of the Court orders in letters to the Director of the Department of Permits and Development Management in 2004, 2005, and 2006.

In 2012, Back River filed an Amended Petition for Special Hearing ("Petition") for the same relief, claiming an amendment (Bill 17-02) to the cell tower legislation (BCZR 426.6) in 2002 eliminated the need for the 200 ft setbacks on the northern, southern, and western side of the site. People's Counsel opposes the 2012 Petition because the essence of Back River's current request for relief duplicates the relief requested in 2002 and is barred by the long established principle of *res judicata*:

"The doctrine of *res judicata* provides that "a judgment on the merits in a previous suit between the same parties or their privies precludes a second suit

predicated upon the same cause of action.” (citations omitted) Seminary Galleria, LLC v. Dulaney Valley Improvement Association, 192 Md. App. 719 (2010).

People’s Counsel strenuously maintains *res judicata* bars adjudication based on a legal theory that could have been raised at the prior hearing:

“With reasonable diligence, Seminary could have discovered and asserted in support of the original 2003 filing its current argument that the Galleria needs more parking spaces in order to comply with requirements the County adopted in 1986. Seminary’s failure to accurately and contemporaneously survey the galleria in connection with its first application to approve the additional spaces is not a reason to consider a second application seeking the same relief.” Id at 741-742.

Following an evidentiary hearing and post hearing memoranda, Administrative Law Judge (ALJ) Beverungen denied Back River’s petition. First, the ALJ found the 2012 Petition is barred by *res judicata*:

“In these circumstances, the doctrine of *res judicata* (which is applicable to quasi-judicial administrative proceedings, such as those before the Baltimore County Board of Appeals) is applicable. That doctrine bars relitigation of claims that were, or could have been litigated in an earlier proceeding between the parties. Seminary Galleria, LLC v. Dulaney Valley Impro. Ass’n., 192 Md. App. 719, 734-37 (2010). As such the doctrine of *res judicata* bars the Petitioners from obtaining special hearing relief in this case.”

Judge Beverungen also held Back River’s proposed new “legal theory” that Bill 17-02 does not impose the 200ft setback to adjoining residential lots without a dwelling to be completely unfounded and without merit.

Back River filed an appeal to the CBA. A hearing was held on December 4, 2012. The parties were heard preliminarily on the *res judicata* issue. The CBA stated it will decide this issue before proceeding on the Petition for Special hearing and requested written memoranda from the parties.

As instructed, this Memorandum addresses the single issue of the application of the doctrine of *res judicata* to the current Petition. Any references to statutory construction and the applicability of Bill 17-02 to the 2002 case are made to “flesh out” our *res judicata* position. It is also in response to Back River’s claims that (i) *res judicata* does not apply to Bill 17-02 since it was enacted after the Petition for Variance was filed

and their proposed interpretation was not presented in the 2002 case; and (ii) Back River's claim that a "mistake of law" constitutes an exception to the *res judicata* doctrine.

**HOW DOES A CHANGE IN LEGISLATION AFFECT A PENDING
ZONING CASE**

Back River argues Bill 17-02, and the interpretation presented at this time, could not have been made in the prior case. As strenuously as our office disagrees with Back River's interpretation, the argument could have been made in the prior case at the *de novo* hearing before the CBA. Before our legal argument is made, it may be beneficial to review the chronology of this case as it relates to our *res judicata* position:

10-19-2001	- Back River files a Petition for Variance seeking 5 variances from the setbacks under BCZR 426.6
01-04-2002	Zoning Commissioner approves the variances; cell tower erected while appeal to CBA pending
02-19-2002	Baltimore County Council enacts Bill 17-02 consolidating and rephrasing BCZR 426.6.
05-14-2002	Bill 17-02 becomes effective (45 days from enactment)
09-25-2002	Day 1 <i>de novo</i> hearing before the CBA
01-21-2003	Day 2 <i>de novo</i> hearing before the CBA
05-14-2003	CBA issues written opinion denying variances
02-05-2004	Circuit Court affirms CBA and denies variances
08-04-2005	Court of Special Appeals affirms CBA's denial of variances
05-09-2008	Back River files Petition for Special hearing and Petition for Special Exception (Petitions never proceeded to hearing and matter lay dormant until 2012 Amended Petition filed)
05-17-2012	Back River files Amended Petition for Special Hearing

Recent Maryland appellate cases support our position that a new statute applies to a pending case, and can be introduced to the Court or agency having jurisdiction over the matter when the statute is enacted.

In Grasslands v. Frizz-King 410 Md. 191 (2009), a Queen Anne's County zoning and land use case, the Petitioner, Frizz-King, sought approval for a residential subdivision. The Board of Appeals and Circuit Court approved the plan which was opposed by the adjoining landowner, Grasslands. Just prior to oral argument in the Court of Special Appeals, the County passed a law amending the standards to evaluate proposed subdivisions. The CSA affirmed the County Board of Appeal's approval of the plan under the prior standards without consideration of the new law. The Court of Appeals reversed and stated the new standards apply. The Court remanded to the Board of Appeals which had erroneously imposed the burden of proof on the protestant instead of the petitioner with instructions to apply the new standards. In the Opinion, Judge Adkins reviewed the effect of a new statute on a pending case, both in general and then specifically in zoning cases:

"The question whether a statute operates retrospectively, or prospectively only, ordinarily is one of legislative intent. In determining such intent this Court has repeatedly stated, "there is a general presumption in the law that an enactment is intended to have purely prospective effect. In the absence of clear legislative intent to the contrary, a statute is not given retrospective effect." (citations omitted) *Id* at 218.

Judge Adkins explained one exception to the general presumption of prospective application is a change that is procedural rather than substantive. A procedural change can be applied retrospectively because " . . . it deprives the appellant of no property or rights . . . ***The provision is merely procedural*** [.] " (citations omitted) Grasslands, *supra* 226. (emphasis in original).

Judge Atkins then emphasizes that zoning cases are treated differently:

"The exception most pertinent to this case is the general presumption ***in favor of*** retroactivity in zoning and land use cases." (citations omitted) Grassland, *supra* 220. (emphasis in original).

Remedial zoning statutes apply retroactively to a pending case where there is no final decision because the petitioner has no legal authority for the requested relief

pending the final outcome and thus has no vested rights. The January 4, 2002 decision of Zoning Commissioner Schmidt approving the cell tower contained the cautionary language:

“The Petitioners may apply for their building permit and be granted same upon receipt of this order; however, Petitioners are hereby made aware that proceeding at this time is at their own risk until the 30-day appeal period from the date of this Order has expired. If an appeal is filed and this order is reversed, the relief granted herein shall be rescinded.” (See Baltimore County Hearing Exhibit #1).

In footnote 10, the Grasslands Court cited with approval a 1964 Baltimore County zoning case, Yorkdale Corporation v. Powell, 237 Md. 121 (1964). In Yorkdale, a special exception and variance for an apartment building were approved and the neighbor appealed. The Circuit Court reversed the approval and the property owner appealed to the Court of Appeals. While the case was pending the county council passed a bill prohibiting any variance for the proposed use. The Court of Appeals applied the new law, determined the relief was not available to the Petitioner, and rendered the case moot.

The point of Yorkdale is that the Court took notice of the new law and applied it to the pending case without a further hearing. Here, Bill 17-02 was enacted before the evidentiary hearing at the CBA, allowing for a review by the administrative agency in “real time”. It is worth noting that Bill 17-02 amending BCZR 426.6 was enacted 7 months before the first CBA hearing date and 11 months before the second date. There was ample time for review of the statute and notification of all parties that a legal argument would be presented on the need for variances. We know it is not uncommon for the parties to present new or different evidence and legal points at the CBA level. Back River could easily have presented their variance case and made the legal argument that in the alternative no variances were required. Admittedly People’s Counsel would have opposed Back River’s interpretation of Bill 17-02 as it does now, but there is no doubt the matter could have been presented to the CBA, and argued and briefed by all parties there and in the appellate proceedings.

In Scrimgeour v. Fox Harbor, LLC, 410 Md. 230 (2009), the parties disputed whether a proposed structure for horse activities was permitted as an accessory use. While the case was pending in the Court of Appeals and before oral argument, the parties advised the court of amendments to the Talbot County Zoning Code which revised the definitions of accessory uses and structures and the location of those uses in agricultural zones. Judge Battaglia held the new regulations applicable under the principles set out in Yorkdale, *supra*, Armstrong v. Mayor and City Council of Baltimore, 409 Md. 648 (2009), Layton v. Howard County Board of Appeals, 399 Md.36 (2007).

The Scrimgeour Court chose to remand the case to the Board of Appeals to permit argument and review by an administrative agency. But it did not require the property owner to file a new Petition based on the changes in the law and start anew. Judge Battaglia remanded for the administrative agency:

“ . . . to consider and apply the local ordinance, as it now stands, in the exercise of its presumed expertise in such matters. Given the freshness of the legislative changes and the vigorous dispute between the parties as to the legislative intent of the changes and the legal effect to be given them on the facts here, any reviewing court (and the record) well may benefit in any future consideration of this dispute from the reasoning of the administrative body”

In Armstrong, *supra*, Judge Harrell determined the Court of Appeals could construe the application of the new zoning ordinance without remand.

The facts here present a much cleaner and uncomplicated scenario. Back River's interpretation of Bill 17-02 could have been made before the very agency charged with hearing the evidence and legal argument, without the need for a remand or a determination of the matter by an appellate court.

There are other appellate cases which applied new legislation to a pending case and these are interspersed in the sections of this Memorandum in the context of *res judicata*.

The point is Back River could have presented its position on the interpretation of the amended statute to the CBA in 2002 and 2003. Its failure to do so prohibits seeking the same relief – a cell tower – under a legal theory readily available in 2002.

Moreover, it is possible the Circuit Court or the CSA may have allowed Back River to present its legal interpretation even if it had not been presented at the CBA. To be sure, Back River never suggested the setbacks were inapplicable in the 2 years the matter was on appeal. (In 2008, six years after the enactment of Bill 17-2002, Back River proposed to purchase additional RC 20 zoned land from adjoining property owners to add to the ML site. It filed a Petition for Special Hearing and a Petition for Special Exception seeking a non-density transfer and approval of a tower in an RC 20 zone. This comports with its original position and recognition that the setbacks apply, even under Bill 17-02. As stated those petitions lay dormant and never advanced to a hearing).

New legislation applies to pending cases whether the law is a “game-changer” or not. Here, our office maintains Bill 17-02 did not change the substance of the law requiring that a cell tower maintain a 200 ft setback from residential properties. Rather, the amendment consolidated the language to maintain the 200 ft setback regardless of the zone in which the tower was located. It is unreasonable to suggest the County Council would eliminate the setback altogether if the adjoining residential properties were not improved with a dwelling as Back River claims.

Finally, the CSA opinion here references and quotes on page 8 the amended §426.6, obviously recognizing its applicability, and the need to maintain the 200 ft setback:

“For ML sites surrounded by residentially zoned properties, the standard rear and side setback is 50 feet. . . . But a wireless telecommunications tower on such a site must satisfy a greater setback requirement – at least 200 feet from any residential boundary. See BCZR 526.6.A.1.” (citations omitted) Sprint PCS, et al v. Baltimore County, Maryland. (Baltimore County’s Hearing Exhibit # 4).

The CSA applied the 200 ft setback by explicitly acknowledging the amended statute applied to the case before them. Implicitly, they rejected an interpretation that required the adjoining properties be improved with a dwelling.

RES JUDICATA BARS A NEW LEGAL THEORY

As stated above, our office strenuously disagrees with this strained and irrational interpretation that the 2002 amendment only requires a 200 ft setback from “improved”

residential property, not vacant property. But assuming validity for the sake of argument, it cannot even be considered at this stage because it could have been raised in the prior litigation and Petitioner failed to do so. In addition to the cases cited in the previous section, Powell v. Calvert County, 368 Md. 400 (2002) and Antwerpen v. Baltimore County, 163 Md. App. 194 (2005) support our position. As noted, there was no final order until the CSA decision in 2005, well after May 5, 2002, the effective date of Bill 17-02.

It is undisputed that the principle of *res judicata*, sometimes referred to as preclusion, applies to CBA decisions. Judge Robert Karwacki confirmed in Batson v. Shiflett 325 Md. 684, 701-05 (1992):

“The Court of Special Appeals used the following test for determining whether the NLRB decision is entitled to preclusive effect:

“Whether an administrative agency's declaration should be given preclusive effect hinges on three factors: ‘(1) whether the [agency] was acting in a judicial capacity; (2) whether the issue presented to the district court was actually litigated before the [agency]; and (3) whether its resolution was necessary to the [agency's] decision.’” (citation omitted)

Batson, 86 Md.App. at 356, 586 A.2d at 799 (quoting West Coast Truck Lines v. American Industries, 893 F.2d 229, 234-35 (9th Cir.1990)). This test was first enunciated in Exxon Corp. v. Fischer, 807 F.2d 842, 845-46 (9th Cir.1987), and its three prongs are supported by the Supreme Court case law on issue preclusion.

In United States v. Utah Constr. Co., 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966), the Court spoke particularly to the preclusive effect of administrative law rulings, stating that:

“When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.” [citations omitted].

Id. at 422, 86 S.Ct. at 1560, 16 L.Ed.2d at 661. Thus, agency findings made in the course of proceedings that are judicial in nature should be given the same preclusive effect as findings made by a court.”

The Supreme Court quoted the Utah Constr. Co. *supra* language in Astoria Federal Savings & Loan Assoc. v. Solimino 501 U.S. 104, 107 (1991). Mr. Justice Souter added,

"Such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise. To hold otherwise would as a general matter, impose unjustifiable upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution. ... The principle holds true when a court has resolved an issue, and should do so equally when the issue has been decided by an administrative agency, be it state or federal"

In Maryland, Chief Judge Brune explained the prohibition of a second zoning action in Whittle v. Board of Zoning Appeals of Baltimore County 211 Md. 36, 45(1956):

"The general rule, where the question has arisen, seems to be that after the lapse of such time as may be specified by the ordinance, a zoning appeals board may consider and act upon a new application for a special permit previously denied, but that it may properly grant such a permit only if there has been a substantial change in conditions. * * * This rule seems to rest not strictly on the doctrine of *res judicata*, but upon the proposition that it would be arbitrary for the board to arrive at the opposite conclusions on substantially the same state of facts and the same law." Emphasis supplied.

A "substantial change in circumstances" is strictly construed. A change in the way the same relief is stated or an exaggeration of a change in the neighborhood in order to avoid *res judicata* will not be countenanced by the courts.

In Chatham Corp. v. Beltram 243 Md. 138 (1966), the applicants attempted to avoid the consequences of an earlier denial by reducing the requested density and invoking new arguments. Judge Hammond wrote that the proposal did not differ significantly in kind or degree, and therefore the first decision was controlling under Woodlawn Ass'n v. Board of Appeals 241 Md. 187, 97 (1965) and the authorities there cited. 243 Md. at 150-52.

Chief Judge Hammond applied these same principles to a zoning case a few years later in Fertitta v. Brown 252 Md. 594 (1969). He approved Circuit Judge Proctor's analysis,

"Judge Proctor said that by analogy to the doctrine of *res judicata* when the evidence which is presented to the agency could have been presented at an earlier hearing, and there is no change in circumstances between the times of the hearings, the final decision in the earlier case is unalterably binding under Whittle v. Board of Zoning Appeals"

Here, there are no changes in the condition of the property or in the neighborhood to support a rehearing. The surrounding properties were vacant throughout the prior litigation and are vacant now. The proposed interpretation of BCZR § 426.6 is a legal argument that could have been raised in the prior litigation. *Res judicata* bars litigation of the same matter with respect not only to the legal claims or issues decided in the case finally adjudicated, but also “as to all matters which with propriety could have been litigated in the first suit.” (emphasis added). Alvey v. Alvey 225 Md. 386, 390 (1961); MPC, Inc. v. Kenny 279 Md. 29, 32 (1977); DeLeon v. Slear 328 Md. 569, 580 (1992); Kim v. Collington Center III 180 Md. App. 606, 619 (2008). A litigant must bring forward the entire case, including all relevant facts and legal issues. Otherwise, there would be a potentially unending series of cases based on different facts and legal theories framed to achieve the same objective and relief.

The appellate cases are in accord that *res judicata* applies (or it would be arbitrary and capricious to differ) regardless of a slight deviation of facts and evidence, where a petitioner could have presented a different legal basis, theory or evidence in the initial case. When a petitioner comes up with a new legal or “mixed factual/legal” ground omitted in the initial case, some different evidence, opinion, or theory will frequently bear on the new approach. The petitioner will then assert that the new theory engenders different facts. The “new facts” are really intertwined with the new legal theory, which could have been asserted in the initial case. To suggest that “different evidence,” exists ignores the conceptual framework of Whittle, *supra* and its progeny.

**THERE WAS NO LEGAL ERROR IN THE DENIAL OF THE PETITION FOR
VARIANCE FILED IN 2002, AND ANYWAY A “MISTAKE OF LAW” IS NOT
AN ESCAPE FROM *RES JUDICATA***

Back River seeks to escape the *res judicata* doctrine by reference to Racine v. Board of County Comm’rs 24 Md. App. 435, 447-52 (1975). The Court of Special Appeals held that the doctrine may be relaxed for administrative decisions which are the product solely of an error of law. Unfortunately, this decision went beyond the bounds for

zoning decisions articulated by Chief Judge Brune in Whittle supra at 45 quoted above but worth repeating in the context of Rancine:

"The general rule, where the question has arisen, seems to be that after the lapse of such time as may be specified by the ordinance, a zoning appeals board may consider and act upon a new application for a special permit previously denied, but that it may properly grant such a permit only if there has been a substantial change in conditions. See Bassett on Zoning (2nd Ed., 1940), pp. 119-120; Yokely on Zoning Law and Practice (1953 Ed.), § 128; 168 A.L.R. 124; St. Patrick's Church Corporation v. Daniels, 113 Conn. 132, 154 A. 343; Burr v. Rago, 120 Conn. 287, 180 A. 444; Rommell v. Walsh, 127 Conn. 272, 16 A.2d 483; Rutland Parkway, Inc. v. Murdock, 241 App.Div. 762, 270 N.Y.S. 971. This rule seems to rest not strictly on the doctrine of *res judicata*, but upon the proposition that it would be arbitrary for the board to arrive at opposite conclusions on substantially the same state of facts and the same law."

The Court of Appeals adhered to this perspective in subsequent zoning cases. Again in the rezoning case, Woodlawn Ass'n v. Board of Appeals supra at 156, Judge Hammond wrote quoting Whittle, 211 Md. at 49-50.

"Neither neighborhood sentiment nor the slight distinction created by the additional restrictions were deemed to amount to a substantial change in circumstances. In conclusion we held:

"Because essentially the same facts appeared in the second case as appeared or as could have been shown in the first case, the appellees are barred by *res judicata*, and their petition should have been denied."

In quick succession, the Court revisited the issue in two other rezoning cases, Chatham Corp. v. Beltram, discussed above and in Alvey v. Hedin 243 Md. 334 (1966), where the Court rejected an applicant's attempt to circumvent an earlier decision on the issue of mistake. Judge Marbury wrote, 243 Md. at 340:

"There was never any holding or indication that an administrative zoning decision involving the same property could be reversed based on a mistaken view of the law existing at the time the decision was made. Rather, there had to be a material or significant change in the facts (such as a change in the character of the neighborhood) or a significant relevant change (not just any change) in the law subsequent to the initial decision."

In this setting, the Court of Special Appeals in Racine made a leap beyond the boundaries set by the high court by relaxing the doctrine and simply allowing an open season on legal criticism of the earlier agency decision. So far as our research discloses

the Court of Appeals has never approved the Racine decision and has implicitly or effectively rejected it.

Indeed, subsequent to Racine, the Court of Appeals reinforced and solidified the principle that *res judicata* applies to quasi-judicial decisions of administrative agencies. White v. Prince George's County 282 Md. 641, 658-59 (1978) held that *res judicata* applies to decisions of the Maryland Tax Court, an administrative agency, whether or not the Tax Court decision was also reviewed in the Circuit Court. There is no principled difference between the two situations. This led to what appears in retrospect to be the landmark decision in 1992 addressing *res judicata* in the administrative law context in Batson, *supra*. Judge Karwacki's opinion there affirmed and approved the Court of Special Appeals decision being reviewed and quoted on page 7 above.

Judge Karwacki's articulation is in direct opposition to the Racine court's open-ended relaxation of the doctrine for mistakes of law. Indeed, as we have observed, it would undermine the doctrine to open up such a wide gap, as there is usually room for argument that a previous decision was mistaken on some ground or other. Indeed, it would also undermine with the settled point that *res judicata* applies not only to all matters --- claims, arguments, legal theories ---which were litigated, advanced, or made in the initial case, but also to those which with propriety could have been litigated. Alvey v. Alvey 225 Md. 386, 390-91 (1961). The Batson Court neither recognized nor cited Racine. Rather, Racine was effectively overruled. Batson remains the leading Court of Appeals case on *res judicata* for administrative law.

Together with earlier zoning cases and other authorities, Batson provided the basis for the Court of Special Appeals decision in our office's recent case, Seminary Galleria v. Dulaney Valley Improvement Ass'n 192 Md. App. 719 (2010). There, the property owner filed what purported to be a new "special hearing" with a new legal theory and new tenant mix in order to justify a use permit for business parking in a residential zone. Judge Meredith provided a comprehensive discussion of the subject. After reviewing the principle enunciated in Alvey that the doctrine applies to all matters which with propriety could have been litigated, he proceed to an analysis of the doctrine in the context of

administrative law generally and zoning cases specifically. He wrote, 192 Md. App. at 735-39,

“Although there were cases decided several decades ago in which the Court of Appeals held that principles of *res judicata* did not apply to rulings of administrative agencies, the Restatement (Second) of Judgments (1982) provides in § 83(1) that “a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of *res judicata*, subject to the same exceptions and qualifications, as a judgment of a court.” The more recent Maryland cases have held that, when an administrative agency is performing a quasi-judicial function, the principles of *res judicata* are applicable. See, e.g., Stavely v. State Farm Mut. Auto. Ins. Co., 376 Md. 108, 116, 829 A.2d 265 (2003); Sugarloaf v. Waste Disposal, 323 Md. 641, 658-59, 594 A.2d 1115 (1991); Cicala v. Disability Review Bd., 288 Md. 254, 263-64, 418 A.2d 205 (1980).

The Court of Appeals has confirmed that an administrative agency's decision will be entitled to preclusive effect if the test first enunciated in Exxon Corp. v. Fischer, 807 F.2d 842, 845-46 (9th Cir.1987), is met. See Batson v. Shiflett, 325 Md. 684, 705, 602 A.2d 1191 (1992). In Batson, *id.* at 701, 602 A.2d 1191, the Court of Appeals quoted with approval the following test for determining whether an administrative agency's ruling “is entitled to preclusive effect”:

Whether an administrative agency's declaration should be given preclusive effect hinges on three factors: (1) whether the [agency] was acting in a judicial capacity; (2) whether the issue presented to the [reviewing] court was actually litigated before the [agency]; and (3) whether its resolution was necessary to the [agency's] decision.

(Internal quotation marks omitted.) Accord Neifert v. Dept. of Environment, 395 Md. 486, 507, 910 A.2d 1100 (2006).

The Board's decision in Seminary Galleria I meets this test. (1) The Board acted in a judicial capacity by conducting a *de novo* hearing, allowing the parties to present evidence, and ruling on the disputed legal issue. (2) The issue of whether the 14 parking spaces could remain was actually litigated in Seminary Galleria I. (3) The ruling was necessary to-indeed, the essence of-the Board's decision in Seminary Galleria I.

Again, in Whittle, *supra*, 211 Md. at 45, 125 A.2d 41, the Court of Appeals reviewed a variant of *res judicata* that arises in connection with successive zoning applications and emphasized the need for absolute “substantial changes in fact and circumstances” before *res judicata* can be overcome.

Woodlawn Ass'n v. Board of County Com'rs, 241 Md. 187, 197, 216 A.2d 149 (1965), involved several neighboring landowners' challenge to the rezoning of 47 acres of nearby undeveloped woodland for garden-style high-occupancy apartments. The owner of the property applied for rezoning but was thwarted in his rezoning efforts three times between 1961 and 1964. When the application was finally granted in 1964, the nearby

landowners appealed. The Woodlawn Court noted that, in Whittle, “[n]either neighborhood sentiment nor the slight distinction created by the additional restrictions were deemed to amount to a substantial change in circumstances.” Woodlawn, supra, 241 Md. at 197, 216 A.2d 149. Finding Whittle to be “dispositive of the case before us,” the Court stated that it found “no substantial or significant change in fact and law was shown to have occurred” between the applications at issue in Woodlawn. Id. at 197, 216 A.2d 149. The Woodlawn Court held that “the principles of *res judicata* were controlling,” id. at 190, 216 A.2d 149, and barred the 1964 approval. The Court explained, id., that it could find in the record no evidence of significant change in the neighborhood of the property between 1961 and 1964, which means that the action of the Council in rezoning in 1964 on essentially the same facts and conditions it found insufficient to permit rezoning in 1961 was arbitrary, capricious, and illegal.

Similarly, in The Chatham Corp. v. Beltram, 243 Md. 138, 220 A.2d 589 (1966), the Court of Appeals rejected a second attempt to rezone a property because, although the applicant made new arguments, the facts underlying the previous denial remained unchanged. The Court stated:

On the question of whether there had in fact been any significant change between the time of the first decision and the second, we think Judge Macgill's analysis in his opinion in the second case is impeccable in its perception and accuracy. He said:

“The resolution [of the Commissioners in the second application] made no specific finding of a change in circumstances in the neighborhood since the last decision, nor of any subsequently discovered mistake in the existing classification. The report and recommendation of the Planning Commission was a recapitulation of the report and recommendation which had been submitted, considered and rejected by the Board at the first hearing. The availability of public water and sewerage was also a factor presented and presumably considered by the Board at its earlier hearing. It was discussed by this Court in its opinion in the case thereafter filed. The fact that the property was contiguous to land zoned for garden apartments and for a shopping center was no less a fact when the first petition was denied. **It must be concluded that the only substantial change which led to the later action of the Board was a change of mind of a majority of its members. The ability to reconsider and change one's mind is, in most aspects of human endeavor, a virtue more often than a vice. In matters such as this, however, it risks the danger of being labelled capricious.**” Id. at 151-52, 220 A.2d 589 (emphasis added).

In the same year that the Court of Appeals decided Chatham, the Court also decided Alvey v. Hedin, 243 Md. 334, 221 A.2d 62 (1966) (“Hedin”). Alvey had

successfully applied to rezone 4.75 acres on the property to Heavy Commercial and then built a marina. The rezoning was later declared void on appeal. Alvey then attempted to obtain Light Commercial zoning. Alvey had argued mistake in the original zoning classification of the property and made the same argument in Hedin. But in the previous case, on the same facts, the court had found no mistake in the original zoning. The Hedin Court ruled against Alvey, stating:

The above holding in the first case is an absolute bar to the present attempt by the Alveys to again raise the question of mistake in original zoning of the same tract of land, because any of the testimony relied upon in the instant case as to this question could and should have been presented in the first case, and the applicability of the doctrine of res judicata as to this mistake question is not affected by the fact that they are here attempting to get a different type of commercial classification than in the first case. Id. at 340, 221 A.2d 62.”

Indeed, the entire decision is instructive. There is no mention or recognition of Racine because that earlier decision plainly was contrary to the path of the law before or after. We cannot find any recent cases which follow Racine.

In the present case, of course, the “mistake of law” which Back River alleges relates to the enactment of Bill 17-02 and its rewording and consolidation of certain setback provisions in BCZR Section 426.6 relating to specified zones, yet leaving in place the provision which requires a setback of 200 feet from a “residential property line.” Again to emphasize, as this law was enacted prior to the CBA hearing in 2002 and the subsequent decisions of the CBA, Circuit Court and Court of Special Appeals, it was available for argument as soon as enacted because, as noted, new laws apply to pending litigation. Powell v. Calvert County 368 Md. 400 (2002), Layton v. Howard County 399 Md. 36, 70 (2009); Grasslands Plantation v. Frizz-King Enterprises 410 Md. 191 (2010). Moreover, as these cases show, it is not necessary for a party to file a new petition or case. This is not a situation where any change in law occurred subsequent to the litigation and a new petition would be the sole recourse.

Anyway, as it is interrelated with the “mistake of law” theory, it should be noted briefly that the “residential property line” setback is not explicitly or implicitly limited to the protection of properties with dwellings. Rather, it sensibly protects residential property owners who anticipate establishing residences and others who have or anticipate

having other uses permitted in the residential zone. In this context, Administrative Law Judge John Beverungen correctly and reasonably found there was no mistake of law anyway.

**THERE ARE NO RELEVANT CHANGE IN CIRCUMSTANCE AND
CERTAINLY NO SUBSTANTIAL CHANGE IN CONDITION**

Back River's further allegations relate to change in zoning and additions to the property. None of them have any impact on the Board's finding on pages 5-6 of its May 14, 2003 that the 810 Back River Neck Road property is in no way unique so as to satisfy the first prong of the two prong uniqueness/practical difficulty test to justify a variance. Indeed, the property has various significant uses, so that the additional lease of part of the property for a tower is obviously a mere convenience and additional source of revenue for the owner. So, a claim of practical difficulty would anyway be artificial and pretextual.

Back River's vague allegation relating to zoning is that part of their property changed from M.L. to R.C. 20 and then back to M.L. The short answer is: so what? Whatever the details, this does not make the property unique or make any difference to the property's situation, as the essential zoning and neighborhood situation remains unchanged. Back River's other allegation is that it acquired some additional property, about .7 acres. This does not help them because there is still required the minimum setback of 200 feet from the adjacent residential property line boundary from property owned by the Julio family or interests to the south.

Nor do these "changes" meet the test of "substantial change" to overcome the *res judicata* bar of the current amended petition.

Back River's claims regarding changes in zoning and property characteristics are reminiscent of the claims of change rejected in Whittle, Woodlawn Area Citizens, and Chatham Corp. In Whittle, as summarized by Judge Hammond in Woodlawn Area Citizens at 241 Md. 196,

"The changes in circumstances alleged to have occurred between 1949 and 1954 were then considered. These were: (1) increased commercialization of the area; (2)

increased population of Baltimore County; (3) decreased opposition; (4) additional safeguarding conditions attached to the granting of the permit. There had been two changes in the immediate neighborhood—a stone church to replace a wooden one and a third filling station where there had been two, all some four hundred feet to the south on York Road. Considerable commercial development had come into being on York Road in the five intervening years, both north and south of the property, but none was shown to have had any effect ‘upon the residential character of the neighborhood where the protestants live’ (p. 46, 125 A.2d p. 46).”

Turning to the claim of changed zoning at hand in Woodlawn Area Citizens, Judge Hammond observed, 241 Md. at 200-01, in reversing the County Board of Appeals’ unjustified disregard of a previous denial,

“[14] The appellees argue that the law has been altered since 1961-62 in that the definition of an R-18 zone was changed thereafter and before 1964 so as to make the R-18 zone in Prince George’s County analogous to the R-H (‘floating’) zone considered in Beall v. Montgomery County, 240 Md. 77, 212 A.2d 751. The point was not raised before or considered by either the District Council or the Circuit Court. The new definition was not formally put before us but the appellees concede that it is like the former one except that the density in an R-18 zone is decreased slightly—under the former density limitations perhaps 950 apartments could have been built on the subject tract in contrast to from 800 to 850 under the new. We think this is not such change in the law as would dispense with principles of the doctrine of *res judicata*. R-18 zoning permitted garden apartments in 1961-62 and it permitted them in 1963-64. Earlier there could have been built on the forty-seven acres here being dealt with approximately four and three-quarter times as many apartment living units as individual homes, later perhaps four and one-quarter, a difference not in kind and, we believe, not legally significant in degree.”

Subsequently, in Chatham Corp., 243 Md. at 151-52, reversing another unjustified change of mind by a zoning board, Judge Hammond approved the Circuit Court’s analysis, which included locational involving the adjacent presence of residential and commercial uses,

“On the question of whether there had in fact been any significant change between the time of the first decisions and the second, we think Judge Macgill’s analysis in his opinion in the second case is impeccable in its perception and accuracy. He said:

‘The resolution (of the Commissioners in the second application) made no specific finding of a change in circumstances in the neighborhood since the last decision, nor of any subsequently discovered mistake in the existing classification. The report and recommendation of the Planning Commission was a recapitulation of the report and recommendation which had been submitted, considered and rejected by the Board at the first hearing. The availability of public water and sewerage was also a factor presented and presumably considered by the Board at its earlier hearing. It was discussed by this Court in its opinion in the case thereafter filed. The fact that the

property was contiguous to land zoned for garden apartments and for a shopping center was no less a fact when the first petition was denied. It must be concluded that the only substantial change which led to the later action of the Board was a change of mind of a majority of its members. The ability to reconsider and change one's mind is, in most aspects of human endeavor, a virtue more often than a vice. In matters such as this, however, it risks the danger of being labelled capricious.'

[7] We think it plain that the first judicial decision was *res judicata* and prevented the second action of the Commissioners unless the second proposal of Chatham was not the same or substantially the same as the first, and we cannot agree with the Commissioners and Chatham that the second application was essentially different from the first. The second was labelled as an application covering the same 99 acres that the first had covered. The Planning Commission considered the two proposals to be essentially the same. Its report and recommendation on the second was a recapitulation of those it submitted on the first and its conclusions were based on the same underlying assumptions and reasons. The second application sought increased residential density for some ninety acres and so did the first—under it, of the 99 acres 6 were to be kept as R-20 for a park and about 4 more were to be developed in fact as R-20. The same approximately 61 acres were sought for R-12 in both the first and second applications. The second application sought to classify some 29 acres as R-16, rather than R-12, seemingly to grease the squeaking wheels of the protestants in Valley Mede, Brinkleigh and Howard Heights. If the second application had been granted as asked for, instead of there being available as building sites some 220 lots, as would have been the case if the first application had been allowed, there would have been from 206 to 210 lots, a relatively slight decrease in density. In Woodlawn the statutory definition of an R-18 zone had been changed between the first and second applications for rezoning to the R-18 classification. At the time of the first application 950 garden apartments could have been built on the subject tract of land, at the time of the second only 800 to 850. We held that this was not such a change in conditions as avoided the principles of the doctrine of *res judicata*, being a difference in degree not significant in amount. In *Strickler* subsequent approval by the District Council of R-30 zoning (town houses) on tracts of land for which R-18 zoning (garden apartments) had been refused, was held to be arbitrary and capricious. We think the second proposal in the case before us did not differ in kind or in significant degree from the first, and that under *Woodlawn*, and the authorities therein cited, the first decision of the Circuit Court was binding and controlling in the absence of change in pertinent law or facts and that there was no such change."

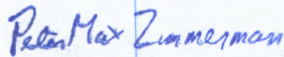
Finally, as to Back River's claim of a "special hearing" with a new legal theory overriding the original "different" variance case, the same essential arguments were made in Seminary Galleria ("new" special hearing supposedly contrasted with previous special hearing and variance) and in the County Board of Appeals decisions in Howard and Melanie Becker CBA Case No. 06-651, Order of the Board on Remand from the Circuit Court, June 17, 2009 ("new" special hearing supposedly contrasted with previous variances) and Andrew and Stephanie Mattes CBA Case No. 11-051-SPH, June 7, 2012

("new" type of special hearing relating to change in intensity of shell fishing use contrasted with earlier special hearing on validity of permit to continue). Such arguments were rejected in each case).

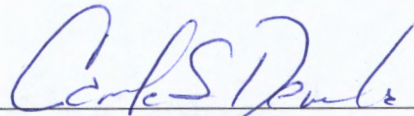
**BALTIMORE COUNTY BOARD OF APPEALS AND OTHER JURISDICTIONS
APPLY RES JUDICATA TO AGENCY DECISIONS**

The CBA has consistently applied the doctrine of *res judicata*. In addition to Becker & Mattes, see John P. and Mary E. Ford, 06-397-SPH, aff'd Circuit Court, 03-C-07-12133, aff'd CSA No. 1309 (11-18-09), Charles and Daryl Wolinski, 06-309-A & 06-310-A, Dr. Harlan Zinn, 07-545-A, Howard and Melanie Becker, 06-651-SPHA. Other jurisdictions are in accord.

Because it is so recent we reference the application of *res judicata* to a zoning agency decision in New York in Feldman v. Planning Town of Rochester, 99 A.D. 3rd 1161 (3rd Dep't 2012). A summary of this case by Patricia Salkin, well-known author/editor of the often cited treatise, American Law of Zoning, 5th edition, is attached as Memorandum Exhibit #1.



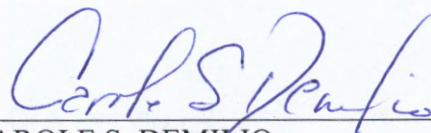
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of December, 2012, a copy of the foregoing Memorandum of People's Counsel for Baltimore County was mailed to Adam Rosenblatt, Esquire, Assistant County Attorney, 111 West Chesapeake Avenue, Towson, Maryland 21204 and Lawrence Schmidt, Esquire, Smith, Gildea & Schmidt, 600 Washington Avenue, Suite 200, Towson, Maryland 21204, Attorney for Petitioner(s).



CAROLE S. DEMILIO

posted by: **Patricia Salkin** | December 4, 2012

NY Appellate Court Upholds Dismissal of Nonconforming Use Claim on Res Judicata Grounds

The Planning Board of the Town of Rochester issued permits in response to a landowner's application to expand a preexisting nonconforming use. The petitioner filed suit claiming the Board's grant of the special use permit and SEQRA negative declaration were in violation of the local code, were arbitrary and capricious, and in violation of SEQRA and the state Open Meetings Law. The Supreme Court, Ulster County, found no violation of the local code, found a rational basis for the grant of the special use permit, but also found the Board failed to satisfy SEQRA and the Open Meetings Law. The petitioner did not challenge the findings concerning the local code or the permit, and the matter was remanded to the Board for reconsideration. The Board and landowner cured all infirmities and the special use permit was issued again. The petitioner then filed suit again in the Supreme Court, alleging the same violations of the local code and that the Board acted arbitrarily and capriciously. The Supreme Court dismissed this second action, finding it barred by res judicata and collateral estoppel. The Appellate Division, Third Department affirmed.

The court provided that res judicata bars "litigation of a claim that was either raised, or could have been raised, in a prior [proceeding] provided that the party to be barred had a full and fair opportunity to litigate any cause of action arising out of the same transaction and the prior disposition was a final judgment on the merits." The court also stated that collateral estoppel bars future litigation of an issue where there is a final determination on the merits, and a party had a full and fair opportunity to litigate the issue in question.

In looking to the facts of the case, the court determined the Supreme Court correctly found that the issues were, or could have been raised in the previous action, there was a full and fair opportunity for the petitioner to litigate any cause of action, and there was a final determination. Contrary to the petitioner's assertion, the second special use permit did not expand the rights of the permit holders. In addition, the laws of the municipality had not changed. Thus, the petitioner could not relitigate any issues concerning the special use permit, whether it be code violations or the rationality of the determination.

Petitioner also argued that res judicata and collateral estoppel should not have applied because he was not aggrieved by the Supreme Court's ruling in the first action, and thus could not have appealed. The Third Department disagreed with the petitioner, finding he was aggrieved by the Supreme Court in the first action, as half of his claims were denied. The petitioner could have appealed the denial of the code violations and rationality components of the first action.

Feldman v. Planning Board of the Town of Rochester, 99 A.D.3d 1161 (3rd Dep't, 2012).

Memorandum Exhibit 1



Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

December 5, 2012

NOTICE OF DELIBERATION / MOTION TO DISMISS

CASE #: 08-531-SPHX **IN THE MATTER OF: Back River LLC -Legal Owner/Petitioner**
810 Back River Neck Road / 15th Election Dist; 6th Councilmanic Dist

Re: Amended Petition for Special Hearing to permit a non-density transfer and lot line adjustment between adjacent tracts of land and to confirm that an existing cellular tower is in compliance with setbacks and all applicable zoning regulations.

8/2/12 Opinion and Order issued by John E. Beverungen, Administrative Law Judge DENYING requested Special Hearing relief. (Note the Special Exception request originally filed in this case was dismissed in open hearing and is MOOT)

The Board convened for a hearing on December 4, 2012 and a Motion to Dismiss was presented on the record at the hearing. The Public Deliberation on the Motion to Dismiss is scheduled for the following:

DATE AND TIME : WEDNESDAY, JANUARY 16, 2013 at 10:00 a.m.

LOCATION : Jefferson Building - Second Floor
Hearing Room #2 - Suite 206
105 W. Chesapeake Avenue

NOTE: Closing briefs are due on Tuesday, December 18, 2012 by 4:00 p.m.
(Original and three [3] copies)

NOTE: ALL PUBLIC DELIBERATIONS ARE OPEN SESSIONS; HOWEVER, ATTENDANCE IS NOT REQUIRED. A WRITTEN OPINION /ORDER WILL BE ISSUED BY THE BOARD AND A COPY SENT TO ALL PARTIES.

Theresa R. Shelton
Administrator

c: Counsel for Applicant/Appellant/Owner	: Lawrence E. Schmidt, Esquire
Applicant/Appellant/Owner	: Michael Lutz, Representative
	Back River, LLC
Contract Purchaser/Lessee	: Steve Boyd, Esquire, Representative
	Sprint Nextel, Inc

Mitchell Kellman, Daft, McCune & Walker, Inc.

Office of People's Counsel – Carole S. Demilio, Deputy People's Counsel	
Adam Rosenblatt, Assistant County Attorney	Lawrence M. Stahl, Managing Administrative Law Judge
John E. Beverungen, Administrative Law Judge	Arnold Jablon, Director/PAI
Andrea Van Arsdale, Director/Planning	Lionel VanDommelen, Chief of Code Enforcement/PAI
Michael Mohler, Chief Administrator	
Thomas Bostwick, Deputy Legal Counsel to the Baltimore County Council	
Nancy C. West, Assistant County Attorney	Michael Field, County Attorney

SMITH, GILDEA & SCHMIDT LLC

MICHAEL PAUL SMITH
DAVID K. GILDEA
LAWRENCE E. SCHMIDT
D. DUSKY HOLMAN
MICHAEL G. DEHAVEN
RAY M. SHEPARD

LAUREN M. DODRILL
CHARLES B. MAREK, III
NATALIE MAYO
ELYANA TARLOW
JASON T. VETTORI
REBECCA G. WYATT

of counsel:

JAMES T. SMITH, JR.

September 21, 2012

Via First Class Mail

Theresa R. Shelton
County Board of Appeals of Baltimore County
105 W. Chesapeake Avenue, Suite 203
Towson, MD 21204

RECEIVED
SEP 24 2012

BALTIMORE COUNTY
BOARD OF APPEALS

Re: Back River, LLC
810 Back River Neck Road
Case No. 08-531-SPHX

Dear Ms. Shelton,

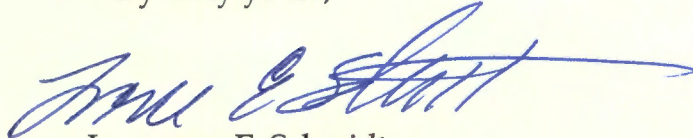
I have received a copy of the Notice of Assignment for the above matter advising that the hearing for this case has been scheduled for Tuesday, December 4, 2012 at 10:00 a.m. A copy of this Notice was also provided to Adam Rosenblatt, Assistant County Attorney and the Office of People's Counsel. Both Mr. Rosenblatt and Ms. Demilio participated in the hearing of this case before Administrative Law Judge Beverungen.

Although this date is tentatively open on my calendar, I have been advised by the Clerk of the Court of Special Appeals of Maryland that it is one of eight dates which are being considered for oral argument in the matter of *Springfield Farms v. People's Counsel et al.* As you are aware, by Maryland Rule, hearings before the Court of Special Appeals are given priority over matters scheduled before the lower Courts and State/Local Administrative Agencies. I believe that Mr. Zimmerman from the Office of People's Counsel will be personally handling that oral argument. Therefore, although I do not have any objection to this assigned date, I would request your consideration of a future postponement request in the event of a conflict. I anticipate correspondence from the Court of Special Appeals with a definitive hearing date in the next several weeks.

Theresa R. Shelton
County Board of Appeals of Baltimore County
September 21, 2012
Page 2

Thank you for your anticipated cooperation and many past courtesies.

Very truly yours,



Lawrence E. Schmidt

LES/amf

cc: Mitch Kellman, Daft, McCune & Walker, Inc.
Michael Lutz, Back River, LLC
Steve Boyd, Esquire



Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

September 12, 2012

NOTICE OF ASSIGNMENT

CASE #: 08-531-SPHX **IN THE MATTER OF: Back River LLC -Legal Owner/Petitioner**
810 Back River Neck Road / 15th Election Dist; 6th Councilmanic Dist

Re: Amended Petition for Special Hearing to permit a non-density transfer and lot line adjustment between adjacent tracts of land and to confirm that an existing cellular tower is in compliance with setbacks and all applicable zoning regulations.

8/2/12 Opinion and Order issued by John E. Beverungen, Administrative Law Judge DENYING requested Special Hearing relief. (Note the Special Exception request originally filed in this case was dismissed in open hearing and is MOOT)

ASSIGNED FOR: TUESDAY, DECEMBER 4, 2012, AT 10:00 A.M.

LOCATION: Hearing Room #2, Second Floor, Suite 206
Jefferson Building, 105 W. Chesapeake Avenue, Towson

NOTICE: This appeal is an evidentiary hearing; therefore, parties should consider the advisability of retaining an attorney.

Please refer to the Board's Rules of Practice & Procedure, Appendix B, Baltimore County Code.

IMPORTANT: No postponements will be granted without sufficient reasons; said requests must be in writing and in compliance with Rule 2(b) of the Board's Rules. No postponements will be granted within 15 days of scheduled hearing date unless in full compliance with Rule 2(c).

If you have a disability requiring special accommodations, please contact this office at least one week prior to hearing date.

Theresa R. Shelton, Administrator

c: Counsel for Applicant/Appellant/Owner	: Lawrence E. Schmidt, Esquire
Applicant/Appellant/Owner	: Michael Lutz, Representative
	Back River, LLC
Contract Purchaser/Lessee	: Steve Boyd, Esquire, Representative
	Sprint Nextel, Inc

Mitchell Kellman, Daft, McCune & Walker, Inc.

Office of People's Counsel – Carole S. Demilio, Deputy People's Counsel	
Adam Rosenblatt, Assistant County Attorney	Lawrence M. Stahl, Managing Administrative Law Judge
John E. Beverungen, Administrative Law Judge	Arnold Jablon, Director/PAI
Andrea Van Arsdale, Director/Planning	Lionel VanDommelen, Chief of Code Enforcement/PAI
Michael Mohler, Chief Administrator	
Thomas Bostwick, Deputy Legal Counsel to the Baltimore County Council	
Nancy C. West, Assistant County Attorney	Michael Field, County Attorney



KEVIN KAMENETZ
County Executive

LAWRENCE M. STAHL
Managing Administrative Law Judge
JOHN E. BEVERUNGEN
TIMOTHY M. KOTROCO
Administrative Law Judges

August 29, 2012

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204



RE: **APPEAL TO BOARD OF APPEALS**
Case No. 2008-0531-SPHX
Location: 810 Back River Neck Road

Dear Mr. Schmidt:

Please be advised that an appeal of the above-referenced case was filed in this Office on August 24, 2012. All materials relative to the case have been forwarded to the Baltimore County Board of Appeals ("Board").

If you are the person or party taking the appeal, you should notify other similarly interested parties or persons known to you of the appeal. If you are an attorney of record, it is your responsibility to notify your client.

If you have any questions concerning this matter, please do not hesitate to contact the Board at 410-887-3180.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Stahl", written over a horizontal line.

LAWRENCE M. STAHL
Managing Administrative Law Judge
for Baltimore County

LMS:dlw

c: ✓ Baltimore County Board of Appeals
Carole Demilio, People's Counsel for Baltimore County
Arnold Jablon, Director, Department of Permits, Approvals, and Inspections
Adam Rosenblatt, Department of Permits, Approvals, and Inspections

APPEAL

Petition for Special Hearing and Exception
W/side of Back River Neck Road, 207' S of Pottery Farm Road
(810 Back River Neck Road)
15th Election District – 6th Councilmanic District
Legal Owners: Back River LLC, Legal Owner
Sprint Nextel, Contract Purchaser/Lessee
Case No. 2008-0530-SPHX

RECEIVED

AUG 29 2012

BALTIMORE COUNTY
BOARD OF APPEALS

✓ Undated	Zoning Description of Property
✓ Undated	Advertising Requirements and Procedures for Zoning Hearings
✓ March 20, 2012	Letter to Carl Richards from Lawrence E. Schmidt, Esq.
✓ May 17	Misc. Cash Receipt for filing of Zoning hearing (<u>revision</u>)
✓ May 17	Amended Petition for Special Hearing filed by Lawrence E. Schmidt on behalf of Back River, LLC and Sprint Nextel
✓ May 30	Entry of Appearance filed by People's Counsel for Baltimore County
✓ June 19	Notice of Zoning Hearing for Petitioners
✓ June 28	Notice of Zoning Hearing for Patuxent Publishing Company
✓ June 28	Certificate of Publication
✓ June 30	Certificate of Posting
✓ July 10	Correspondence from W. Carl Richards, Jr. and ZAC Comments
✓ July 16	MD Department of Assessments and Taxation (SDAT) Property Info./Map
✓ July 18	Email from Adam Rosenblatt entering his appearance on behalf of Balto. Co.
✓ July 19	B.C.Z.R. §§ 426.5 and 426.6
July 20	<u>Petitioner's Exhibits:</u> ✓ 1 – Zoning Commissioner's Opinion - 1/4/2002 - 02-159-A ✓ 2 – Balto. Co. BOA Opinion, 5/14/2003 - 02-159-A ✓ 3 – Circuit Court Opinion – 2/5/2004 - 02-159-A/03-C-03-8657 ✓ 4 – Court of Special Appeals Opinion – 8/3/2005 - 02-159-A ✓ 5 – Kellman CV ✓ 6 – Site Plan ✓ 7 – Color Photos (A-G) ✓ 8 – Bill 30-98 ✓ 9 – Bill 17-02 ✓ 10 – Deeds (A – 2/12/08 & B – 2/20/08)
	<u>People's Counsel Exhibits:</u> ✓ 1 – Balto. Co. Zoning Map Extract – 5 pages
	<u>Baltimore County Exhibits:</u> ✓ 1 – Code Enforcement Hearing - Order 1/7/2009
✓ July 30	Letter and Closing Memorandum in lieu of Closing Argument – Schmidt
✓ July 30	Post Hearing Memorandum – Adam Rosenblatt
✓ July 30	Memorandum of People's Counsel for Baltimore County
✓ August 2	Order and Opinion & Cover Letter from Judge Beverungen - DENIED
✓ August 24	Miscellaneous Cash Receipt, Notice of Appeal, and copy of Opinion filed by Lawrence E. Schmidt, Esq.

2008

- ✓ Undated Zoning Description of Property
- ✓ Undated Advertising Requirements and Procedures for Zoning Hearings
- ✓ May 9 Misc. Cash Receipt for filing of Zoning hearing
- ✓ May 9 & 23 Petitions for Special Hearing and Exception
- ✓ June 19 Notice of Zoning Hearing for Petitioners
- ✓ June 19 Notice of Zoning Hearing for Patuxent Publishing Company
- ✓ August 5 Certificate of Posting
- ✓ August 5 Certificate of Publication
- ✓ August 13 Correspondence from W. Carl Richards, Jr. and ZAC Comments
- ✓ August 14 Case No. 07-506-X (Nearby tower Order)
- ✓ August 20 Sign-In Sheets (Petitioner's, Citizen's County)
- ✓ August 21 Email to Mike Mohler and Nancy West from Tom Bostwick
- ✓ August 21 Inter-office Memorandum to File from Tom Bostwick re: 8/20 Hearing

Undated Misc. Documents:

- ✓ Exhibit B – 5 pgs.
- ✓ Exhibit C – 3 pgs. (Sprint)
- ✓ Exhibit C – 3 pgs. (T Mobile)
- ✓ Exhibit E – 1 pg.
- ✓ Exhibit F – 1 pg.

Zoning Drawings {
Title Sheet – Z-1 – ~~www~~
Site Plan and Notes – Z-2
Existing & Proposed Compound Plan – Z-3
✓ Maps (3)

- ✓ Filed Unreported in the Court of Special Appeals of Md. No. 0047 Sept. Term, 2004
- Aug. 2003 - Spring PCS, et al. v. Baltimore County, Md.

8/3/05

c: Baltimore County Board of Appeals
Carole Demilio, People's Counsel for Baltimore County
Arnold Jablon, Director, Department of Permits, Approvals and Inspections
Adam Rosenblatt, Esq., Assistant County Attorney

Date Sent: August 29, 2012

SMITH, GILDEA & SCHMIDT LLC

MICHAEL PAUL SMITH
DAVID K. GILDEA
LAWRENCE E. SCHMIDT
D. DUSKY HOLMAN
MICHAEL G. DEHAVEN
RAY M. SHEPARD

LAUREN M. DODRILL
MICHAEL J. LIPPENHOLZ
CHARLES B. MAREK, III
ELYANA TARLOW
JASON T. VETTORI
REBECCA G. WYATT

of counsel:

JAMES T. SMITH, JR.

August 24, 2012

Sent via Hand Delivery

Office of Administrative Hearings
105 W. Chesapeake Avenue, Suite 103
Towson, MD 21204

RECEIVED

AUG 24 2012

Re: Petition for Special Hearing and Exception
Case No. 2008-0531-SPHX
Back River, LLC, Petitioner
810 Back River Neck Road

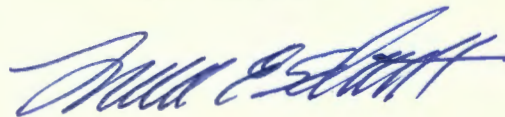
OFFICE OF ADMINISTRATIVE HEARINGS

Dear Sir/Madam:

I am in receipt of the Honorable John Beverungen's Order and Opinion dated August 2, 2012 with regard to the above referenced matter. I have attached a copy of the same for your convenient reference. Please accept this letter as my client's appeal to such opinion and order. I have enclosed a check payable to Baltimore County of Maryland in the amount of \$650.00 which covers the fee for the appeal.

Should you have any questions, comments or concerns, please feel free to contact me.

Very truly yours,



Lawrence E. Schmidt

LES:amf
Enclosure

cc: Carole DeMilio, Esquire, People's Counsel for Baltimore County
Adam Rosenblatt, Esquire, Assistant County Attorney
Nancy West, Esquire, Office of the County Attorney
Steve Boyd, Esquire, Sprint
Michael Lutz, Back River, LLC
Mitch Kellman, Draft, McCune, Walker, Inc.

8/2/12

**IN RE: PETITIONS FOR SPECIAL HEARING *
AND SPECIAL EXCEPTION**

W/S of Back River Neck Road, 207' S *
of Pottery Farm Road *
15th Election District *
6th Councilmanic District *
(810 Back River Neck Road) *

Back River LLC, *Legal Owner* *
Sprint Nextel, *Contract Purchaser/Lessee* *
Petitioners *

BEFORE THE
OFFICE OF
ADMINISTRATIVE HEARINGS
FOR
BALTIMORE COUNTY
CASE NO. 2008-0531-SPHX

* * * * *

ORDER AND OPINION

This matter comes before the Office of Administrative Hearings (OAH) as Petitions for Special Hearing and Special Exception filed by Lawrence E. Schmidt, Esquire with Gildea & Schmidt, LLC, on behalf of the legal property owner, Back River LLC and the proposed contract purchaser, Sprint Nextel (the "Petitioners"). The Petitioners are requesting to Amend Special Hearing relief originally sought in May, 2008 pursuant to Section 500.7 of the Baltimore County Zoning Regulations (B.C.Z.R.) as follows:

1. To permit a non-density transfer and lot line adjustment between adjacent tracts of land,
2. To confirm that an existing cellular tower is in compliance with setback and all other applicable zoning regulations, and
3. For such other and further relief as may be deemed necessary by the Administrative Law Judge.

In addition, the Petition for Special Exception sought in May, 2008 is no longer required due to a re-zoning of the property. As such, this Order will consider only the Petition for Special Hearing. The subject property and requested relief is more fully described on the site plan that was marked and accepted into evidence as Petitioners' Exhibit 6.

ORDER RECEIVED FOR FILING

Date 8-2-12

By DW

Appearing at the public hearing held for this case was Mitchell J. Kellman with Daft McCune Walker, Inc., the consulting firm that prepared the site plan. The Petitioners were represented by Lawrence E. Schmidt, Esquire. Also in attendance were Adam Rosenblatt, Esquire for Baltimore County and Carole Demilio for People's Counsel. The file reveals that the Petition was properly advertised and the site was properly posted as required by the Baltimore County Zoning Regulations.

The Zoning Advisory Committee (ZAC) comments were received and made a part of the file. There were no adverse comments from any of the County reviewing agencies.

Testimony and evidence offered revealed that the subject property is 4.916 acres (214,140 square feet) and is zoned ML/RC 20.

HISTORY

In Case No. 2002-0159-A, the property owner filed a Petition for Variance from certain setback requirements for a proposed cell tower. The case was originally heard by Zoning Commissioner Schmidt, then appealed to the Board of Appeals and ultimately to the Circuit Court for Baltimore County and Court of Special Appeals of Maryland. The Court of Special Appeals affirmed the denial of the requested Variances. Even so, the cell tower was erected on site and remains standing on the subject property.

Several years later, the property owner filed a second zoning application related to the property and cell tower. This application was assigned Case No. 2008-0531-SPHX and included both Petitions for Special Exception (to permit a cell tower in an RC zone) and Special Hearing (to permit a non-density transfer of land). Due to several reasons, Case No. 2008-0531-SPHX never went forward and a public hearing was never conducted. The case was never decided or resolved and was effectively "in limbo". According to an internal memorandum from then Deputy

ORDER RECEIVED FOR FILING

Date 8-2-12

2

By DW

Commissioner Thomas Bostwick dated August 21, 2008, the matter was postponed at the request of Baltimore County (Nancy West, Esquire, Assistant County Attorney). It was never rescheduled.

Now, this matter comes before the undersigned as an Amended Petition for Special Hearing. It includes the relief originally sought in the Petition for Special Hearing filed in Case No. 2008-0531-SPHX and also amends the Petition to include other appropriate relief. Moreover, the Petition for Special Exception was dismissed in open hearing as it is no longer required due to a re-zoning of the property.

The site plan, legal description and other documents filed with the original petitions are all still relevant and applicable to this amended filing. The factual and procedural background of this complex case was set forth clearly and extensively in the unreported decision of the Court of Special Appeals (Exhibit 4). As such, it will not be repeated here. The present matter involves questions of law, and the facts underpinning those legal issues are either undisputed or irrelevant.

NON-DENSITY TRANSFER/LOT LINE ADJUSTMENT

During the course of this protracted dispute, Petitioners acquired two small parcels of RC-zoned land, as shown on Exhibit 6. Petitioners seek a non-density transfer of these small parcels (to the larger ML zoned parcel) and a lot line adjustment reflecting the new configuration of the tract.

As I noted at the hearing, the B.C.Z.R. and/or the Baltimore County Code (B.C.C.) provide no guidance concerning "non-density transfers." The Zoning Commissioner's Policy Manual (ZCPM) contains a brief reference (at p. 1A-3), but it involves RC zoned land, while the present scenario involves transferring RC parcels into a larger ML-zoned parcel. In addition, lot line adjustments are defined as "development" under the B.C.C., and are routinely handled as an

ORDER RECEIVED FOR FILING

Date 8-2-12

By [Signature]

administrative matter by the Department of Permits, Approvals and Inspections (PAI). B.C.C. § 32-4-106(a)(1)(v) and (viii). As such, I will deny this aspect of the special hearing relief.

EXISTING CELLULAR TOWER

The more important aspect of the case concerns whether the cell tower at present complies with the B.C.Z.R. I do not believe it does, and will explain below the reasons for that conclusion. Before doing so, it seems appropriate to comment that this case illustrates the principle that "it is better to beg forgiveness than ask for permission." The Petitioners were denied variance relief to construct the cell tower, and they appealed that issue all the way to the Court of Special Appeals, which affirmed the denial of relief. Even so, Petitioners constructed the tower, and it has been in service for nearly ten (10) years. The County sought to have the tower removed, but was unsuccessful. See Baltimore County Exhibit 1, p.3. In fact, the hearing officer in the code enforcement case found a zoning violation, but assessed only a \$9,200 civil penalty, which the Petitioners paid.

Petitioners retained new counsel thereafter, and they filed the current petition, arguing that the tower is in fact lawfully sited. Petitioners' primary argument is that the regulation at issue was amended in 2002 (Bill 17-02) to provide that a "cell tower" shall be set back at least 200 feet from any other owner's residential property line." (emphasis added). The former regulation provided that the set back was 200' from an adjoining "residential zone line." (emphasis added). See Exhibit 8, p. 10. Petitioners contend that "residential zone" is a defined term in B.C.Z.R. § 101, while the newer phrasing – which became effective after the Zoning Commissioner's decision in the original variance case, 02-159-A, See Exhibit 1 – of "residential property line" is not defined by the B.C.Z.R. Mr. Kellman, who was accepted as an expert in land use matters and the B.C.Z.R., opined that a "residential property line" exists only when the property in question is

ORDER RECEIVED FOR FILING

Date 8-2-0

By pw

improved with a dwelling. Mr. Kellman testified that there is no residentially used property within 200' of the cell tower, and as such, he opined that the tower was in compliance with B.C.Z.R. § 426.

In response to questions on cross examination, Mr. Kellman noted that he had not testified previously in a zoning matter involving this issue, and he conceded this was a "new theory." While I do think Petitioners make a creative argument, I do not believe it withstands scrutiny. Distilled to its essence, the issue is one of statutory construction: does the language used in Bill 17-02 ("residential property line") have a different meaning than the former regulation's use of "residential zone line." Both iterations use the word "residential," and thus the distinction – if there is one – must turn on the meaning of "zone line" versus "property line." And if the meanings are different, must a property be improved with a dwelling before it will have residential property lines?

A "zone line" is a boundary that separates land into different zoning classifications. These lines are drawn by governmental authorities, who have the "power to alter zone lines from time to time" when in the public's interest. Offutt v. Baltimore County, 204 Md. 551, 557 (1954). Zone lines need not be coextensive with a "property line." Indeed, in land use matters one frequently encounters "split-zoned" properties, as with the property owned here by Petitioners. A "property line" is a boundary establishing the limits of land owned by any particular person. Neither of these terms is defined in Webster's Dictionary (See B.C.Z.R. § 101.1) or Black's Law Dictionary, for that matter. When a term is not defined in a statute, or dictionary, principles of statutory construction dictate that it be given its "ordinarily understood" meaning. Comptroller v. J/Port, Inc., 184 Md. App. 608, 632 (2009).

ORDER RECEIVED FOR FILING

Date 8-2-12

By [Signature]

Thus, as noted above, the terms "property line" and "zoning line" do refer to different things, but here it is a distinction without a difference, because the tower is not set back 200' from either the RC 20 "zone line" or the "property line" of the parcel owned by Theodore Julio (Tax Account #1516150500). Even so, Petitioners' expert testified that "residential property line" as now appears in B.C.Z.R. § 426.A.1 means that the property is in fact improved with a dwelling, i.e., residentially used. But in numerous instances, the County Council has imposed certain property restrictions when a "residentially used" property is at issue or in the vicinity. See, e.g., B.C.Z.R. §§ 204.4.C.4; 220.1.B; 230.1.A.4; 404.2; 415A.2; 424.1.C; 432A.1.C.1. And it has distinguished that term from a "residentially zoned" property. Id. As such, if the County Council had intended the 200' cell tower setback to apply only to "residentially used" property, it would have said as much. But it did not use that terminology in B.C.Z.R. § 426.A.1, and I do not believe it is appropriate to engraft such language onto the regulation as written.

RES JUDICATA

At the hearing, Baltimore County contended that the merits of the case should not be reached, because the Petition is barred by res judicata. Having reviewed the post-hearing submissions, I am inclined to agree.

As noted in the County's memorandum (pp. 2-3), the Bill (17-02) in question became effective on May 5, 2002. While this was subsequent to the Zoning Commissioner's January 4, 2002 Order in Case No. 02-159-A, the legislation was effective well before the de novo hearing concluded in the Board of Appeals on January 21, 2003. Thus, it is obvious that Petitioners could have (though they in fact did not) made the argument now advanced in the Petition for Special Hearing back in 2003 while the underlying case was being heard by the Board of Appeals. It may be, as argued by the Petitioners, that the original variance petition could not be amended during

ORDER RECEIVED FOR FILING

Date 8-2-12

By DW

the course of the "appellate" proceedings, but nothing would have precluded Petitioners from filing a new Petition for Special Hearing after the effective date of Bill 17-02, and then perhaps having the matters consolidated at the Board of Appeals upon appeal of the Zoning Commissioner's Order on the petition for special hearing.

In these circumstances, the doctrine of res judicata (which is applicable to quasi-judicial administrative proceedings, such as those before the Baltimore County Board of Appeals) is applicable. That doctrine bars relitigation of claims that were, or could have been litigated in an earlier proceeding between the parties. Seminary Galleria, LLC v. Dulaney Valley Improv. Ass'n., 192 Md. App. 719, 734-37 (2010). As such, the doctrine of res judicata bars the Petitioners from obtaining special hearing relief in this case.

Pursuant to the advertisement, posting of the property, and public hearing on this Petition, and for the reasons set forth above, the special hearing relief requested shall be DENIED. The Special Exception request originally filed in Case No. 2008-0531-SPHX was dismissed in open hearing as it is no longer required due to a re-zoning of the property, and is dismissed as moot.

THEREFORE, IT IS ORDERED this 2nd day of August, 2012 by the Administrative Law Judge for Baltimore County, that the Petition for Special Hearing seeking relief pursuant to Section 500.7 of the Baltimore County Zoning Regulations (B.C.Z.R.) as follows:

1. To permit a non-density transfer and lot line adjustment between adjacent tracts of land, and
2. To confirm that an existing cellular tower is in compliance with setback and all other applicable zoning regulations,

be and is hereby DENIED.

ORDER RECEIVED FOR FILING

Date 8-2-12

By [signature]

Any appeal of this decision must be made within thirty (30) days of the date of this Order.

JEB:dlw



JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

ORDER RECEIVED FOR FILING

Date 8-2-12

By dlw



KEVIN KAMENETZ
County Executive

LAWRENCE M. STAHL
Managing Administrative Law Judge
JOHN E. BEVERUNGEN
TIMOTHY M. KOTROCO
Administrative Law Judges

August 2, 2012

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204

RE: Petitions for Special Hearing and Exception
Case No.: 2008-0531-SPHX
Property: 810 Back River Neck Road

Dear Mr. Schmidt:

Enclosed please find a copy of the decision rendered in the above-captioned matter.

In the event any party finds the decision rendered is unfavorable, any party may file an appeal to the County Board of Appeals within thirty (30) days of the date of this Order. For further information on filing an appeal, please contact the Office of Administrative Hearings at 410-887-3868.

Sincerely,

A handwritten signature in dark ink, appearing to read "JEB", is written over the printed name of John E. Beverungen.

JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB:dlw
Enclosure

c: Carole Demilio, People's Counsel
Adam Rosenblatt, Department of Permits, Approvals and Inspections

7/30/12

IN RE: PETITION FOR SPECIAL HEARING
W/s of Back River Neck Road, 270 feet +/- south of
centerline Pottery Farm Road

810 Back River Neck Road

15th Election District
6th Councilmanic District

Legal Owners: Back River, LLC, Michael Lutz,
Rep.

Petitioner: Back River, LLC

* * * * *

* BEFORE THE
* OFFICE OF
* ADMINISTRATIVE HEARINGS
* FOR BALTIMORE COUNTY
*

* **Case No.: 2008-0531-SPH**

RECEIVED
JUL 30 2012
OFFICE OF ADMINISTRATIVE HEARINGS

CLOSING MEMORANDUM IN LIEU OF CLOSING ARGUMENT

Back River LLC and Sprint Nextel, Inc., hereinafter "Petitioners" by and through Lawrence E. Schmidt and Smith, Gildea & Schmidt, LLC, their attorneys, submit this Closing Memorandum in Lieu of Closing Argument and respectfully state:

Background

Back River LLC is the owner of a 5.0 (+/-) acre rectangular shaped property located at 810 Back River Neck Road in the Turkey Point community of eastern Baltimore County. The property is zoned ML (Manufacturing, Light) and has at all relevant times been used for office/commercial/manufacturing purposes. In late 2001, Sprint Nextel contracted with Back River LLC to lease a small area of the rear of the site to construct a telecommunications tower. Pursuant to the zoning regulations then in effect; the Petitioners filed a Petition for Variance to cure insufficient setbacks for the proposed tower and associated equipment. After public hearing, the Zoning Commissioner issued an order on January 4, 2002 granting the variances. Sprint then constructed a 115 foot high tower in order to fill an immediate need and hole in its coverage network. A timely appeal of the Commissioner's order was filed and after a hearing at the Board of Appeals ("Board"), the Petition was denied by order dated May 14, 2003. Appeals to the

Circuit Court and Court of Special Appeals affirmed the denial. In the instant case, Petitioners have filed a Petition for Special Hearing, advocating an interpretation/theory of the BCZR which would result in a finding that the tower is compliant.

Argument

I. The Special Hearing is not Barred by *Res judicata*

The doctrine of *res judicata* bars the litigation of a cause of action after it has already been litigated. *Gertz v. Anne Arundel County*, 339 Md. 261, 269 (1995); *DeLeon v. Slear*, 328 Md. 569, 580 (1992). It has been held that *res judicata* applies in administrative (quasi judicial) proceedings and that the doctrine bars claims previously litigated and those claims that properly could have been litigated. *Batson v. Shiflett*, 325 Md. 684, (1992) The elements of *res judicata* are as follows:

(1) the parties in the present litigation should be the same or in privity with the parties to the earlier case; (2) the second suit must present the same cause of action or claim as the first; and (3) in the first suit, there must have been a valid final judgment on the merits by a court of competent jurisdiction. *DeLeon*, 328 Md. at 580.

In the instant cases, the controversy is over the second element of *res judicata*: whether the claim in the instant matter is the same "claim" or "cause of action" that arose before the Zoning Commissioner in 2002. Maryland has adopted the transaction test of § 24 of the *Restatement (Second) of Judgments* as the test for determining when two claims or causes of action are the same for purposes of *res judicata*. *Gertz*, 339 Md. at 269-270. The transaction test has been stated as follows:

What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage. *Id.* at 270.

In *Gertz*, Gertz and Anne Arundel County settled a grading permit dispute in 1985 by entering into a Consent Agreement that allowed Gertz to dispose of raw materials on his land. *Id.* at 264. In 1989, the County filed a petition for Contempt in Circuit Court challenging the nature of Gertz's activities under the Agreement. *Id.* Gertz was found not in contempt, as his land filling activity was determined to be farming and permissible under the agreement. Subsequently, on April 23, 1990, the County enacted an emergency ordinance that required Gertz to obtain a sanitary landfill permit to continue this use. *Id.* at 265. Soon thereafter Gertz filed a declaratory judgment claim and on appeal, the Court of Appeals determined that *res judicata* did not bar the County's counterclaim because it was not the same claim presented in the 1989 action. *Id.* at 270.

The *Gertz* Court found that the conduct complained of by the County occurred at different times. *Id.* Additionally, the counterclaim addressed Gertz's failure to obtain a landfill permit following the enactment of the 1990 Ordinance, whereas the contempt action addressed Gertz's land filing activity in 1989 under the Consent Agreement. *Id.* Moreover, the *Gertz* Court noted that even though both of the County's claims related to the same land and activity, the County's claims originated from different sources. *Id.* The Court of Appeals went on to explain:

Significantly, the theory of liability in the instant action did not exist when the earlier suit was litigated; thus, Gertz's argument that the counterclaim is barred because the County merely changed its legal theory is inapposite. Although *res judicata* generally bars a second suit based on a different legal theory applied to the same set of facts previously litigated, that rule does not apply here because it assumes that the second theory of liability existed when the first action was litigated. When the contempt action was litigated, the County had no right to proceed against Gertz under the Ordinance because it had not yet been enacted. *Id.*

Furthermore, the *Gertz* Court determined that the County's two claims were motivated by different considerations. *Id.* In the contempt action, the County sought to enforce the Consent

Agreement and to regulate Gertz's activity. *Id.* at 270-71. By contrast, the County's second claim was to enjoin Gertz's activities only until such time as he obtained a landfill permit in compliance with the new law. *Id.* at 271. In addition, the *Gertz* Court established that the County's two claims did not form a convenient trial unit because the County's rights under the ordinance did not exist until April 23, 1990, and therefore could not have been litigated in the contempt action in 1989. *Id.* Finally, treating the facts as separate trial units would not conform to the parties' expectations because in addition to the change in the law, the 1989 decision could not be seen as exempting Gertz from all future regulation. *Id.*

A. The law changed after the Zoning Commissioner's Hearing in the initial action.

Like *Gertz*, the law changed in the instant case and the origin of the two claims emanated from different sources. Specifically, on January 4th, 2002 the Zoning Commissioner granted the petition for variance seeking relief from Section 426.6.A.3 of the BCZR. The granted variance was from the following regulation:

If a tower is located in a medium or high intensity commercial zone, the tower shall be set back from an adjoining property line a distance equal to the setback requirement for other structures in the zone. However, if the property adjoins a *residential zone*, the tower shall be set back at least 200 feet from the residential zone line. (emphasis added) (BCZR 426.6.A..3)

On February 19, 2002, § 426.6.A of the BCZR was amended by Bill No 17-02. As amended, Section 426.6.A reads:

A tower shall be set back at least 200 feet from any other owner's *residential property line*. (emphasis added)

On May 14th, 2003, after the change in the law, the Board denied the Petitioner's request for a variance. It is to be noted that nowhere in the Board's Opinion, or in the Opinions of the Appellate Courts, was Bill 17-02 recognized nor is it stated that the setback regulations had been substantially changed during the course of the proceedings. In fact, on page 8 of the Court of

Special Appeals decision, the Court incorrectly explained that the “[BCZR] establish front, rear, and side setbacks based primarily upon three factors: (1) the use for the subject property, (2) the zoning classification of the subject property, and (3) the zoning classifications of neighboring properties.” *Sprint PCS v. Baltimore County*, No. 0047 (Md. App. August 3, 2005). Clearly the Court did not consider the amended regulation, as Section 426.6.A no longer mentions zoning classifications as part of the setback criteria. Therefore, similar to *Gertz*, the present claim is not the same as that previously litigated because the theory of relief in the instant action did not exist when the earlier petition was considered.

Additionally, like *Gertz*, the two petitions are motivated by different considerations. In the petition for variance, the Petitioners sought approval of a lesser set back than was required under the zoning regulations. In the instant petition for special hearing, the Petitioners are seeking an interpretation of the BCZR to determine if the cell tower is in compliance with the applicable zoning regulations. The required elements of proof are significantly different. For a zoning variance to be granted, the applicant must demonstrate that the property is unique and that the petitioner would suffer a practical difficulty if the variance were denied. (BCZR § 307.1) Comparatively, pursuant to BCZR § 500.7, no such standard of review is imposed in considering special hearings. A special hearing has been likened to a declaratory judgment action wherein the Commissioner interprets the BCZR as is necessary for the proper enforcement of the zoning regulations.

Finally, as will be further explained below, the two claims did not form a convenient trial unit and treating the facts as separate trial units would not conform to the party’s expectations because the Petitioner’s rights under the new law could not have been litigated in the initial

action. Thus, applying the transactional test in accordance with the *Gertz* decision clearly establishes that *res judicata* does not bar the present petition.

B. As a matter of law, Petitioners could not amend the relief requested when the matter went before the Board.

It is anticipated that Baltimore County and People's Counsel will contend that the theory presented in the instant Petition for Special Hearing should have been offered by the Petitioners during the course of the previous proceedings. However, Petitioners were legally barred from amending their requested relief after the law was changed and when the matter was appealed to the Board. The Court of Appeals has previously explained that while the Board conducts a de novo hearing, it nevertheless exercises appellate jurisdiction. *UPS v. People's Counsel*, 336 Md. 569, 587-91 (1994). Moreover, in light of the requisite notice requirements, a Petition may not be amended at the Board if it adds an element which a citizen reasonably would find material in deciding whether to participate. *Cassidy v. Baltimore County Board of Appeals*, 218 Md. 418, 425-26 (1958) (the public must be apprised clearly of the *character of the action proposed* and have enough of a basis upon which it rests to enable them to intelligently prepare for the hearing). In this case, a member of the public may have participated in the requested interpretation under the special hearing given its implication County-wide, but chose not to participate in the variance case. The interpretation of "new" section 426.6.A requested by Petitioners in the instant case affects any tower located in Baltimore County. To the contrary, a variance is site specific to the property at issue. Thus, such an amendment would violate requisite notice requirements. BCZR § 500.7 specifically requires that notice of petitions for special hearing be given to the public via the posting of the sign on the subject property and advertisement in a newspaper. Such notice requirement mandates that the posted sign "describe the action requested in the petition." These notice requirements are not required while a matter is

pending at the Board and are imposed when the case is first filed at the Zoning Commissioner level. Therefore, there would have been no "notice" to the public of the special hearing theory if an amendment was proposed.

Additionally, such an amendment is also prohibited because the new theory would escape the requisite review by the County's Zoning Advisory Committee Agencies. *See* BCZR § 32-3-302; *see also* BCZR § 500.7. Once a hearing date before the Commissioner is established, a copy of the petition shall be forwarded to the Department of Planning for consideration and a written report containing findings related to planning factors.

C. Res judicata does not apply when an administrative agency's decision is based on an error of law.

Even if it is determined that an amendment would have been permissible, the Board's failure to take the new law into account was arbitrary and capricious and is a defense to *res judicata*. *Klein v. Colonial Pipeline Co.*, 55 Md. App. 324, 340 (1983); *Board of County Commissioners of Cecil County v. Racine*, 24 Md. App. 435, 443 (1978). *Res judicata* does not apply to decisions of administrative agencies where "there has been a substantial change of conditions or it is shown that the decision was a product of fraud, surprise, mistake or inadvertence." *Klein*, 55 Md. App. at 340 (*quoting Racine*, 24 Md. App. at 443). Furthermore, to avoid unfairness, *res judicata* does not apply when an administrative agency's decision is based on an error in law. *Klein*, 55 Md. App. at 341; *Racine*, 24 Md. App. at 452.

Here, the Board's Opinion made no mention of the change to the law, and it appears that it applied the regulation as it existed before the Zoning Commissioner. As noted previously, the Court of Special Appeals clearly applied the old regulation. *See Sprint, supra*. Accordingly, because the roles of the Circuit Court and the Court of Special Appeals were to review the

decision of the Board, neither Court had an opportunity to account for the change in the law. Thus, to avoid unfairness, *res judicata* should not apply to the Board's legal error.

D. In the initial action, Petitioners lacked ample procedural means for fully developing the entire transaction.

In approving the transaction test, the Court of Appeals has made clear that "equating a claim with transaction is justified only when the parties have ample procedural means for fully developing the entire transaction." *Esslinger v. Baltimore City*, 95 Md. App. 607, 619 (1993) (quoting *Restatement Second of Judgments*, §24 cmt. a (1982)). Part of being afforded ample procedural means in an initial action is also being afforded the opportunity to pursue all of one's remedies in that action. *Esslinger*, 95 Md. App. at 619; see also *Restatement* §26(1)(c) (*res judicata* does not apply when a "plaintiff [is] unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action...and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief").

Therefore, irrespective of the factors associated with the transactional test, Petitioner's request for special hearing is not barred by *res judicata* since it could not have been asserted in the initial action.¹

II. The Existing Cell Tower is in Compliance with Setback and all other Applicable Zoning Regulations

As previously discussed, BCZR § 426.6.A was amended to provide that "a tower shall be set back at least 200 feet from any other owner's residential property line", as opposed to the previous regulation which required a set back from a "residential zone". Residential Zone is

¹ *Res judicata* also does not attach based upon the Code Enforcement proceeding through which the Petitioners were sanctioned. First, it is the Zoning Commissioner, not the Code Enforcement Hearing Officer, who has the authority to "interpret" the Zoning Regulations. (See BCC § 32-3-301). Second, Code Enforcement Hearing Officer Wisnom was not a quasi-judicial administrative body. Finally, a review of Wisnom's written findings and order shows that he was not cognizant of the law change and thus did not consider it.

defined in § 101.1 of the BCZR as follows: “a zone classified as R.C., D.R., R.O., R-O-A or R.A.E. Zoned for residential purposes; within a residential zone.” However, Residential Property is not a defined term within the BCZR.

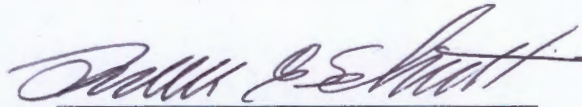
Accordingly, Mitch Kellman, who has been accepted as an expert witness in the field of planning and interpretation of the BCZR, testified to the difference between a residential zone and a residential property line. Mr. Kellman opined that a residential property line relates to the use of the property rather than the property’s zoning classification. Specifically, he stated that the purpose of the new regulation was to keep cell towers away from dwellings. Therefore, unimproved property, like that surrounding the subject property, does not satisfy the residential use requirement necessary to establish a residential property line.

The Court of Appeals has made clear that “only if the statutory language is ambiguous will this Court look beyond the statute’s plain language in discerning the legislative intent.” *Melton v. State*, 379 Md. 471, 489 (2004). Furthermore, the Court of Appeals has established that “[t]he plain meaning rule of construction is not absolute; rather, the statute must be construed reasonably with reference to the purpose, aim, or policy of the enacting body.” *Derry v. State*, 358 Md. 325, 336 (2000). Moreover, it has been clearly established that statutes are to be read “so that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless, or nugatory.” *Stanley v. State*, 157 Md. App. 363, 378-79 (2004).

Accordingly, examination of the amended regulation in context and in conjunction with the County Council’s scheme makes clear that the Council’s intent was to protect dwellings rather than residential zones. In the prior version of the ordinance, both the terms “residential zone” and “residential property line” were used. As such, it must be inferred that the County Council intended these two terms to have different meanings. Otherwise, the changed word would be

rendered meaningless in violation of clearly established Maryland law regarding statutory interpretation. *See Stanley*, 157 Md. App. at 378-79. Therefore, in light of the change in the law and pursuant to Mr. Kellman's testimony, the subject cell tower is in compliance with the applicable zoning regulations.

Respectfully submitted,



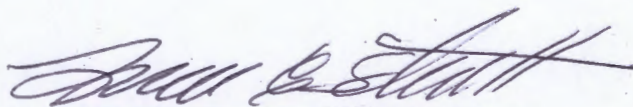
LAWRENCE E. SCHMIDT
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204
(410) 821-0070
Attorney for Owner/Petitioner Back River, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this **30th** day of **July, 2012**, a copy of the foregoing Closing Memorandum in Lieu of Closing Argument was mailed first-class pre-paid postage to:

Carole DeMilio, Esquire
People's Counsel for Baltimore County
The Jefferson Building
105 West Chesapeake Avenue
Room 204
Towson, MD 21204

Adam Rosenblatt, Esquire
Assistant County Attorney
Baltimore County Department of
Permits, Approvals and Inspections
111 West Chesapeake Avenue
Suite 105
Towson, MD 21204



LAWRENCE E. SCHMIDT

SMITH, GILDEA & SCHMIDT^{LLC}

MICHAEL PAUL SMITH
DAVID K. GILDEA
LAWRENCE E. SCHMIDT
D. DUSKY HOLMAN
MICHAEL G. DEHAVEN
RAY M. SHEPARD

LAUREN M. DODRILL
CHARLES B. MAREK, III
NATALIE MAYO
ELYANA TARLOW
JASON T. VETTORI
REBECCA G. WYATT

of counsel:

JAMES T. SMITH, JR.

July 30, 2012

Sent via Hand Delivery

John E. Beverungen, Esquire
Office of Administrative Hearings
Administrative Law Judge
105 W. Chesapeake Avenue, Suite 103
Towson, MD 21204

RECEIVED
JUL 30 2012
OFFICE OF ADMINISTRATIVE HEARINGS

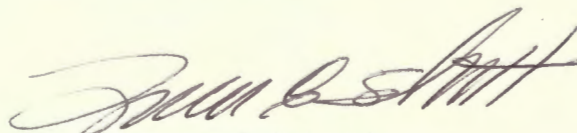
**Re: Case No. 2008-0531-SPH
Back River, LLC, Petitioner
810 Back River Neck Road**

Dear Hon. Beverungen:

Herein enclosed please find the Petitioner's Closing Memorandum in Lieu of Closing Argument in the above captioned case.

Should you have any questions, comments or concerns, please feel free to contact me.

Very truly yours,



Lawrence E. Schmidt

LES:arg

CC: Carole DeMilio, Esquire, People's Counsel for Baltimore County
Adam Rosenblatt, Esquire, Assistant County Attorney
Nancy West, Esquire, Office of the County Attorney
Steve Boyd, Esquire, Sprint
Michael Lutz, Back River, LLC
Mitch Kellman, Draft, McCune, Walker, Inc.

7/30/12

IN RE:
PETITION FOR SPECIAL HEARING
SW/S Back River Neck Road,
330' SE of c/l Pottery Farm Road
(810 Back River Neck Road)
15th Election District
5th Council District

Back River, LLC
Petitioner

JB 7/20 10AM

BEFORE THE OFFICE OF
ADMINISTRATIVE HEARINGS
FOR BALTIMORE COUNTY

Case No. 2008-0531-SPH

RECEIVED
JUL 30 2012
OFFICE OF ADMINISTRATIVE HEARINGS

POST HEARING MEMORANDUM

Baltimore County, Maryland, by undersigned counsel, hereby submits this Post Hearing Memorandum demonstrating that the above-captioned petition for Special Hearing is barred by res judicata and states as follows:

INTRODUCTION

There is no question that Mr. Schmidt and Mr. Kellman made every effort to present a convincing case for their interpretation of Section 426 of the Baltimore County Zoning Regulations (BCZR) at the July 20, 2012 hearing on this petition for Special Hearing. Unfortunately for their clients, the window for raising this argument has long been shut, and the Office of Administrative Hearings is barred by well settled legal principles from entertaining the Petitioner's request for an interpretation that the "existing cellular tower is in compliance with setback and all other applicable zoning regulations." Quite simply, this portion of the petition cannot even be considered because it is legally barred by res judicata.

BACKGROUND

This dispute dates back to January 4, 2002, when former Zoning Commissioner Lawrence E. Schmidt (now counsel for the Petitioner) issued a written Order granting the Petitioner a variance from BCZR § 426 to construct a cell tower in the location in which it

continues to stand today. *See* Pet. Ex. 1. The case was appealed to the Board of Appeals, which reversed the decision and denied the variances (Pet. Ex. 2), and the Circuit Court and Court of Special Appeals, both of which affirmed the Board of Appeals. *See* Pet. Exs. 3-4. In 2009, the Baltimore County Code Enforcement Hearing Officer issued an Order finding the Petitioner in violation of BCZR § 426.6.A.1 for failing to maintain a 200 foot setback “from another owner’s residential property line” and issued a \$9,200.00 civil penalty, which was paid by the Petitioner without any appeal. *See* BC Ex. 1. Now, for the first time, Petitioner argues that the cell tower, all along, has been in compliance with the BCZR and never even required a setback variance. This argument is barred by res judicata.

FACTS

Most if not all of the facts relevant to this SPH Petition are undisputed. The facts are drawn from a series of past legal decisions and a change in the wording of BCZR § 426.6A, which governs the setback requirements for Wireless Communications Towers in Baltimore County. Until May 5, 2002, the law read as follows:

1. If a tower is located in a residential zone, the tower shall be set back at least 200 feet from any other owner’s residential property line.
2. If a tower is located in a transitional zone, the tower shall be set back at least 200 feet from any residential zone.
3. If a tower is located in a medium or high intensity commercial zone, the tower shall be set back from an adjoining property line a distance equal to the setback required for other structures in the zone. However, if the property adjoins a residential zone, the tower shall be set back at least 200 feet **from the residential zone.** [line]

See Pet. Ex. 8 (emphasis added).

In 2002, Bill 17-02 simplified and changed the law governing these setbacks to require that a “tower shall be setback at least 200 feet from **any other owner’s residential property**

line.” BCZR § 426.6A(1) (emphasis added); *see also* Pet. Ex. 9. The Bill became effective on May 5, 2002, and continues to govern the setbacks for Wireless Communication Towers (“cell towers”) today. This change in the law lies at the heart of Petitioner’s argument in the instant petition, so its timing and discussion throughout the various legal decisions in this case are the facts that are relevant to whether this petition is barred by res judicata.

Bill 17-02 became effective four (4) months after Mr. Schmidt granted Petitioner the variance, so the language in § 426.6A that was presented to Mr. Schmidt as Zoning Commissioner in 2002 is different from the language that Mr. Schmidt is now interpreting on behalf of his now client. However, the change occurred well before the Board of Appeals conducted *de novo* hearings and denied the variances on May 14, 2003 (Pet. Ex. 2), and obviously before the Court of Special Appeals affirmed the Board on August 3, 2005 (Pet. Ex. 4). Likewise, the law had changed well before the Baltimore County Code Enforcement Hearing Officer issued his January 7, 2009 final order determining that the tower violates the setback requirements “from another owner’s residential property line.” *See* BC Ex. 1.

There was some back and forth at the hearing on this Petition as to whether the Court of Special Appeals interpreted the prior or current version of the setbacks provision of the BCZR. However, page 31 of the Court of Special Appeals opinion makes clear that the new and current version was at stake in the prior Petition that was reviewed by the appellate court:

The ML Zone permits cellular towers by right, subject to a 200 foot setback requirement **“from any other owner's residential property line.”** BCZR 426.6(A)(1). Because the setback requirement could not be met, it was necessary for Sprint to prove grounds for a variance.

See Pet. Ex. 4 at p. 31 (emphasis added).

Thus, it is beyond dispute that there has already been a legal interpretation that the version of the setbacks law governing the cell tower at stake in this petition for Special Hearing imposes a 200 foot setback from all neighboring properties, and that the setback cannot be met absent a variance. Indeed, the Court of Special Appeals echoed the Board of Appeals, which held quite clearly that variances are required for this tower to remain in the location it continues to stand today:

The Board is not denying Sprint the right to erect a telecommunications tower in the Holly Neck area. It is only saying that there may be a more appropriate piece of property where the tower could be erected **and not require the variances that would be necessary on the instant property.**"

See Pet. Ex. 2, p. 6 (emphasis added).

There is no dispute that the cell tower in this case remains in the location that was reviewed by the prior administrative and judicial forums, nor is there any dispute that the argument set forth in this petition for Special Hearing (that the "existing cellular tower is in compliance with setback and all other applicable zoning regulations") was never presented in the prior zoning petitions or code enforcement proceedings and is being raised for the first time in this petition. Based on these facts, Baltimore County submits that the petition for Special Hearing is barred by res judicata.

ARGUMENT

I. Doctrine of res judicata

The doctrine of res judicata provides that "a judgment on the merits in a previous suit between the same parties or their privies precludes a second suit predicated upon the same cause of action." *Seminary Galleria, LLC v. Dulaney Valley Improvement Ass'n, Inc.*, 192 Md.App. 719, 734-737 (2010). A point of crucial importance to this zoning petition is that res judicata

acts as “an absolute bar, not only as to all matters which were litigated in the earlier case, but as to all matters which *could have been* litigated.” *Id.* (citing *Whittle v. Bd. of Zoning Appeals*, 211 Md. 36, 49 (1956) (emphasis in original)). In *Whittle*, the Court of Appeals stressed that successive litigation of zoning petitions is discouraged because it “would be arbitrary for the board to arrive at opposite conclusions on substantially the same state of facts and the same law.” 211 Md. at 45. The doctrine applies to the administrative decisions reached by the County Board of Appeals, as demonstrated by Mr. Schmidt’s successful use of the doctrine this past year in case number 11-051-SPH. *See also Batson v. Shiflett*, 325 Md. 684, 705 (1992).

II. Res judicata bars this Petition for SPH

As each of the prior orders indicate, and as was confirmed by Mr. Kellman’s testimony at the July 20, 2012 hearing in this case, Petitioner never argued that the tower complied with all applicable provisions of the BCZR until this petition for Special Hearing was presented to the Office of Administrative Hearings last week. As the orders also demonstrate, Petitioner previously made a number of legal arguments in an effort to keep the cell tower within the 200 foot setback, and then even attempted to purchase property from neighboring owners in order to meet the 200 foot setback for cell towers. *See BC Ex. 1, p. 2.* Not until all else failed did Petitioner retain a new attorney that generated an argument for keeping the tower in its current location without a variance or additional purchase of neighboring property.

Unfortunately for Petitioner, the window for raising this argument was shut years ago, and the Administrative Law Judge is now barred by well settled legal principles from reconsidering the decisions of the Board of Appeals, Court of Special Appeals, and Code Enforcement Hearing Officer. Quite simply, res judicata acts “as an absolute bar, not only as to all matters which were litigated in the earlier case, but as to all matters which *could have been*

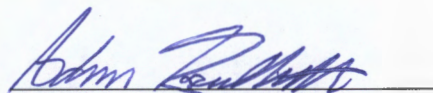
litigated.” *Seminary Galleria, supra*. The initial petition should have requested the Special Hearing relief that was just presented last week, and should have been filed in the alternative to request a variance if the administrative agencies disagreed with the argument that the tower was in compliance with the BCZR absent a variance. Indeed, this is the precise legal strategy that was successfully employed in a similar cell tower setback case in 2010. *See* 2010-0147-SPHA.

If that was not enough, Petitioner again failed to raise this legal defense when faced with a code enforcement action in 2009, and paid a civil penalty without appealing or challenging the hearing officer’s finding of a violation. Having failed to raise an argument that could and should have been raised in over the course of this litigation, Petitioner is now barred from relitigating their request to maintain a cell tower in this location.

CONCLUSION

Wherefore, Baltimore County respectfully requests that the portion of this Petition for Special Hearing requesting an interpretation that the “existing cellular tower is in compliance with setback and all other applicable zoning regulations” be dismissed with prejudice on the basis of res judicata.

Respectfully submitted,



Adam M. Rosenblatt
Assistant to the Director and
Assistant County Attorney
Dept. of Permits, Approvals and Inspections
111 W. Chesapeake Avenue, Room 105
Towson, MD 21204
(410) 887-3353

CERTIFICATE OF SERVICE

I hereby certify on this 30th day of July, 2012 that a copy of this Memo was mailed to
Lawrence Schmidt and Carol Demilio.



Adam M. Rosenblatt

7/30/12

RE: PETITION FOR SPECIAL HEARING * BEFORE THE OFFICE
AND SPECIAL EXCEPTION *
810 Back River Neck Road; WS of Back * OF ADMINISTRATIVE
River Neck Road, 270' S of Pottery Farm Rd * HEARINGS FOR
15th Election & 6th Councilmanic Districts * BALTIMORE COUNTY
Legal Owner(s): Back River, LLC
Contract Purchaser(s): Sprint Nextel *

Petitioner(s) * 08-531-SPHX

* * * * *

MEMORANDUM OF PEOPLE'S COUNSEL
FOR BALTIMORE COUNTY

People's Counsel for Baltimore County files this Memorandum in Opposition to the Amended Petition for Special Hearing.

INTRODUCTION

Petitioner's argument that the 2002 change in BCZR § 426.6 "Setback requirements for wireless communication towers" reduces the tower's setback from a residential boundary line from 200 ft to 0 ft. is not only unfounded and incorrect but strains credulity. The change under Bill 17-02, (Pet. Exhibit 9), consolidated and unified the setback requirement from residential properties but did not amend the 200 ft standard. The County Council retained the same setback language, "any other owner's residential property line" irrespective of the zone on the tower's site. All possible scenarios were then addressed in one simple sentence. For example, even under the prior law, if the proposed tower and the other surrounding lots were all in a residential zone, the tower must still comply with the 200 ft setback. If the term "residential zone" was used instead of property line in that section, there could be no setback from these other residential lots because the residential zone line would not be the individual property lines. Zoning lines are drawn around areas with the same zone, not around individual properties.

On the other hand, the prior law used the term "residential zone" if a tower was in a nonresidential zone because the property line between the zones would also be the zoning line. Since under Bill 17-02, the zone on the tower's location was no longer a factor, the Council merely eliminated the superfluous language. Now, for purposes of tower setbacks, there was no need to identify property lines and zoning lines. The setback

remained 200 feet from residential lots. Whether the surrounding lots were improved or vacant was never a consideration. Petitioner's injection of a dwelling requirement to impose the 200 feet setback is a gratuitous and unlawful change unsupported by the statute's clear language and the obvious intent of the language changes made in Bill 17-02. This interpretation will be further discussed below. For purposes of this Introduction, it must be pointed out at the onset that even assuming Petitioner's argument is correct, it is barred by *res judicata*.

Bill 17-02 became effective May 5, 2002, some four months prior to the CBA's first *de novo* hearing on September 25, 2002 and seven months prior to the continued hearing date on January 21, 2003. It is undisputed that at the CBA hearing and throughout the appeals process, Petitioner did not dispute that the side and rear 200 foot setbacks applied. Petition sought variances from the standards but did not abdicate the setbacks. The CBA and the courts in the appellate process all referred to the language in Bill 17-02 as the applicable law. Furthermore, from the onset in 2001, the surrounding R.C. 20 residential lots remain vacant. The Petitioner certainly could have raised this interpretation at the *de novo* CBA and perhaps at the appellate levels since the law was enacted after the original Petition was filed. Even so, the CBA Opinion (Pet. Exhibit. 2) referred to the "property line" not the residential zone line as did the CSA decision (Pet. Exhibit 4). A legal theory that could have been raised in the prior action is barred by the doctrine of *res judicata*.

**PETITIONER'S CLAIM SETBACKS DO NOT APPLY
IS WITHOUT MERIT**

There is no support for Petitioner's claim that the setback requirements for a wireless communications tower only apply to residential lots improved with a dwelling. Setbacks have been recognized for over 80 years, with approval based on the need to protect health and safety as well as aesthetics. "Most zoning ordinances provide that new buildings be constructed with a setback line." Salkin, Patricia American Law of Zoning § 7:19. "Setback regulations commonly require that buildings and other structures be established behind the setback line." *Id.* § 9:58. This was particularly important in residential neighborhoods since "The protection of residential neighborhoods was a

primary concern of early zoning legislation.” Salkin, *supra* § 9:24. For these reasons, “Setback regulations are widely upheld as an appropriate use of the zoning power.” *Id.* § 9:58. Furthermore, “Setback regulations may specify setbacks for particular uses. Thus, an ordinance imposed a line applicable to towers. . . A requirement that turbine towers be set back at least a tower’s length from the boundaries of the lot ,. . . the purpose being to prevent a falling tower from encroaching other land.” (citations omitted). Salkin, § 9:58, Footnote 35. Historically, setbacks were measured from boundary lines, independent of improvements on neighboring properties, to protect against infringement. See Baltimore County Code (“BCC”) §32-3-101, the zoning enabling law, stating a purpose of zoning is to establish setbacks, without regard to improvements on adjoining lots.

The applicable statute here serves to separate the tower use from neighboring residential properties. To eliminate the setback if the neighboring properties do not contain a dwelling frustrates the protective purpose of distance requirements and fosters a rush to develop, to the detriment of owners of unimproved residential lots. Moreover, there are uses in the residential zones without dwellings, such as agriculture in R.C. zones and farm markets, schools, farmstead creameries, and various recreational uses in the R.C. 20 zone, that, under Petitioner’s interpretation, would not be entitled to any setback.

It is helpful to review the language of the applicable statute and its context within BCZR. The applicable statute and definitions are as follows:

426.6. Setback requirements for wireless telecommunications towers.

A. Setbacks [Bill No. 17-2002]

1. A tower shall be set back at least 200 feet from any other owner’s residential property line.

A “setback” is defined in BCZR § 101.1 and Bill 138-1962, attached:

“SETBACK --- The required minimum horizontal distance between the building line (as defined in Section 101) and the related front, side or rear property line. (underline added)

The residential zones are defined in BCZR § 101.1:

RESIDENTIAL ZONE --- A zone classified as R.C., D.R., R.O., R-O-A or R.A.E.

“Zoned for residential purposes”; within a residential zone. [Bill Nos. 98-1975; 170-1991; 149-2004]

Petitioner's position contradicts long-standing principles of statutory construction where the plain meaning of words is the first test. There are numerous appellate decisions on statutory construction but the CA provides an excellent summary in Swinson v. Lords Landing, 360 Md. 462, 478 (2000). The language is particularly applicable here:

"In construing statutes, we obviously begin with the language of the statute. If that language, both on its face and in context, is clear and unambiguous, we need go no further. We give the language its plain meaning. We do not add or delete words in order to reflect an intent not evidenced by what the Legislature actually said and we do not construe statutes with " ' forced or subtle interpretations' that limit or extend its application." (citations omitted).

There is nothing ambiguous about the term "property line", whose clear meaning has been applied in numerous variance and special exception cases. Petitioner unnecessarily creates a distraction by injecting confusion into a straight forward and direct application of the setback regulation. Instead, Petitioner could and should follow the legitimate procedural path to a hearing on the merits.

In AD+ Soil, Inc. v. County Commr's 307 Md. 307, 339 (1986), the CSA affirmed the Board of Appeals of Queen Anne's County's denial of setback requirements for a sewage sludge storage and distribution facility. The zoning regulation referred simply to a property line: "[T]he storage location shall be located a minimum of one hundred (100) feet from any property line, two hundred (200) feet from any road, one hundred fifty (150) feet from any drainage ditch, swale or gully, and a minimum of three hundred (300) feet from any stream, lake, pond or other body of water." (emphasis added). Interestingly, the petitioner there constructed the facility while the matter was in litigation; in the meantime, the county enacted legislation requiring conditional use approval in addition to the setback requirements which the Court applied and noted that the petitioner had sufficient land to comply with the setbacks if it moved the facility to another area of the site: "Indeed, the record contains undisputed evidence that Ad+ Soil could have situated its facilities on the site in compliance with the applicable setback requirements of the Zoning ordinance had it ascertained these requirements before constructing the facilities." In AD+, the Board declined to grant the

variances, concluding that any so-called hardship was self-inflicted. *Id.* 340. The CSA agreed that a “property line” setback was reasonable, enforceable, and unambiguous.

In the instant case, there is no need to go beyond the plain meaning of the language which gives no indication that the “other owner’s property line” requires improvement a dwelling. The changes in Bill No. 17-02 are obvious. The Council consolidated § 426.6 A. so that regardless of the zone for the tower site, it must be at least 200 ft from a residential property line. As stated, “residential property line” existed in the prior legislation and the Council merely deleted all the sections and language pertaining to the zone on the tower site. (See bracketed deletions in Bill 17-02.) Neither the prior law nor the current law required neighboring properties to be improved with a dwelling. Indeed there is no condition, definition or reference anywhere in BCZR or any administrative agency’s interpretation that “residential zone line” or “residential property line” is enforceable only if the site is improved. BCZR is replete with examples to refute Petitioner’s position that setback requirements apply only if a dwelling is located on neighboring properties. If the Council required a setback from a dwelling, it was clearly stated. A sampling includes the following:

BCZR § 1B01.1B (Residential Transition Areas) where the statute specifically discusses RTA generated setbacks depending on whether the adjoining residential site is vacant or improved: “Contains a single-family . . . dwelling within 150 feet . . .” or “Is vacant, less than two acres in size, and contains a buildable area. . .”

BCZR § 410A.2. where a Class II Trucking Facility cannot be located “. . . within 300 feet of a dwelling or a residential zone.”

BCZR § 229.6 C. establishing setbacks “. . . 20 feet from the property line of a residentially zoned property . . .”

BCZR § 232.2 “Side yards. . . B. For commercial buildings, . . . where the lot abuts a lot in a residential zone. . . there must be a side yard . . . width required for dwelling on the abutting lot . . .”

BCZR § 243.4 [M.R. zone] requiring no structure “. . . shall be closer than 125 feet at any point to the nearest boundary line of a residential zone.”

BCZR § 250.4 [M.L.R. zone] where the regulation states interchangeably “R.C. 5 Zone line” and R.C.5-Zoned property line”.

BCZR § 250.6 where the setback is measured from “. . . any residential zone boundary.”

BCZR § 254.1 where the statute refers to a height restriction if the building is “. . . within 100 feet of the boundary line of said residence . . . zone”.

BCZR § 255.2 “Within 1000 feet of any residential zone boundary . . .”

BCZR § 303 where the front yard depths are the average of the adjoining lots, “. . . provided such adjoining lots are improved with principal buildings situate within 200 feet of the joint side property line, but where said immediately adjoining lots are not both so improved . . .”

BCZR § 421.1 requiring a kennel to maintain a distance from the “nearest property line.”

BCZR § 415.3 C.2 requiring trailers to be set back a distance from a “residential zone boundary.”

There are numerous other examples, particularly in BCZR “Article 4 Special Regulations” §400-450, but the point is the terms for property lines, including “residential property line” and “residential zone line,” are used interchangeably in BCZR. They all refer to boundary lines. The existence of a dwelling is not a factor for these setbacks unless specifically stated. No one has ever disputed the obvious meaning.

On the other hand, the Council has specifically used the terms “residence” or “dwelling” when it intended a home to be a measuring factor. There is nothing in Bill 17-02 or in BCZR in general to support Petitioner’s bald allegation that “residential zone” refers to unimproved property while “residential property line” refers to a site improved with a residence. By obtaining land from the adjoining vacant sites, Petitioner clearly recognized the 200 ft setback applies. It is only because the property owner to the south would not comply that Petitioner now obfuscates the plain language of the setback regulation in §426.6.

RES JUDICATA BARS A NEW LEGAL THEORY

As stated above, our office strenuously disagrees with this strained and irrational interpretation that the 2002 amendment only requires a 200 ft setback from "improved" residential property, not vacant property. But assuming validity for the sake of argument, it cannot even be considered at this stage because it could have been raised in the prior litigation and Petitioner failed to do so. Powell v. Calvert County, 368 Md. 400 (2002) and Antwerpen v. Baltimore County, 163 Md. App 194 (2005) are clear that Bill 17-02 applies to the original Petition for Variances filed in 2001; both cases state unequivocally that a new and amended statutes apply to litigation prior to a final order. Here, there was no final order until the CSA decision in 2005, well after May 5, 2002, the effective date of Bill 17-02. The Petitioner could have raised its current interpretation of the setback regulation before the CBA hearing dates on September 25, 2002 and January 21, 2003. It likely could have raised it in the Circuit Court case hearing held on February 2, 2004 and subsequently before the CSA. Since Petitioner failed to present this legal theory at the *de novo* CBA hearing or at any other stage in the litigation while the law was in effect, he is barred by *res judicata*. Judge Robert Karwacki confirmed in Batson v. Shiflett 325 Md. 684, 701-05 (1992) that *res judicata* applies to administrative decisions:

"The Court of Special Appeals used the following test for determining whether the NLRB decision is entitled to preclusive effect:

"Whether an administrative agency's declaration should be given preclusive effect hinges on three factors: '(1) whether the [agency] was acting in a judicial capacity; (2) whether the issue presented to the district court was actually litigated before the [agency]; and (3) whether its resolution was necessary to the [agency's] decision.'"

Batson, 86 Md.App. at 356, 586 A.2d at 799 (quoting West Coast Truck Lines v. American Industries, 893 F.2d 229, 234-35 (9th Cir.1990)). This test was first enunciated in Exxon Corp. v. Fischer, 807 F.2d 842, 845-46 (9th Cir.1987), and its three prongs are supported by the Supreme Court case law on issue preclusion.

In United States v. Utah Constr. Co., 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966), the Court spoke particularly to the preclusive effect of administrative law rulings, stating that:

"When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an

adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." [citations omitted].

Id. at 422, 86 S.Ct. at 1560, 16 L.Ed.2d at 661. Thus, agency findings made in the course of proceedings that are judicial in nature should be given the same preclusive effect as findings made by a court."

The Supreme Court quoted the Utah Constr. Co. *supra* language in Astoria Federal Savings & Loan Assoc. v. Solimino 501 U.S. 104, 107 (1991). Mr. Justice Souter added,

"Such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise. To hold otherwise would as a general matter, impose unjustifiable upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution. ... The principle holds true when a court has resolved an issue, and should do so equally when the issue has been decided by an administrative agency, be it state or federal"

In Maryland, Chief Judge Brune explained the prohibition of a second zoning action in Whittle v. Board of Zoning Appeals of Baltimore County 211 Md. 36, 45(1956):

"The general rule, where the question has arisen, seems to be that after the lapse of such time as may be specified by the ordinance, a zoning appeals board may consider and act upon a new application for a special permit previously denied, but that it may properly grant such a permit only if there has been a substantial change in conditions. * * * This rule seems to rest not strictly on the doctrine of *res judicata*, but upon the proposition that it would be arbitrary for the board to arrive at the opposite conclusions on substantially the same state of facts and the same law." Emphasis supplied.

Here, there are no changes in the condition of the property or in the neighborhood to support a rehearing. The surrounding properties were vacant throughout the prior litigation and are vacant now. See Site Plan dated 2002, attached. The proposed interpretation of BCZR § 426.6 is a legal claim that could have been raised in the prior litigation. It is paramount that *res judicata* bars litigation of the same matter with respect not only to the legal claims or issues decided in the case finally adjudicated, but also "as to all matters which with propriety could have been litigated in the first suit." Alvey v. Alvey 225 Md. 386, 390 (1961); MPC, Inc. v. Kenny 279 Md. 29, 32 (1977); DeLeon v. Slear 328 Md. 569, 580 (1992); Kim v. Collington Center III 180 Md. App. 606, 619

(2008). A litigant must bring forward the entire case, including all relevant facts and legal issues. Otherwise, there would be a potentially unending series of cases based on different facts and legal theories framed to achieve the same objective and relief.

The CBA has consistently applied the doctrine of *res judicata*. See John P. and Mary E. Ford, 06-397-SPH, aff'd Circuit Court, 03-C-07-12133, aff'd CSA No. 1309 (11-18-09), Charles and Daryl Wolinski, 06-309-A & 06-310-A, Dr. Harlan Zinn, 07-545-A, Howard and Melanie Becker, 06-651-SPHA, Andrew and Stephanie Mattes, 11-051-SPH.

**THE ACQUISITION OF R.C. 20 PROPERTIES REQUIRES SPECIAL
EXCEPTION APPROVAL UNDER BCZR § 426.5**

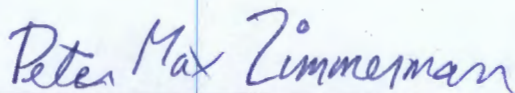
Petitioner also proposes that the 200 ft rear and side (northern) setback requirements are satisfied with the "deed acquisition" of adjoining R.C. 20 properties. First, Petitioner puts the proverbial "cart before the horse". A deed is not a substitute for lawful subdivision unless provided in BCC. The owners of the RC20 properties must obtain Baltimore County approval for a subdivision under BCC § 32-4-101 (p) (2) (3) where "Development" includes "The subdivision of property" and "The combination of any two or more lots, tracts, or parcels of property for any purpose. At a minimum, they must obtain approval of a lot line adjustment.

Furthermore, since the areas acquired are zoned R.C. 20 and serve to satisfy the 200 ft setback on those sides, they are part of the tower use. As such, the tower is interconnected with the R.C. 20 area, which requires a special exception for a tower use, (BCZR § 426.5) and imposes other standards in BCZR §426.9. If the tower met all setbacks and other requirements, that is to say "self-supporting" in the M.L. zone, a special exception would not be required. But if Petitioner contends the R.C.20 acquisitions satisfy 2 setback requirements, he must accept the application of the R.C. 20 standards. It is irrelevant that the tower structure is located in the M.L. zone if the 200 ft setbacks are not entirely in the M.L. zone.

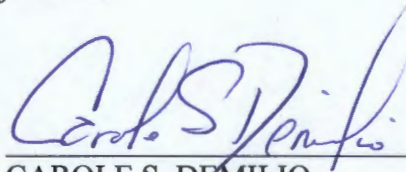
Likewise, Mr. Kellman's bald testimony that commercial uses are permitted on commercial and noncommercial split zoned properties is misleading, particularly without

reference to the total area of a site. For instance, BCZR § 409.8 B requires approval under special exception standards for business or industrial parking in a residential zone, even if the site is in common ownership. As a corollary, expert opinions are considered conclusory or "quasi-conclusory opinions and entitled to no weight where unsupported by adequate facts and supporting reasons. Mayor & Council of Rockville v. Henry 268 Md. 469, 473-74 (1973); A.H. Smith Sand & Gravel Co. v. Dep't of Natural Resources 270 Md. 652, 667 (1974); People's Counsel v. Beachwood 107 Md. App. 627, 650 (1995), cert. denied 342 Md. 472 (1996). See Alviani v. Dixon, 365 Md. 95 (2001), where the property owner requested both special exception relief because the use was not permitted by right on part of the split-zoned site, and setback variances.

In summary, the Amended Petition for Special Hearing violates the principles of statutory construction, is not supported by the language and intent of BCZR, fails to seek special exception approval, and is barred by *res judicata*.



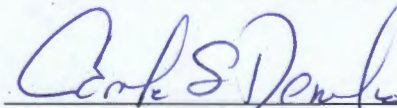
PETER MAX ZIMMERMAN
People's Counsel for Baltimore County



CAROLE S. DEMILIO
Deputy People's Counsel
Jefferson Building, Room 204
105 West Chesapeake Avenue
Towson, MD 21204
(410) 887-2188

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of July, 2012, a copy of the foregoing Memorandum was mailed to Adam Rosenblatt, Esquire, Assistant County Attorney, 111 West Chesapeake Avenue, Towson, Maryland 21204 and Lawrence Schmidt, Esquire, Smith, Gildea & Schmidt, 600 Washington Avenue, Suite 200, Towson, Maryland 21204, Attorney for Petitioner(s).



CAROLE S. DEMILIO

COUNTY COUNCIL OF BALTIMORE COUNTY,
MARYLAND

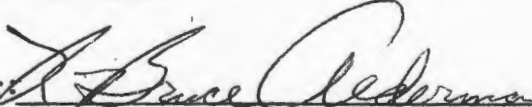
BILL NO. 138

Mr. Anderson, Councilman

By the County Council, September 10, 1962

Legislative Session 1962, Legislative Day No. 22

I hereby certify that this is the original of Bill No. 138, which was introduced and read the first time on the above date.

By Order, 

R. Bruce Alderman, Secretary

A BILL

ENTITLED

AN ACT, to change the definition of "setback" on page 6 of the Baltimore County Zoning Regulations (1955) to apply to side and rear lines as well as to the front line, by amending section 101 of said Regulations.

1. SECTION 1. Be it enacted by the County Council of Baltimore County, Maryland
2. that section 101 of the Baltimore County Zoning Regulations (1955) is hereby
3. amended by changing the definition of "setback" on page 6 of said Regulations to
4. read as follows:

5. 101. "Setback: The required minimum horizontal distance between
6. the building line, (as defined in Section 101) and the related front, side, or rear
7. property line."

8. SECTION 2. And be it further enacted, that this Act shall take effect forty-five
9. days after its enactment.

READ AND PASSED this 20th day of September 1962.

By Order

R. Bruce Alderman
R. Bruce Alderman, Secretary

PRESENTED to the County Executive, for his approval this 21st day of September 196

R. Bruce Alderman
R. Bruce Alderman, Secretary

APPROVED AND ENACTED:

SEP 26 1962

Date

Christian Wahl
County Executive

I HEREBY CERTIFY THAT BILL NO. 138 IS TRUE AND CORRECT AND WILL TAKE
EFFECT ON November 10, 1962.

October 11, 1962

Dale Anderson
Chairman, County Council

Debra Wiley - Back River - Certificate of Posting

From: Amy Gillespie <agillespie@sgs-law.com>
To: "dwiley@baltimorecountymd.gov" <dwiley@baltimorecountymd.gov>
Date: 7/11/2012 10:43 AM
Subject: Back River - Certificate of Posting
CC: Amy Gillespie <agillespie@sgs-law.com>
Attachments: Certification of Posting.PDF

Debbie:

Please see attached Certificate of Posting. Please let me know if you need anything else!

Thanks,
Amy

Amy Gillespie
Land Use Paralegal
SMITH, GILDEA & SCHMIDT, LLC
600 Washington Avenue
Suite 200
Towson, MD 21204
(410) 821-0070
(410) 821-0071 - fax
agillespie@sgs-law.com

This email contains information from the law firm of Smith, Gildea & Schmidt, LLC which may be confidential and/or privileged. The information is intended to be for the exclusive use of the individual or entity named above. If you are not the intended recipient, be advised that any disclosure, copying, distribution or other use of this information is strictly prohibited. If you have received this e-mail in error, please notify Smith, Gildea & Schmidt, LLC by telephone immediately.

CERTIFICATE OF POSTING

2012-0531-SPH

RE: Case No.: _____

Petitioner/Developer: _____

Sprint Nextel, Steve Boyd, Rep.

July 20, 012

Date of Hearing/Closing: _____

**Baltimore County Department of
Permits, Approvals and Inspections
County Office Building, Room 111
111 West Chesapeake Avenue
Towson, Maryland 21204**

Attn: Kristen Lewis:

Ladies and Gentlemen:

This letter is to certify under the penalties of perjury that the necessary sign(s) required by law were posted conspicuously on the property located at:

810 Back River Neck Road

June 30, 2012

The sign(s) were posted on _____
(Month, Day, Year)

Sincerely,

June 30, 2012

(Signature of Sign Poster)

(Date)

SSG Robert Black

(Print Name)

1508 Leslie Road

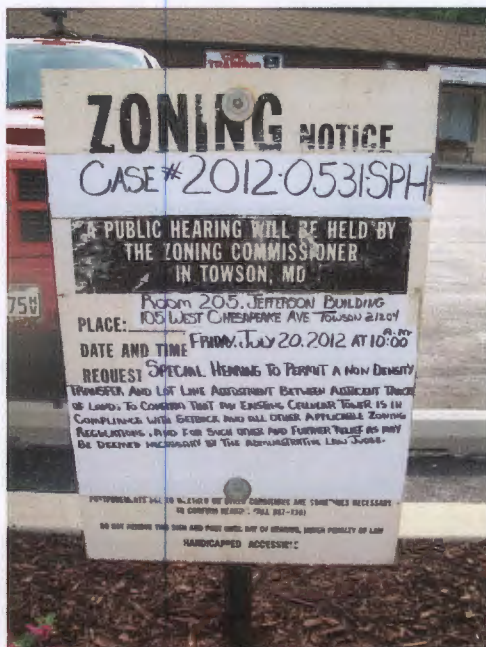
(Address)

Dundalk, Maryland 21222

(City, State, Zip Code)

(410) 282-7940

(Telephone Number)



CERTIFICATE OF POSTING

2012-0531-SPH

RE: Case No.: _____

Petitioner/Developer: _____

Sprint Nextel, Steve Boyd, Rep.

July 20, 012

Date of Hearing/Closing: _____

Baltimore County Department of
Permits, Approvals and Inspections
County Office Building, Room 111
111 West Chesapeake Avenue
Towson, Maryland 21204

RECEIVED

JUL 11 2012

OFFICE OF ADMINISTRATIVE HEARINGS

Attn: Kristen Lewis:

Ladies and Gentlemen:

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June 30, 2012

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1508 Leslie Road

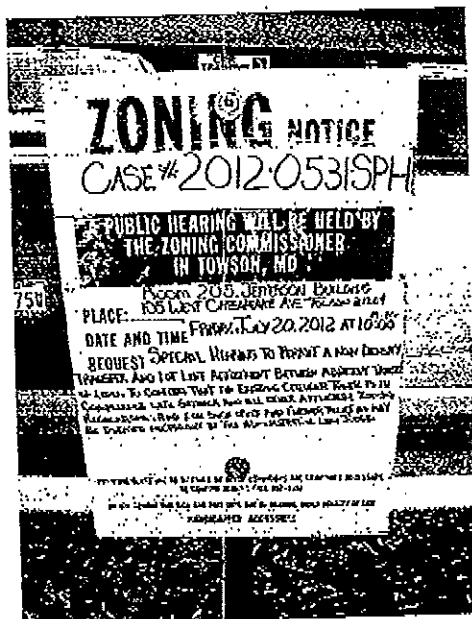
(Address)

Dundalk, Maryland 21222

(City, State, Zip Code)

(410) 282-7940

(Telephone Number)



NOTICE OF ZONING HEARING

The Administrative Law Judges of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County will hold a public hearing in Towson, Maryland on the property identified herein as follows:

Case: # 2008-0531-SPH

810 Back River Neck Road

W/s of Back River Neck Road, 270 feet +/- south of centerline Pottery Farm Road

15th Election District - 6th Councilmanic District

Legal Owner(s): Back River, LLC, Michael Lutz, Rep.

Contract Purchaser: Sprint Nextel, Steve Boyd, Rep.

Special Hearing: to permit a non density transfer and lot line adjustment between adjacent tracts of land; to confirm that an existing cellular tower is in compliance with setback and all other applicable zoning regulations; and for such other and further relief as may be deemed necessary by the Administrative Law Judge.

Hearing: Friday, July 20, 2012 at 10:00 a.m. in Room 205, Jefferson Building, 105 West Chesapeake Avenue, Towson 21204.

ARNOLD JABLON, DIRECTOR OF PERMITS, APPROVALS
AND INSPECTIONS FOR BALTIMORE COUNTY

NOTES: (1) Hearings are Handicapped Accessible; for special accommodations Please Contact the Administrative Hearings Office at (410) 887-3868.

(2) For Information concerning the File and/or Hearing, Contact the Zoning Review Office at (410) 887-3391.

06/364 June 28

304616

CERTIFICATE OF PUBLICATION

6/28/, 2012

THIS IS TO CERTIFY, that the annexed advertisement was published in the following weekly newspaper published in Baltimore County, Md., once in each of 1 successive weeks, the first publication appearing on 6/28/, 2012.

- ☒ The Jeffersonian
- ☐ Arbutus Times
- ☐ Catonsville Times
- ☐ Towson Times
- ☐ Owings Mills Times
- ☐ NE Booster/Reporter
- ☐ North County News

S. Wilkinson

LEGAL ADVERTISING

CHECKLISTComment
ReceivedDepartmentSupport/Oppose/
Conditions/
Comments/
No Comment5-31

DEVELOPMENT PLANS REVIEW

(if not received, date e-mail sent _____)

NC6/16/12 7-3-08

DEPS

(if not received, date e-mail sent _____)

Comments

FIRE DEPARTMENT

PLANNING

(if not received, date e-mail sent _____)

6-1

STATE HIGHWAY ADMINISTRATION

NO objection

TRAFFIC ENGINEERING

COMMUNITY ASSOCIATION

ADJACENT PROPERTY OWNERS

ZONING VIOLATION

(Case No. _____)

PRIOR ZONING

(Case No. 2002-0159-1A)

NEWSPAPER ADVERTISEMENT

Date: 6-28-12

SIGN POSTING

Date: 6-30-12by Beck(7-11 Amy to email)

PEOPLE'S COUNSEL APPEARANCE

Yes

☒

No

☐

PEOPLE'S COUNSEL COMMENT LETTER

Yes

☐

No

☐

Comments, if any:

* Please See Fax Ltr. from Larry Schmitt re:
Zoning History* See memo from Bastwick* See Adam Resubmitt 15 Ending of Appearance

TO: PATUXENT PUBLISHING COMPANY
Thursday, June 28, 2012 Issue - Jeffersonian

Please forward billing to:
Lawrence Schmidt
Smith, Gildea & Schmidt
600 Washington Avenue, Ste. 200
Towson, MD 21204

410-821-0070

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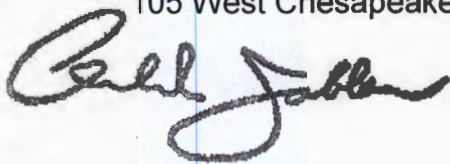
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Hearing: Friday, July 20, 2012 at 10:00 a.m. in Room 205, Jefferson Building,
105 West Chesapeake Avenue, Towson 21204



Arnold Jablon
Director of Permits, Approvals and Inspections for Baltimore County

- NOTES: (1) HEARINGS ARE HANDICAPPED ACCESSIBLE; FOR SPECIAL ACCOMODATIONS, PLEASE CONTACT THE ADMINISTRATIVE HEARINGS OFFICE AT 410-887-3868.
- (2) FOR INFORMATION CONCERNING THE FILE AND/OR HEARING, CONTACT THE ZONING REVIEW OFFICE AT 410-887-3391.



KEVIN KAMENETZ
County Executive

ARNOLD JABLON
Deputy Administrative Officer
Director, Department of Permits,
Approvals & Inspections

June 19, 2012

NOTICE OF ZONING HEARING

The Administrative Law Judges of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County, will hold a public hearing in Towson, Maryland on the property identified herein as follows:

CASE NUMBER: 2008-0531-SPH

810 Back River Neck Road

W/s of Back River Neck Road, 270 feet +/- south of centerline Pottery Farm Road

15th Election District – 6th Councilmanic District

Legal Owners: Back River, LLC, Michael Lutz, Rep.

Contract Purchaser: Sprint Nextel, Steve Boyd, Rep.

Special Hearing to permit a non density transfer and lot line adjustment between adjacent tracts of land; to confirm that an existing cellular tower is in compliance with setback and all other applicable zoning regulations; and for such other and further relief as may be deemed necessary by the Administrative Law Judge.

Hearing: Friday, July 20, 2012 at 10:00 a.m. in Room 205, Jefferson Building,
105 West Chesapeake Avenue, Towson 21204

A handwritten signature in black ink, appearing to read "Arnold Jablon", is written over the hearing information.

Arnold Jablon
Director

AJ:kl

C: Larry Schmidt, Gildea & Schmidt, 600 Washington Ave., Ste. 200, Towson 21204
Steve Boyd, 6450 Sprint Parkway, Orlando Park, KS 66251
Michael Lutz, Back River, LLC, 806 Back River Neck Rd., Baltimore 21221

- NOTES: (1) THE PETITIONER MUST HAVE THE ZONING NOTICE SIGN POSTED BY AN APPROVED POSTER ON THE PROPERTY BY SATURDAY, JUNE 30, 2012.**
- (2) HEARINGS ARE HANDICAPPED ACCESSIBLE; FOR SPECIAL ACCOMMODATIONS PLEASE CALL THE ADMINISTRATIVE HEARINGS OFFICE AT 410-887-3868.
- (3) FOR INFORMATION CONCERNING THE FILE AND/OR HEARING, CONTACT THE ZONING REVIEW OFFICE AT 410-887-3391.

Debra Wiley - ZAC Comments - Distribution Mtg. of May 28, 2012

From: Debra Wiley
To: Kennedy, Dennis; Lanham, Lynn; Livingston, Jeffrey; Lykens, David; M...
Date: 6/11/2012 1:36 PM
Subject: ZAC Comments - Distribution Mtg. of May 28, 2012

Good Afternoon,

Please see the cases listed below and the hearing date, if assigned. If you wish to submit a ZAC comment, please be advised that you must do so before the hearing date. If it's not received by the hearing date, it will not be considered in our decision.

2008-0531-SPHX - 810 Back River Neck Road
No hearing date in data base as of 6/11/12

2012-0295-A - 12628 Fork Road
Administrative Variance - Closing Date: 6/11/12

2012-0296-A - 1228 Birch Avenue
Administrative Variance - Closing Date: 6/16/12

2012-0297-A - 2919 Cornwall Road
No hearing date in data base as of 6/11/12

2012-0299-A - 6701 North Point Road
Administrative Variance - Closing Date: 6/18/12

2012-0300-A - 3641 Bay Drive
No hearing date in data base as of 6/11/12

Thanks.

Debbie Wiley
Legal Administrative Secretary
Office of Administrative Hearings
105 West Chesapeake Avenue, Suite 103
Towson, Md. 21204
410-887-3868
410-887-3468 (fax)
dwiley@baltimorecountymd.gov



Amended

PETITION FOR ZONING HEARING(S)

To be filed with the Department of Permits, Approvals and Inspections

To the Office of Administrative Law of Baltimore County for the property located at:

address 810 Back River Neck Road

which is presently zoned ML & RC 20

Deed Reference 13577/00535

10 Digit Tax Account # 2300004470

Property Owner(s) Printed Name(s) Back River, LLC

CASE NUMBER 2008-0531 SPH Filing Date 5.17.2012 Estimated Posting Date / / Reviewer RBJ(SELECT THE HEARING(S) BY MARKING ☒ AT THE APPROPRIATE SELECTION AND PRINT OR TYPE THE PETITION REQUEST)

The undersigned legal owner(s) of the property situate in Baltimore County and which is described in the description and plan attached hereto and made a part hereof, hereby petition for:

1. ☒ a **Special Hearing** under Section 500.7 of the Zoning Regulations of Baltimore County, to determine whether or not the Zoning Commissioner should approve

PLEASE SEE ATTACHED

2. ☐ a **Special Exception** under the Zoning Regulations of Baltimore County to use the herein described property for

3. ☐ a **Variance** from Section(s)

of the zoning regulations of Baltimore County, to the zoning law of Baltimore County, for the following reasons:
(Indicate below your hardship or practical difficulty or indicate below "To Be Presented At Hearing". If you need additional space, you may add an attachment to this petition)

TO BE PRESENTED AT HEARING

Property is to be posted and advertised as prescribed by the zoning regulations.

I, or we, agree to pay expenses of above petition(s), advertising, posting, etc. and further agree to and are to be bounded by the zoning regulations and restrictions of Baltimore County adopted pursuant to the zoning law for Baltimore County.

Legal Owner(s) Affirmation: I / we do so 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 / these Petition(s).

Contract Purchaser/Lessee:

Steve Boyd, Authorized Representative of Sprint Nextel

Name- Type or Print

Signature

6450 Sprint Parkway, Overland Park, KS 66251

Mailing Address

(913) 315-9460

steven.j.boyd@sprint.com

Zip Code

Telephone #

Email Address

Attorney for Petitioner:

Lawrence E. Schmidt, Smith, Gildea & Schmidt, LLC

Name- Type or Print

Signature

600 Washington Avenue, Suite 200, Towson, MD 21204

Mailing Address

(410) 821-0070

lschmidt@sgs-law.com

Zip Code

Telephone #

Email Address

Legal Owners:

Michael Lutz, Authorized Representative of Back River, LLC

Name #1 - Type or Print

Name #2 - Type or Print

Signature #1

Signature #2

806 Back River Neck Road, Baltimore, MD 21221

Mailing Address

City

State

(410) 274-0728

brllc810@yahoo.com

Zip Code

Telephone #

Email Address

Representative to be contacted:

Lawrence E. Schmidt, Smith, Gildea & Schmidt, LLC

Name - Type or Print

Signature

600 Washington Avenue, Suite 200, Towson, MD 21204

Mailing Address

City

State

(410) 821-0070

lschmidt@sgs-law.com

Zip Code

Telephone #

Email Address

2008-531-SPH

ATTACHMENT TO AMENDED PETITION FOR SPECIAL HEARING

810 Back River Neck Road

1. To permit a non-density transfer and lot line adjustment between adjacent tracts of land;
2. To confirm that an existing cellular tower is in compliance with setback and all other applicable zoning regulations; and
3. For such other and further relief as may be deemed necessary by the Administrative Law Judge.

2008-531-SPH



(Amended)

PETITION FOR ZONING HEARING(S)

To be filed with the Department of Permits, Approvals and Inspections

To the Office of Administrative Law of Baltimore County for the property located at:

address 810 Back River Neck Road which is presently zoned ML & RC 20

Deed Reference 13577/00535 10 Digit Tax Account # 2300004470

Property Owner(s) Printed Name(s) Back River, LLC

CASE NUMBER 2008-0531 SPH Filing Date 5/17/2012 Estimated Posting Date 1/1 Reviewer RDD

(SELECT THE HEARING(S) BY MARKING **X** AT THE APPROPRIATE SELECTION AND PRINT OR TYPE THE PETITION REQUEST)

The undersigned legal owner(s) of the property situate in Baltimore County and which is described in the description and plan attached hereto and made a part hereof, hereby petition for:

1. ☒ a Special Hearing under Section 500.7 of the Zoning Regulations of Baltimore County, to determine whether or not the Zoning Commissioner should approve

PLEASE SEE ATTACHED

2. ☐ a Special Exception under the Zoning Regulations of Baltimore County to use the herein described property for

3. ☐ a Variance from Section(s)

of the zoning regulations of Baltimore County, to the zoning law of Baltimore County, for the following reasons:
(Indicate below your hardship or practical difficulty or indicate below "To Be Presented At Hearing". If you need additional space, you may add an attachment to this petition)

TO BE PRESENTED AT HEARING

Property is to be posted and advertised as prescribed by the zoning regulations.

I, or we, agree to pay expenses of above petition(s), advertising, posting, etc. and further agree to and are to be bounded by the zoning regulations and restrictions of Baltimore County adopted pursuant to the zoning law for Baltimore County.

Legal Owner(s) Affirmation: I / we do so 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 / these Petition(s).

Contract Purchaser/Lessee:

Steve Boyd, Authorized Representative of Sprint Nextel

Name- Type or Print

Signature

6450 Sprint Parkway, Overland Park, KS 66251

Mailing Address

(913) 315-9460

steven.j.boyd@sprint.com

Zip Code

Telephone #

Email Address

Legal Owners:

Michael Lutz, Authorized Representative of Back River, LLC

Name #1 - Type or Print

Name #2 - Type or Print

Signature #1

Signature #2

806 Back River Neck Road, Baltimore, MD 21221

Mailing Address

City

State

(410) 274-0728

brlc810@yahoo.com

Zip Code

Telephone #

Email Address

Attorney for Petitioner:

Lawrence E. Schmidt, Smith, Gildea & Schmidt, LLC

Name- Type or Print

Signature

600 Washington Avenue, Suite 200, Towson, MD 21204

Mailing Address

City

State

(410) 821-0070

lschmidt@sgs-law.com

Zip Code

Telephone #

Email Address

Representative to be contacted:

Lawrence E. Schmidt, Smith, Gildea & Schmidt, LLC

Name- Type or Print

Signature

600 Washington Avenue, Suite 200, Towson, MD 21204

Mailing Address

City

State

(410) 821-0070

lschmidt@sgs-law.com

Zip Code

Telephone #

Email Address

ATTACHMENT TO AMENDED PETITION FOR SPECIAL HEARING

810 Back River Neck Road

1. To permit a non-density transfer and lot line adjustment between adjacent tracts of land;
2. To confirm that an existing cellular tower is in compliance with setback and all other applicable zoning regulations; and
3. For such other and further relief as may be deemed necessary by the Administrative Law Judge.

2008-531-SPH

DMW
DAFT MCCUNE WALKER INC

Description
To Accompany Petition
For a Special Hearing
Back River Neck Road
Baltimore County, Maryland

Beginning for the same at the end of the following two distances measured from the point formed by the intersection of the centerline of Luciano Drive with the centerline of Back River Neck road; thence Southeasterly along the centerline of Back River Neck Road 26.50 feet, more or less; thence leaving said centerline and running Southwesterly 52.50 feet, more or less, to the point of beginning; thence leaving said point of beginning and referring all courses of this description to the Maryland Coordinate System (NAD 83-1991) and running (1) Southeasterly by a line curving to the right having a radius of 775.00 feet, for a distance of 228.14 feet (the arc of said curve being subtended by a chord bearing South 03 degrees 03 minutes 20 seconds East 227.32 feet); thence (2) South 66 degrees 30 minutes 02 seconds West 768.36 feet; thence (3) South 23 degrees 29 minutes 58 seconds East 77.00 feet; thence (4) South 66 degrees 30 minutes 02 seconds West 65.50 feet; thence (5) North 23 degrees 29 minutes 58 seconds West 300.00 feet; thence (6) North 66 degrees 30 minutes 02 seconds East 65.50 feet; thence (7) North 23 degrees 29 minutes 58 seconds West 33.00 feet; thence (8) North 66 degrees 30 minutes 02 seconds East 30.62 feet; thence (9) Northeasterly by a line curving to the right having a radius of 40.00 feet, for a distance of 47.46 feet (the arc of said curve being subtended by a chord

bearing North 32 degrees 30 minute 46 seconds East 44.72 feet); thence (10) North 66 degrees 30 minutes 02 seconds East 176.67 feet; thence (11) North 66 degrees 30 minutes 02 seconds East 25.00 feet; thence (12) South 23 degrees 29 minutes 58 seconds East 58.00 feet; thence (13) North 66 degrees 30 minutes 02 seconds East 380.63 feet; thence (14) South 23 degrees 29 minutes 58 seconds East 10.00 feet; thence (15) North 66 degrees 30 minutes 02 seconds East 197.76 feet to the point of beginning; containing 214,140 square feet or 4.916 acres of land, more or less.

THIS DESCRIPTION HAS BEEN PREPARED FOR ZONING PURPOSES ONLY AND IS NOT INTENDED TO BE USED FOR CONVEYANCE.

April 30, 2012

Project No. 12009 (L12009)



Michael Martin



Description
To Accompany Petition
For a Special Hearing
Back River Neck Road
Baltimore County, Maryland

Beginning for the same at the end of the following two distances measured from the point formed by the intersection of the centerline of Luciano Drive with the centerline of Back River Neck road; thence Southeasterly along the centerline of Back River Neck Road 26.50 feet, more or less; thence leaving said centerline and running Southwesterly 52.50 feet, more or less, to the point of beginning; thence leaving said point of beginning and referring all courses of this description to the Maryland Coordinate System (NAD 83-1991) and running (1) Southeasterly by a line curving to the right having a radius of 775.00 feet, for a distance of 228.14 feet (the arc of said curve being subtended by a chord bearing South 03 degrees 03 minutes 20 seconds East 227.32 feet); thence (2) South 66 degrees 30 minutes 02 seconds West 768.36 feet; thence (3) South 23 degrees 29 minutes 58 seconds East 77.00 feet; thence (4) South 66 degrees 30 minutes 02 seconds West 65.50 feet; thence (5) North 23 degrees 29 minutes 58 seconds West 300.00 feet; thence (6) North 66 degrees 30 minutes 02 seconds East 65.50 feet; thence (7) North 23 degrees 29 minutes 58 seconds West 33.00 feet; thence (8) North 66 degrees 30 minutes 02 seconds East 30.62 feet; thence (9) Northeasterly by a line curving to the right having a radius of 40.00 feet, for a distance of 47.46 feet (the arc of said curve being subtended by a chord

bearing North 32 degrees 30 minute 46 seconds East 44.72 feet); thence (10) North 66 degrees 30 minutes 02 seconds East 176.67 feet; thence (11) North 66 degrees 30 minutes 02 seconds East 25.00 feet; thence (12) South 23 degrees 29 minutes 58 seconds East 58.00 feet; thence (13) North 66 degrees 30 minutes 02 seconds East 380.63 feet; thence (14) South 23 degrees 29 minutes 58 seconds East 10.00 feet; thence (15) North 66 degrees 30 minutes 02 seconds East 197.76 feet to the point of beginning; containing 214,140 square feet or 4.916 acres of land, more or less.

THIS DESCRIPTION HAS BEEN PREPARED FOR ZONING PURPOSES ONLY AND IS NOT INTENDED TO BE USED FOR CONVEYANCE.

April 30, 2012

Project No. 12009 (L12009)



DEPARTMENT OF PERMITS, APPROVALS AND INSPECTIONS
ZONING REVIEW

ADVERTISING REQUIREMENTS AND PROCEDURES FOR ZONING HEARINGS

The Baltimore County Zoning Regulations (BCZR) require that notice be given to the general public/neighbor property owners relative to property which is the subject of an upcoming zoning hearing. For those petitions which require a public hearing, this notice is accomplished by posting a sign on the property (responsibility of the petitioner) and placement of a notice in a newspaper of general circulation in the County, both at least fifteen (15) days before the hearing.

Zoning Review will ensure that the legal requirements for advertising are satisfied. However, the petitioner is responsible for the costs associated with these requirements. The newspaper will bill the person listed below for the advertising. This advertising is due upon receipt and should be remitted directly to the newspaper.

OPINIONS MAY NOT BE ISSUED UNTIL ALL ADVERTISING COSTS ARE PAID.

For Newspaper Advertising:

Item Number or Case Number: 2008-0531-SPH
Petitioner: Michael Lutz, Auth. Representative of Back River, LLC
Address or Location: 810 Back River Neck Rd

PLEASE FORWARD ADVERTISING BILL TO:

Name: Lawrence E. Schmidt
Address: 600 Washington Ave.
Suite 200
Towson, MD 21204
Telephone Number: (410) 821-0070

BALTIMORE COUNTY, MARYLAND
OFFICE OF BUDGET AND FINANCE
MISCELLANEOUS CASH RECEIPT

No. 83530
Date: 5/17/12

Fund	Dept	Unit	Sub Unit	Rev Source/ Obj	Sub Rev/ Sub Obj	Dept Obj	BS Acct	Amount
001	806	0000		6150				\$250 ⁰⁰

Total: \$250⁰⁰

Rec
From:

For:

zoning hearing (revision) # 2008-531-SPH

DISTRIBUTION

WHITE - CASHIER

PINK - AGENCY

YELLOW - CUSTOMER

GOLD - ACCOUNTING

PLEASE PRESS HARD!!!!

CASHIER'S
VALIDATION

D 305 - (5135)

BALTIMORE COUNTY, MARYLAND
OFFICE OF BUDGET AND FINANCE
MISCELLANEOUS CASH RECEIPT

No. **29688**

Date: **8-24-12**

Fund	Dept	Unit	Sub Unit	Rev Source/ Obj	Sub Rev/ Sub Obj	Dept Obj	BS Acct	Amount
001	806	000		6130				650.00

Total: **650.00**

Rec
From:

Lawrence Schmidt, Esq.

For:

*Oppent of Case No. 2008-0531-SHIX
810 Park River North Rd.
Buck River, Md*

DISTRIBUTION

WHITE - CASHIER

PINK - AGENCY

YELLOW - CUSTOMER

GOLD - ACCOUNTING

PLEASE PRESS HARD!!!!

PAID RECEIPT

BUSINESS - ACTUAL - FIVE 16W
28/08/12 07/09/12 05:11:10 2
REG 4505 0000 0000 000
CASH RECEIPT IN AGENCY 08/09/2012 07/18
Dep. 5, 500 0000 0000 0000
Dep. 5, 000000
Dep. 5, 000000
Dep. 5, 000000
Baltimore County, Md, Land

**CASHIER'S
VALIDATION**

MICHAEL PAUL SMITH
DAVID K. GILDEA
LAWRENCE E. SCHMIDT
D. DUSKY HOLMAN
MICHAEL G. DEHAVEN
RAY M. SHEPARD

LAUREN M. DODRILL
MICHAEL J. LIPPENHOLZ
CHARLES B. MAREK, III
ELYANA TARLOW
JASON T. VETTORI
REBECCA G. WYATT

of counsel:

JAMES T. SMITH, JR.

March 20, 2012

Sent via Hand Delivery

W. Carl Richards, Jr.
Department of Permits, Approvals, and Inspections
Zoning Review Supervisor
111 W. Chesapeake Avenue, Room 111
Towson, MD 21204

**Re: 810 Back River Neck Road
Case No.: 2008-0531-SPHX**

Dear Mr. Richards:

This is in reference to the above matter and to follow up our recent conference.

As we discussed, there is a zoning history to the subject property and the cell tower use thereon. In Case No.: 2002-159-A, the property owner filed a Petition for Variance from certain setback requirements for a proposed cell tower. The case was originally heard by the Zoning Commissioner; then appealed to the Board of Appeals and ultimately to the Circuit Court for Baltimore County and Court of Special Appeals of Maryland. The Court of Special Appeals affirmed the denial of the requested Variances.

Several years later, the property owner filed a second zoning application related to the property and cell tower. This application was assigned Case No.: 2008-531-SPHX and included both Petitions for Special Exception (to permit a cell tower in an RC zone) and Special Hearing (to permit a non-density transfer of land). Due to several reasons, Case No.: 2008-531-SPHX never went forward and a public hearing was never conducted. The case was never decided or resolved and is effectively "in limbo." For your reference, I have attached a copy of an internal memorandum from then Deputy Commissioner Thomas Bostwick dated August 21, 2008, that indicates that the matter was postponed at the request of Baltimore County (Nancy West, Esquire, County Attorney). It was never rescheduled.

I represent the property owner and on its behalf am filing the attached Amended Petition for Special Hearing. It includes the relief originally sought in the Petition for Special

W. Carl Richards, Jr.
March 20, 2012
Page 2

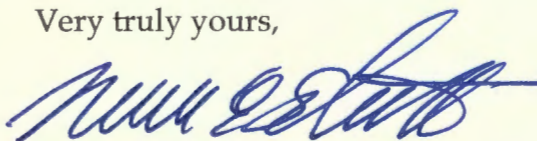
Hearing filed in Case No.: 2008-531-SPHX and also amends that Petition to include other appropriate relief. Moreover, the Petition for Special Exception will be dismissed in open hearing as it is no longer required due to a re-zoning of the property.

As we discussed, it is appropriate to file the attached as an amendment to the prior case; rather than a new filing. The site plan, legal description and other documents filed with the original petitions are all still relevant and applicable to this amended filing. Updates or amendments thereof (if any) can be presented in open hearing. Although Deputy Commissioner Bostwick's memorandum indicates that posting and re-advertising of subsequent proceedings is not required, I believe that the property should be re-posted given the lapse of time since the hearing was suspended. I will leave it to your judgment as to whether a re-advertisement in the newspaper is required. Please let me know if posting, advertisement or both are required.

Kindly confirm that the amended petition attached hereto is sufficient to "resuscitate" Case No.: 2008-531-SPHX and set this matter in for hearing in due course. I also enclose herewith my check in the amount of Two Hundred Fifty Dollars (\$250.00) to cover the requisite cost of the Amended Petition.

As always, please do not hesitate to contact me should you have any questions regarding the above.

Very truly yours,



Lawrence E. Schmidt

LES: jkl

Enclosures

CC: Michael Lutz, Back River, LLC
Steve Boyd, Sprint Nextel
James R. Michal, Esquire, Jackson & Campbell, P.C.
Nancy West, Esquire, Baltimore County Office of Law

Item #531



KEVIN KAMENETZ
County Executive

ARNOLD JABLON
Deputy Administrative Officer
Director, Department of Permits,
Approvals & Inspections

July 10, 2012

Michael Lutz
806 Back River Neck Road
Baltimore MD 21221

RE: Case Number: 2008-0531 SPH, Address: 810 Back River Neck Road

Dear Mr. Lutz:

The above referenced petition was accepted for processing **ONLY** by the Bureau of Zoning Review, Department of Permits, Approvals, and Inspection (PAI) on May 17, 2012. This letter is not an approval, but only a **NOTIFICATION**.

The Zoning Advisory Committee (ZAC), which consists of representatives from several approval agencies, has reviewed the plans that were submitted with your petition. All comments submitted thus far from the members of the ZAC are attached. These comments are not intended to indicate the appropriateness of the zoning action requested, but to ensure that all parties (zoning commissioner, attorney, petitioner, etc.) are made aware of plans or problems with regard to the proposed improvements that may have a bearing on this case. All comments will be placed in the permanent case file.

If you need further information or have any questions, please do not hesitate to contact the commenting agency.

Very truly yours,

A handwritten signature in black ink that reads "W. Carl Richards, Jr.".

W. Carl Richards, Jr.
Supervisor, Zoning Review

WCR:jaf

Enclosures

c: People's Counsel
Lawrence E. Schmidt Esq., Smith Gildea & Schmidt LLC, 600 Washington Avenue, Suite 200,
Towson MD 21204
Steve Eoydl, 6450 Sprint Parkway, Overland Park, Kansas 66251

7/20 10AM

BALTIMORE COUNTY, MARYLAND

Inter-Office Correspondence



RECEIVED

JUN 16 2012

OFFICE OF ADMINISTRATIVE HEARINGS

TO: Hon. Lawrence M. Stahl; Managing Administrative Law Judge
Office of Administrative Hearings

FROM: David Lykens, Department of Environmental Protection and Sustainability
(DEPS) - Development Coordination

DATE: June 15, 2012

SUBJECT: DEPS Comment for Zoning Item # 2008-0531-SPH
Address 810 Back River Neck Road
(Lutz Property)

Zoning Advisory Committee Meeting of May 28, 2012.

The subject property is located within the Chesapeake Bay Critical Area. According to BCZR Section 500.14, no decision shall be rendered on any petition for special exception, zoning variance, or zoning special hearing for a property within the Critical Area until the Department of Environmental Protection and Sustainability (EPS) has provided written recommendations describing how the proposed request would:

1. Minimize adverse impacts on water quality that result from pollutants that are discharged from structures or conveyances or that have run off from surrounding lands;

The subject properties are located within a Limited Development Area and a Resource Conservation Area, and are subject to Critical Area lot coverage requirements. To minimize impacts on water quality, lot coverage cannot exceed the existing amount, and cannot be placed within Critical Area buffers or forest. There are no indications of changes to lot coverage on the applicant's plan, but a decrease in lot coverage may be required based on the location of any required Critical Area buffers. By meeting the lot coverage and Critical Area buffer requirements, allowing the relief requested by the applicant will result in minimal impacts to water quality. It is recommended that the zoning item be conditioned to require that the properties involved meet all Critical area requirements including Lot Consolidation and Reconfiguration requirements.

2. Conserve fish, wildlife, and plant habitat; and

It appears that a Critical Area buffer may be required on the properties based on the location of tidal waters, streams, and tidal/non-tidal wetlands. The properties must also meet minimum forest cover requirements. In addition, the forest on and off-site appears to be forest interior dwelling bird habitat (FIDS), and must adhere to the FIDS guidelines for conservation of the habitat. The current development of the property may be preventing the buffer from fulfilling water quality and habitat functions. These areas are subject to EPS's Critical Area law, and to Critical Area Buffer requirements found in COMAR 27.01.09.01. The applicant's proposal will require compliance with COMAR 27.01.02.08 Lot Consolidation and Reconfiguration, and may require a Critical Area administrative variance (CAAV) from EPS. It is recommended that the zoning petition be conditioned to require conformance with these requirements to offset water quality impacts associated with the uses on this property. Meeting these requirements will improve buffer functions and fish habitat in Muddy Gut and Back River as well as plant and wildlife habitat on land.

3. Be consistent with established land use policies for development in the Chesapeake Bay Critical Area which accommodate growth and also address the fact that, even if pollution is controlled, the number, movement and activities of persons in that area can create adverse environmental impacts.

The applicant's proposal can be consistent with established land-use policies provided that the applicants meet the conditions listed in comments 1 and 2 above.

Martin O'Malley, Governor
Anthony G. Brown, Lt. Governor



Beverley K. Swaim-Staley, Secretary
Melinda B. Peters, Administrator

Date: 6-1-12

Ms. Kristen Lewis
Baltimore County Office of
Permits and Development Management
County Office Building, Room 109
Towson, Maryland 21204

RE: Baltimore County
Item No 2008-0531-SPHX
Special Hearing
Michael Lutz,
810 Back River Neck Road.

Dear Ms. Lewis:

Thank you for the opportunity to review your referral request on the subject of the above captioned. We have determined that the subject property does not access a State roadway and is not affected by any State Highway Administration projects. Therefore, based upon available information this office has no objection to Baltimore County Zoning Advisory Committee approval of Item No. 2008-0531-SPHX.

Should you have any questions regarding this matter, please contact Richard Zeller at 410-545-5598 or 1-800-876-4742 extension 5598. Also, you may E-mail him at (rzeller@sha.state.md.us).

Sincerely,

Steven D. Foster, Chief
Access Management Division

SDF/raz

My telephone number/toll-free number is _____

Maryland Relay Service for Impaired Hearing or Speech 1.800.735.2258 Statewide Toll Free

Street Address: 707 North Calvert Street • Baltimore, Maryland 21202 • Phone 410.545.0300 • www.roads.maryland.gov

BALTIMORE COUNTY, MARYLAND
INTEROFFICE CORRESPONDENCE

TO: Arnold Jablon, Director
Department of Permits, Approvals
And Inspections

DATE: May 31, 2012

FROM: Dennis A. Kennedy^{DAK}, Supervisor
Bureau of Development Plans
Review

SUBJECT: Zoning Advisory Committee Meeting
For June 11, 2012
Item Nos. 2008-0531, 2012- 0295, 0296, 0297
and 0299.

The Bureau of Development Plans Review has reviewed the subject-zoning items, and we have no comments.

DAK:CEN

cc: File

G:\DevPlanRev\ZAC -No Comments\ZAC-06112012-NO COMMENTS.doc

RE: PETITION FOR SPECIAL HEARING * BEFORE THE OFFICE
AND SPECIAL EXCEPTION *
810 Back River Neck Road; WS of Back * OF ADMINISTRATIVE
River Neck Road, 270' S of Pottery Farm Rd *
15th Election & 6th Councilmanic Districts * HEARINGS FOR
Legal Owner(s): Back River, LLC *
Contract Purchaser(s): Sprint Nextel * BALTIMORE COUNTY

Petitioner(s) * 08-531-SPHX

* * * * *

ENTRY OF APPEARANCE

Please enter the appearance of People's Counsel in the above-captioned matter. Notice should be sent of any hearing dates or other proceedings in this matter and the passage of any preliminary or final Order. All parties should copy People's Counsel on all correspondence sent/ documentation filed in the case.

Peter Max Zimmerman

PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

RECEIVED

MAY 30 2012

.....

Carole S. Demilio

CAROLE S. DEMILIO
Deputy People's Counsel
Jefferson Building, Room 204
105 West Chesapeake Avenue
Towson, MD 21204
(410) 887-2188

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of May, 2012, a copy of the foregoing Entry of Appearance was mailed to Lawrence Schmidt, Esquire, Smith, Gildea & Schmidt, 600 Washington Avenue, Suite 200, Towson, Maryland 21204, Attorney for Petitioner(s).

Peter Max Zimmerman

PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

Department of Permits and Development Management
111 West Chesapeake Avenue
Towson, Maryland 21204
Baltimore County, Maryland

In the Matter of

Civil Citation No. C00052984

Back River Neck Road
Albert C. Jones, President
500 Vogts Lane
Baltimore, MD 21221

810 A Back River Neck Road

Respondent

FINDINGS OF FACT AND CONCLUSION OF LAW
FINAL ORDER OF THE CODE ENFORCEMENT HEARING OFFICER

This matter came before the Code Enforcement Hearing Officer for the Department of Permits and Development Management on November 25, 2008, for a hearing on a citation for violations under the Baltimore County Zoning Regulations (BCZR) section 426.6.A.1, failure to provide and maintain 200 ft. set back from another owner's residential property line on property zoned ML known as 810 A Back River Neck Road, 21221.

On November 7, 2008, pursuant to §3-6-205, Baltimore County Code, Code Enforcement Officer, issued a code enforcement citation. The citation was sent to the Respondent by 1st class mail to the last known address listed in the Maryland State Tax Assessment files.

The citation proposed a civil penalty of \$238,600.00 (two hundred and thirty eight thousand six hundred dollars).

James R. Michal, Esquire appeared representing Back River LLC.

Nancy West, Assistant County Attorney appeared representing Baltimore County.

Subject case returns to this Hearing Officer to determine:

- A. If violation of BCZR 426.6.A.1 continues to exist.
- B. The appropriate civil penalty.

Counsel for each side has presented memorandums to the case file. I have reviewed each brief and thought about instant case to point of losing sleep. The facts are as follows:

1. Monopole Cell Tower constructed on lot too narrow to afford proper setbacks.
2. Variance granted by Zoning Commissioner allowing reduced set back.
3. Variance appealed to CBA. Variance overturned.
4. CBA decision appealed to Court of Special Appeals. CBA decision affirmed.
5. Back River LLC purchased adjacent property on 2 sides leaving 1 side with inadequate set back.
6. Back River LLC has agreement with family members to purchase final piece of real estate needed to meet set back requirement.
7. Required land parcel in trust with Wachovia; which has been taken over by Wells Fargo.
8. Bank refused to appoint sub trustee.
9. Family members have filed to appoint new trustee.
10. Land to be transferred to Back River LLC upon appointment of new trustee and legal requirements.

Counsel for Back River LLC stated that the LLC has every motivation to finalize sale and transfer of ownership within 60-90 days. However, there is no way to guarantee the timeframe of 60-90 days due to conditions beyond the control of either Back River LLC or the family holding the property.

The tower appears to be located in an area that naturally screens the tower from public view. One has to know exactly when and where to look to see any part of the tower. Neighbors have not complained nor contested the tower or tower site. People's Counsel entered protest on behalf of all citizens of Baltimore County. Though the protest was upheld, the end result may well be disadvantageous for Baltimore County citizens. Service to the area has been greatly enhanced by subject tower. Cell phones and cell towers are here to stay due to customer demand. The regulation certainly has wrought what appears to be an unintended consequence.

Due to the service provided to citizens the obscure location that appears perfect save for the one last piece of the puzzle required; lack of public clamor to remove the offending tower, I will not require the tower to be removed at this time.

Evidence supports a finding of violation. Civil penalty shall be tabulated from November 7, 2008 date of correction notice and citation # CO0052984.

IT IS ORDERED by the Code Enforcement Hearing Officer this 7th day of January 2009 that a civil penalty be imposed in the amount of \$9,200.00 (nine thousand two hundred dollars).

IT IS FURTHER ORDERED that the civil penalty is suspended on condition the Respondent enters into a contract of sale with recordation receipt on or before August 1, 2009.

If the Respondent fails to meet condition of instant Final Order, the civil penalty shall be imposed and placed as a lien upon the property.

IT IS FURTHER ORDERED that the inspector inspect the property to determine whether the violations have been corrected.

Signed: _____
Raymond S. Wisnom, Jr.
Code Enforcement Hearing Officer

The violator is advised that pursuant to §3-6-301(a), Baltimore County Code, an appeal to the Baltimore County Board of Appeals may be taken within fifteen (15) days after the date of a final Order. §3-6-302(a)(b)(c)(d) requires the filing of a petition setting forth the grounds for appeal and a filing fee of \$150. The appellant is urged to read the requirements for the appeal petition. Security in the amount of the civil penalty must be posted with the Director.

BOARD OF APPEALS OF BALTIMORE COUNTY
MINUTES OF DELIBERATION

IN THE MATTER OF: Back River, LLC – Legal Owner/Petitioner 08-531-SPHX

DATE: January 16, 2013

BOARD/PANEL: Lawrence S. Wescott, Panel Chair
Wendy A. Zerwitz
Andrew M. Belt

RECORDED BY: Sunny Cannington/Legal Secretary

PURPOSE: To deliberate the following:

1. Motion to Dismiss Amended Petition for Special Hearing on the basis of *res judicata*.

PANEL MEMBERS DISCUSSED THE FOLLOWING:

STANDING

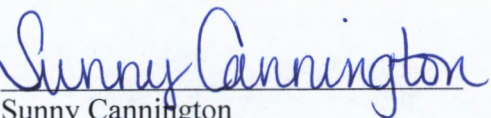
- The Board discussed the definition of *res judicata* as well as the facts, law and argument in this matter.
- The Board determined that the doctrine of *res judicata* requires one to make use of all facts and evidence that has argued or could have argued the first time through. The only time a case is not barred by *res judicata* would be if there was an error of law.
- In the present matter, the Board discussed that this case originated in 2002 and all arguments should have been made at that time.
- The Board determined that the property is the property and has not changed. The Board was not convinced of ambiguity in the language of the statutes.

DECISION BY BOARD MEMBERS: The present case is barred by the doctrine of *res judicata*.

FINAL DECISION: After thorough review of the facts, testimony, and law in the matter, the Board unanimously agreed to GRANT the Motion to Dismiss.

NOTE: These minutes, which will become part of the case file, are intended to indicate for the record that a public deliberation took place on the above date regarding this matter. The Board's final decision and the facts and findings thereto will be set out in the written Opinion and Order to be issued by the Board.

Respectfully Submitted,


Sunny Cannington



Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

October 1, 2012

Lawrence E. Schmidt, Esquire
GILDEA & SCHMIDT LLC
600 Washington Avenue
Suite 200
Towson, MD 21204

Re: *In the Matter of:* Back River, LLC
Case No.: 08-531-SPHX

Dear Mr. Schmidt:

I am in receipt of your letter dated September 21, 2012, indicating that there may be a possible conflict with your calendar for Tuesday, December 4, 2012.

This office is very appreciative that you have taken the time to advise that there may be a postponement request of the above mentioned date. Please be advised that this matter will be postponed in the event of a conflict with the pending scheduling in the Court of Special Appeals.

Please notify this office upon receipt from the Clerk of the Court of Special Appeals of the scheduled date for argument, and if the above captioned matter will need to be re-scheduled.

I remain,

Very truly yours,

A handwritten signature in cursive script that reads "Theresa R. Shelton".

Theresa R. Shelton
Administrator

cc: Peter Max Zimmerman, People's Counsel for Baltimore County (via Hand Delivery)
Michael Lutz, Representative/Back River, LLC
Steve Boyd, Esquire, Representative/Sprint Nextel, Inc.
Mitchell Kellman, Daft, McCune & Walker, Inc.
Panel/Board of Appeals

IN THE MATTER OF:

BACK RIVER, LLC
CASE NUMBER: 08-531-SPHX

Hearing date: December 4, 2012

Pursuant to Notice, the above-entitled hearing was held before before the Board of Appeals for Baltimore County at the Jefferson Building, Second Floor, Suite 203, 105 West Chesapeake Avenue, Towson, Maryland 21204, commencing at 10:07 AM.

PANEL PRECIDING:

LAWRENCE S. WESCOTT, CHAIRMAN

WENDY ZERWITZ, BOARD

ANDREW M. BELT, BOARD

PRESENT ON BEHALF OF THE PARTIES:

ON BEHALF OF THE APPELLEES/PETITIONERS:

LAWRENCE E. SCHMIDT, ESQUIRE

ON BEHALF OF THE APPELLANT/PROTESTANT:

ADAM M. ROSENBLATT, ESQUIRE

CAROLE S. DE MILIO, ESQUIRE

Debbie H. Eichner
8101 Bletzer Road
Baltimore, Maryland 21222

 **ORIGINAL**

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IN THE MATTER
OF
BACK RIVER, LLC

* IN THE
* CIRCUIT COURT FOR
* BALTIMORE COUNTY
* Civil Proceeding
* Case No.: 03-C-13-004769

* * * * *

TRANSCRIPT OF PROCEEDINGS:

December 16, 2013

Judge Mickey Norman, presiding

LAWRENCE SCHMIDT, ESQUIRE
Counsel for the Plaintiff

ADAM ROSENBLATT, ESQUIRE
CAROL DEMILIO, ESQUIRE
Counsel for the Defendant

Debbie H. Eichner, transcriptionist

 ORIGINAL

From: Theresa Shelton
To: Schmidt, Lawrence
CC: Counsel, People's; Demilio, Carole; Fiore, Alyssa; Zimmerman, Peter; ...
Date: 10/29/2012 10:42 AM
Subject: Re: Back River Appeal (Hearing date 12/4/12)

Mr. Schmidt:

Good Morning. Your email was received in the middle of my drafting a letter to you with regard to this very subject. The Board appreciates your timely notification and the case will remain on the Board's docket as scheduled for Tuesday, December 4, 2012, at 10:00 a.m.

Thank you again for prompt notification.

Theresa
Semper Fi

Theresa R. Shelton, Administrator
Board of Appeals for Baltimore County
Suite 203, The Jefferson Building
105 W. Chesapeake Avenue
Towson, MD 21204

410-887-3180
410-887-3182 (FAX)
tshelton@baltimorecountymd.gov

"I took the Green @ Work Energy Challenge Pledge."

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in error, please immediately notify the sender.

>>> Lawrence Schmidt <lschmidt@sgs-law.com> 10/29/2012 10:31 AM
>>>

Theresa: I had written to you about the potential schedule conflict that I might have with the above matter (Back River cell tower case) and an appeal that I am scheduled to argue in Annapolis (Springfield Farm). I wasn't sure when the Springfield Farm argument would be scheduled but had been advised by the Court of Special Appeals that it would be in early December. People's Counsel had the same potential conflict too. As it turns out, the Court has scheduled the argument for the next week so I am thus "good to go" to handle the Back River matter on December 4. It is on my calendar and I will be prepared to go forward on that date.

Thanks for your courtesies on this.

Larry Schmidt

Lawrence E. Schmidt
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, MD 21204
(410) 821-0070
(410) 821-0071 - fax
lschmidt@sgs-law.com <<mailto:lschmidt@sgs-law.com>>

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Debra Wiley - Case number 08-0531-SPH

From: Adam Rosenblatt
To: Schmidt, Larry; Wiley, Debra; Zook, Patricia
Date: 7/18/2012 1:23 PM
Subject: Case number 08-0531-SPH

Debbie, Patti,

I just wanted to let your office know that I will be entering my appearance on behalf of Baltimore County and attending the hearing in this case, which is set for Friday at 10:00.

I have already spoken with Petitioner's counsel, Larry Schmidt, and he is copied on this email to confirm our prior conversation.

Thank you,

Adam

Adam M. Rosenblatt
Assistant to the Director and
Assistant County Attorney
Baltimore County Department of
Permits, Approvals and Inspections
County Office Building
111 W. Chesapeake Avenue
Suite 105
Towson, Maryland 21204
(410) 887-3353

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Krysundra Cannington - Re: Back River, LLC 08-531-SPHX

From: Debra Wiley
To: Cannington, Krysundra
Date: 8/30/2012 10:25 AM
Subject: Re: Back River, LLC 08-531-SPHX

Hi Sunny,

Unfortunately, I did not include any sign-in sheets for the July 20th hearing as they were not contained in the file once we received it the second time. As this was an "old" case, not sure if the sign-in sheets were not prepared or simply lost.

Thanks.

Debbie Wiley
Legal Administrative Secretary
Office of Administrative Hearings
105 West Chesapeake Avenue, Suite 103
Towson, Md. 21204
410-887-3868
410-887-3468 (fax)
dwiley@baltimorecountymd.gov

>>> Krysundra Cannington 8/30/2012 9:17 AM >>>
Good morning Debbie,

I am working on opening the Board of Appeals file on this matter and have a couple of questions.

Were there sign in sheets for the July 20, 2012 hearing? If so, they were not included in the file. I only received the sign in sheets for the August 20, 2008 hearing in this matter.

Thank you for your assistance.

Sunny

Krysundra "Sunny" Cannington
Legal Secretary
Board of Appeals of Baltimore County
Jefferson Building, Suite 203
105 W. Chesapeake Avenue
Towson, MD 21204
(410) 887-3180

From: Patricia Zook
To: Mohler, Mike; West, Nancy
Date: 8/21/2008 11:24:31 AM
Subject: Case No. 2008-0531-SPHX – 810 Back River Neck Road

Nancy and Mike -

Please see Tom Bostwick's memorandum to the case file.

Kristen - the case file is being returned to PDM for safe keeping.

Patti Zook
Baltimore County
Office of the Zoning Commissioner
Jefferson Building, Suite 103
105 West Chesapeake Avenue
Towson MD 21204

410-887-3868

pzook@baltimorecountymd.gov

CC: Bostwick, Thomas; Matthews, Kristen

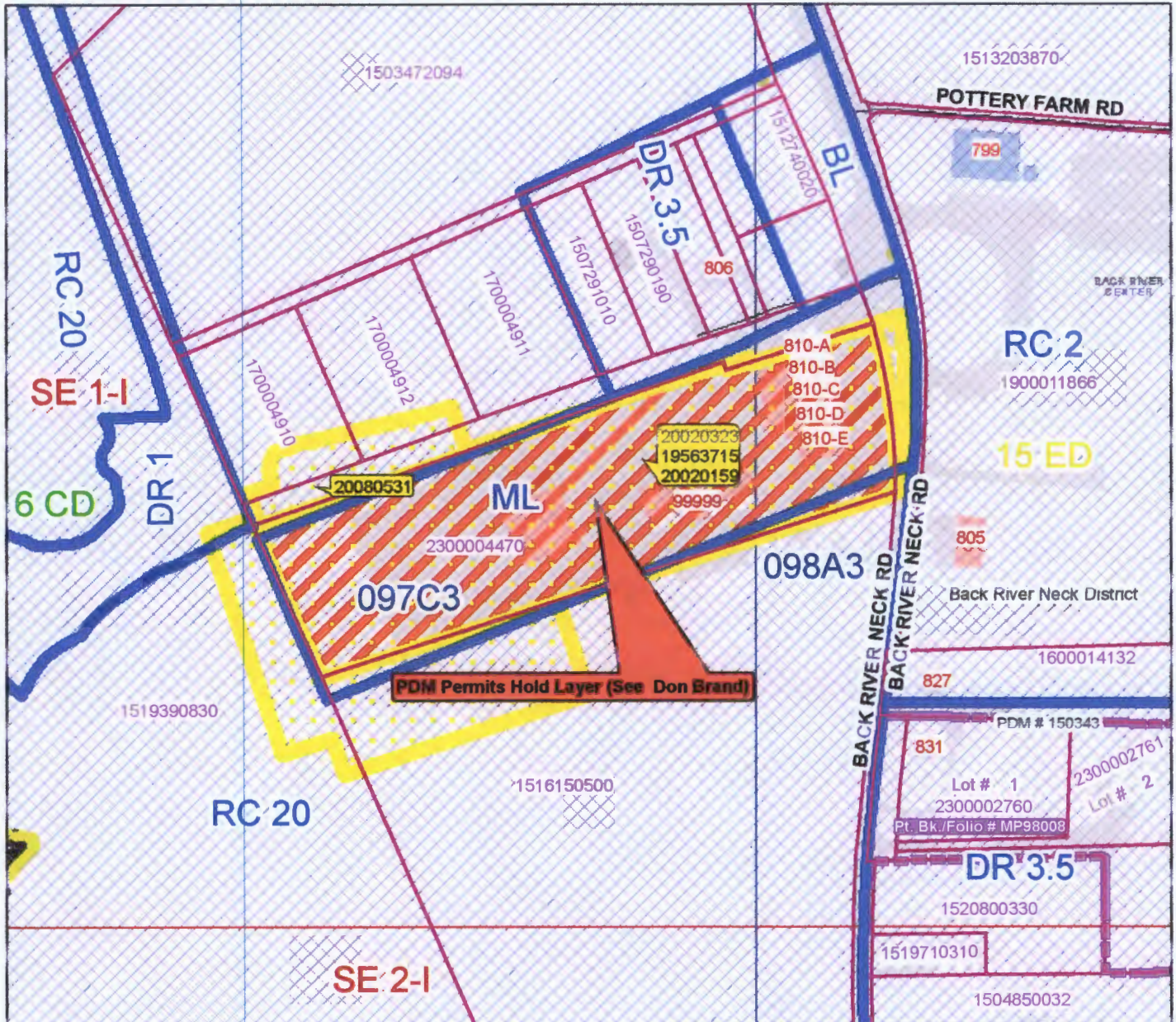
People's Counsel Sign-In Sheet

Case Name: BACK RIVER NECK, LLC
Case No.: 08-531-SPHX
Date: 12/4/2012

The Office of People's Counsel was created by the County Charter to participate in zoning matters on behalf of the public interest. While it does not actually represent community groups or protestants, it will assist in the presentation of their concerns, whether they have their own attorney or not. If you wish to be assisted by People's Counsel, please sign below.

[illegible]

810 Back River Neck Road



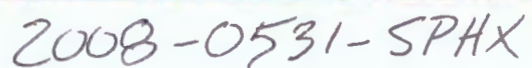
Publication Date: March 26, 2012
 Publication Agency: Department of Permits & Development Management
 Projection/Datum: Maryland State Plane,
 FIPS 1900, NAD 1983/91 HARN, US Foot



0 200 400
 Feet

1 inch = 200 feet

Item #531



JB 7/20

Case No.: 2008-0531-SPHX

Exhibit Sheet

Petitioner/Developer

People's Council
Protestants

COUNTY

No. 1	ZC Opinion 1-4-2002	BL Zoning Map Extract 5 pages	Code Enforc. Hrg. 1-7-2009
No. 2	BCBA Opinion 5-14-2003		
No. 3	Circuit Court Opinion Feb. 5, 2004		
No. 4	Ct. Special Appeals Op. 8-3-2005		
No. 5	Kellman CV		
No. 6	Site Plan		
No. 7	A-G Color Photos		
No. 8	Bill 30-98		
No. 9	Bill 17-02		
No. 10	Deeds A-2/12/08 A+B B-2/20/08		
No. 11			
No. 12			

IN RE: PETITION FOR VARIANCE
SW/S Back River Neck Road,
330' SE of c/l Pottery Farm Road
(810 Back River Neck Road)
15th Election District
5th Council District

Back River LLC
Petitioner

* BEFORE THE
* ZONING COMMISSIONER
* OF BALTIMORE COUNTY
* Case No. 02-159-A

*

* * * * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Zoning Commissioner for consideration of a Petition for Variance filed by the owner of the subject property, Back River LLC, by Buck Jones, President, and the Contract Lessee, Sprint PCS, by Howard Leger, through their attorney, Jennifer R. Busse, Esquire. A series of variances are requested to accommodate the construction of a 115-foot tall wireless telecommunications tower. Specifically, the Petitioners seek relief from Section 426.6.A.3 of the Baltimore County Zoning Regulations (B.C.Z.R.) to permit setbacks of 75 feet each from the south and west property lines, and 148 feet from the north property line in lieu of the required 200 feet each for the proposed tower. In addition, the Petitioners seek relief from Section 426.6.A.4 to permit setbacks of 40 feet each to the south and west property lines, in lieu of the required 125 feet each, for proposed equipment cabinets to support the proposed tower. The subject property and requested relief are more particularly described on the site plan submitted which was accepted into evidence and marked as Petitioner's Exhibit 14.

Appearing at the requisite public hearing on behalf of the Petition were Buck Jones, President of Back River LLC, property owners; and, Peter Fastnacht, President of Integrated Wireless Analysis, and Hassan Khalil, a Radio Frequency Design Engineer, consultants hired by the Petitioners. Also appearing in support of the requests were Richard L. Smith and Marianne Kiernan, engineers from KCI Technologies, Inc., the consultants who prepared the site plan for this property; and Jennifer R. Busse, Esquire and G. Scott Barhight, Esquire, attorneys for the

ORDER RECEIVED FOR FILING

Date

By

EXHIBIT

tabbles

IN THE MATTER OF
THE APPLICATION OF
BACK RIVER LLC, BUCK JONES, PRESIDENT -
LEGAL OWNER, SPRINT PCS - C.P. - PETITIONERS
FOR VARIANCE ON PROPERTY LOCATED ON
THE SW/S BACK RIVER NECK ROAD, 330' SE OF
POTTERY FARM RD (810 BACK RIVER NECK RD)
15TH ELECTION DISTRICT
5TH COUNCILMANIC DISTRICT

* BEFORE THE
* COUNTY BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* CASE NO. 02-159-A

* * * * *

OPINION

This matter is before the Board on an appeal from a decision of the Zoning Commissioner in which the Commissioner granted variances from various setback requirements to accommodate the construction of a 115-foot tall wireless communications tower. The Petition was filed by the Property Owner, Back River LLC, by Buck Jones, President, and the Contract Lessee, Sprint PCS, by Howard Leger, through their attorney. An appeal was filed by the Office of People's Counsel on January 14, 2002. The Back River Peninsula Community Association, Inc., also filed its appeal on January 31, 2002.

A hearing was held on September 25, 2002 and January 21, 2003. The Petitioner was represented by G. Scott Barhight, Esquire, and Jennifer S. Busse, Esquire, of the law firm of Whiteford, Taylor & Preston. The Protestants /Appellants were not represented by counsel. People's Counsel, Peter Max Zimmerman, participated on behalf of the Office of People's Counsel. Public deliberation was held on March 20, 2003.

Facts

Back River Neck LLC is the owner of 4.3 acres zoned M.L. (manufacturing light) at the northern gateway to the Back River Peninsula. Mr. Buck Jones, the builder and owner of the company, purchased the site in early 1999. It is currently improved with two buildings that house Mr. Jones' contracting business and approximately seven other commercial operations. It also has a parking lot which accommodates these uses.

EXHIBIT

tabbles

2

DMW

DAFT MCCUNE WALKER INC

MITCHELL J. KELLMAN DIRECTOR OF ZONING SERVICES

Education

Towson University, BA, Geography and Environmental Planning, Urban Planning
Towson University, Masters, Geography and Environmental Planning, Urban Planning

Professional Summary

Mr. Kellman has over 24 years of experience working in zoning, subdivision, and development regulations for the public and private sector; 12 of those years were with the Baltimore County Office of Planning and Zoning. His responsibilities included review, approval and signatory powers on behalf of the Director of Final Development Plans and Record Plats. He represented the Zoning Office on the County Development Review Committee, a body reviewing the procedural compliance of all development submissions. Review of petitions and site plans filed for zoning hearing approvals were within his authority. Additionally, he supervised county review staff, met with professionals and the public on development project matters, and made determinations regarding developments and their compliance with county regulations. In working for DMW, he has extensive experience in testifying before the Baltimore County Zoning Commissioner, Hearing Officer, Administrative Law Judges, and Board of Appeals. He also regularly represents the company at the Baltimore County Development Review Committee meetings. He is also a member of Baltimore County's Design Review Panel which formulates design recommendations to the Planning staff and Administrative Law Judges.

Partial List of Projects

Delight Quarry, Baltimore County, MD
Hunt Valley Business Community, Baltimore County, MD
Hunt Valley Towne Centre, Baltimore County, MD
Charlestown Retirement Community, Baltimore County, MD
GBMC, Baltimore County, MD
Goucher College, Baltimore County, MD
Greenspring Quarry, Baltimore County, MD
Hopewell Point, Baltimore County, MD
Loveton Business Center, Baltimore County, MD
Notre Dame Preparatory School, Baltimore County, MD
Oakcrest Village Retirement Community, Baltimore County, MD
Sheppard and Enoch Pratt Hospital, Baltimore County, MD
Sparks Corporate Center, Baltimore County, MD
Towson Town Center, Baltimore County, MD

Professional Experience

Daft-McCune-Walker, Inc., Towson, MD: 2000-Present
Baltimore County Office of Planning and Zoning, Permits and Development Management – Zoning Office, Development Control, 1988-2000
Baltimore County Design Review Panel, 2012
Greater Towson Committee, Planning and Development Sub-Committee, 2012

Pet Ex 5



Ps #7A



810 Back River Neck Rd, Essex, MD 21221

© 2011 Google

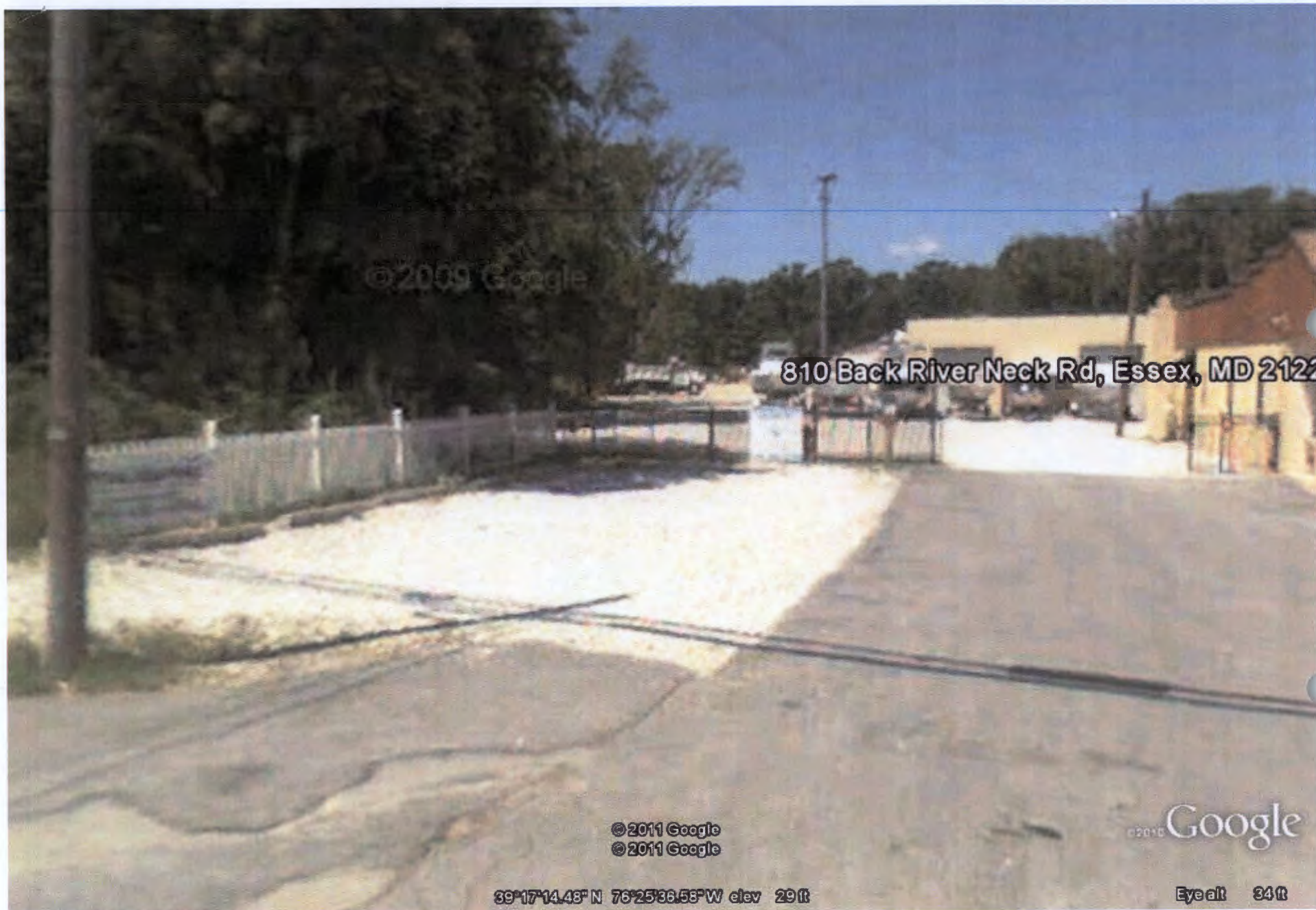
© 2010 Google

Imagery Date: 8/29/2010

39°17'16.12" N 76°25'41.98" W elev 23 ft

Eye alt 789 ft

7B



2009

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2009
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7E

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7G



COUNTY COUNCIL OF BALTIMORE COUNTY, MARYLAND
Legislative Session 1998, Legislative Day No. 4

Bill No. 30-98

All Councilmembers

By the County Council, February 17, 1998

A BILL
ENTITLED

AN ACT concerning

Zoning - Wireless Telecommunications Towers and Antennas

FOR the purpose of amending the Zoning Regulations in order to establish guidelines regarding the regulation of certain towers and antennas; excepting certain towers and antennas from regulation; establishing the Tower Review Committee; requiring certain persons to meet with and submit certain information to the Committee; authorizing the Committee to provide certain comments; authorizing certain towers and antennas to be located in certain zones under certain circumstances; requiring certain towers and structures to meet certain requirements; requiring a security bond or fee; requiring the owner of certain towers and structures to take certain actions; providing for the issuance of certain notices under certain circumstances; providing for the removal of a tower under certain circumstances; requiring towers by special exception to meet certain conditions;

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.
[Brackets] indicate matter stricken from existing law.
~~Strike out~~ indicates matter stricken from bill.
Underlining INDICATES AMENDMENTS TO BILL.

Pet Ex 8

COUNTY COUNCIL OF BALTIMORE COUNTY, MARYLAND
Legislative Session 2002, Legislative Day No. 4

Bill No. 17-02

Councilmembers Moxley, McIntire, Skinner & Bartenfelder

By the County Council, February 19, 2002

A BILL
ENTITLED

AN ACT concerning

Wireless Telecommunications Towers - Setbacks

FOR the purpose of revising the setback requirements for wireless telecommunications towers.

BY repealing and re-enacting, with amendments

Section 426.6A

Baltimore County Zoning Regulations, as amended

1 SECTION 1. BE IT ENACTED BY THE COUNTY COUNCIL OF BALTIMORE
2 COUNTY, MARYLAND, that Section 426.6A of the Baltimore County Zoning Regulations, as
3 amended, be and it is hereby repealed and re-enacted, with amendments, to read as follows:

4 Section 426. Wireless Telecommunications Facilities

5 426.6 Setback requirements for wireless telecommunications towers.

EXPLANATION:

CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter stricken from existing law.

~~Strike out~~ indicates matter stricken from bill.

Underlining indicates amendments to bill.

Pet Ex 9

DEED

THIS DEED, made this 20 day of FEBRUARY, 2008, by and between **Elsie R. Luciano, also known as Ruth Elsie Luciano, Michael Luciano, Jr. and Maria Luciano**, (hereinafter "Grantors"), residents of the State of Maryland, parties of the first part and **Back River, L.L.C.**, (hereinafter "Grantee") of the State of Maryland, party of the second part.

WITNESSETH, that in consideration of the sum of **Two Thousand Dollars (\$2,000.00)**, and other valuable consideration, the Grantors do grant and convey to Grantee, their personal representatives, heirs and assigns, in fee simple, all that land in the **State of Maryland, County of Baltimore** more particularly described as follows:

Part of that lot or parcel of land situate, lying and being Luciano Drive, in the 15th election district of Baltimore County, Maryland with all bearings referring to Liber S.M. 13577 folio 535 etc., being more particularly described as follows:

Beginning for the same at the beginning of the fourth or South 15 degree 45 minute 00 second East 223.00 foot line of that parcel of land conveyed by Anthony D. Luciano, Personal Representative of the Estate of Augustine L. Luciano and Ruth Elise Luciano to Back River LLC, by deed dated February 2, 1999 and recorded among the Land Records of Baltimore County, Maryland in Liber S.M. 13577 folio 535 etc., said point also being located 641.20 feet from a stone found at the end of the second or North 16 degree 53 minute West 1356 foot line as described in a deed of conveyance from Robert B. Simms and Brenda J. Scruggs to Back 50, L.L.C., by deed dated August 17, 2004 and recorded among the Land Records of Baltimore County, Maryland in Liber S.M. 20628 folio 117 etc.; thence binding on and running with said second line, as follows,

1.) North 15 degrees 45 minutes 00 seconds West 33.00 feet to a point at the end of the fifth or South 74 degrees 15 minute West 30.00 foot line as described in a deed of conveyance from Maria Luciano to Albert Ladanyi and Eva I. Ladanyi, dated January 27, 1976 and recorded among the Land Records of Baltimore County, Maryland in Liber E.H.K. 5606 folio 589 etc.; thence binding on and running reversely with the fifth, fourth and third lines, as follows,

2.) North 74 degrees 15 minutes 00 seconds West 30.62 feet; thence,

3.) 58.75 feet along the arc of a curve to the right having a radius of 40.00 feet and being subtended by a chord bearing and

JB 7/20

Case No.: 2008-0531-SPHX

Exhibit Sheet

Petitioner/Developer

People's Counsel
Protestants

COUNTY

No. 1	ZC Opinion 1-4-2002	BL Zoning Map Extract 5 pages	Code Enforc. Hrg. 1-7-2009
No. 2	BCBA Opinion 5-14-2003		
No. 3	Circuit Court Opinion Feb. 5, 2004		
No. 4	Ct. Special Appeals Op. 8-3-2005		
No. 5	Kellman CV		
No. 6	Site Plan		
No. 7 A-G	Color Photos		
No. 8	Bill 30-98		
No. 9	Bill 17-02		
No. 10 A+B	Deeds A-2/12/08 B-2/20/08		
No. 11			
No. 12			



My Neighborhood Map
PC #1

Created By
Baltimore County
My Neighborhood



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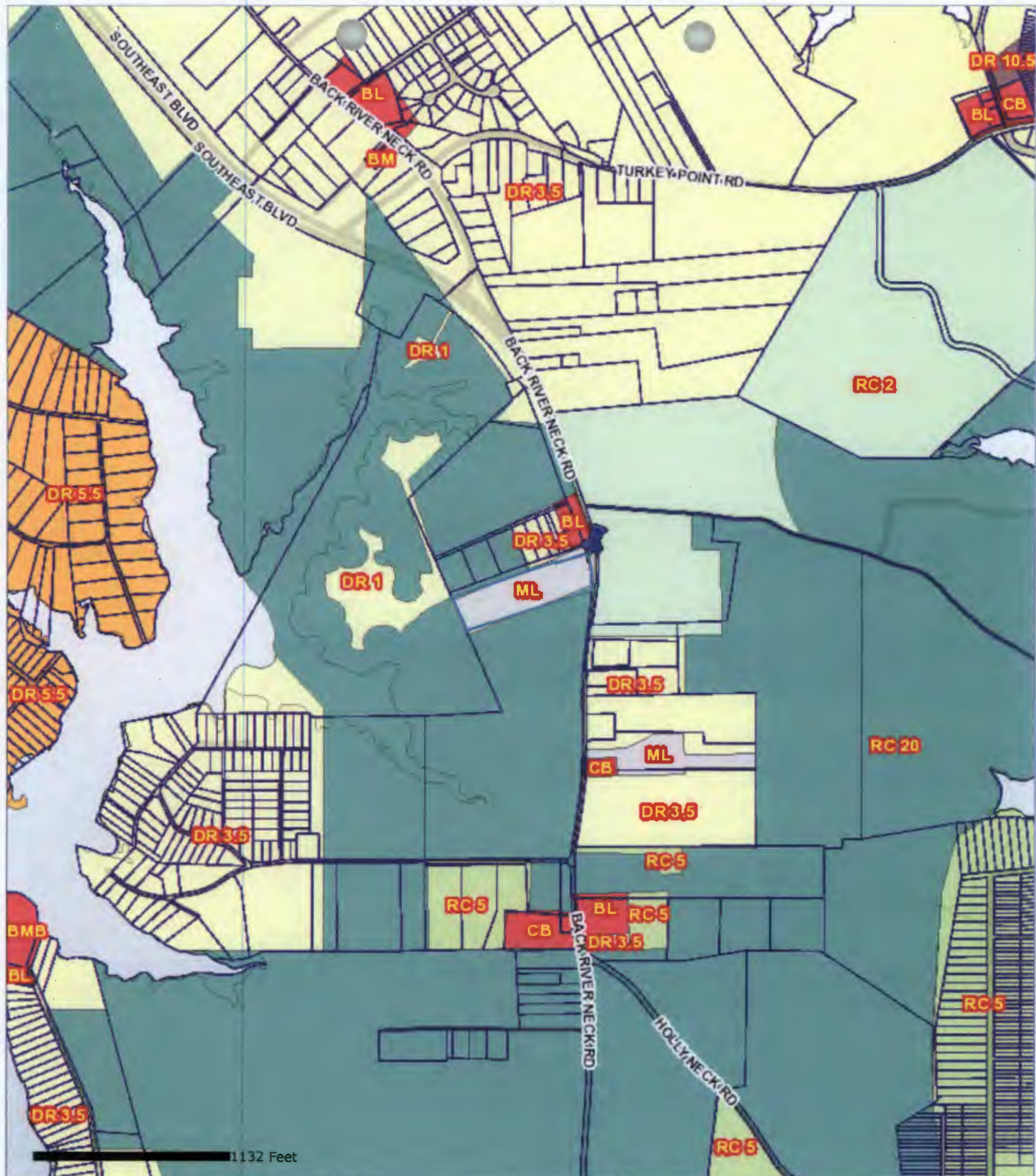
Printed 7/17/2012



Created By
Baltimore County
My Neighborhood



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My Neighborhood Map

Created By
Baltimore County
My Neighborhood



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Map Legend**Property****Zoning**

BL



BLR



BM



BMB



BMM



BR



BYMC



CB



DR 1



DR 10.5



DR 16



DR 2



DR 3.5



DR 5.5



MH



ML



MLR



MR



O 3



OR 1



OR 2



OT



RAE 1



RAE 2



RC 2



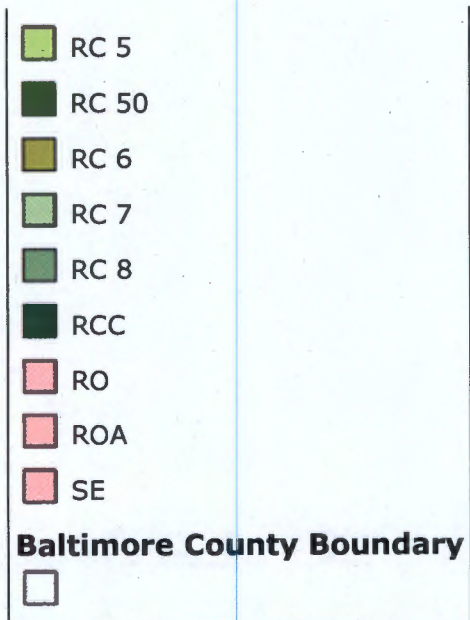
RC 20



RC 3



RC 4



JB 7/20

Case No.: 2008-0531-SPHX

Exhibit Sheet

Petitioner/Developer

People's Counsel
~~Protestants~~

COUNTY

No. 1	ZC Opinion 1-4-2002	BL Zoning Map Extract 5 pages	Code Enfor. Hrg. 1-7-2009
No. 2	BCBA Opinion 5-14-2003		
No. 3	Circuit Court Opinion Feb. 5, 2004		
No. 4	Ct. Special Appeals Op. 8-3-2005		
No. 5	Kellman CV		
No. 6	Site Plan		
No. 7	A-G Color Photos		
No. 8	Bill 30-98		
No. 9	Bill 17-02		
No. 10	Deeds A-2/12/08 B-2/20/08		
No. 11			
No. 12			

Department of Permits and Development Management
111 West Chesapeake Avenue
Towson, Maryland 21204
Baltimore County, Maryland

In the Matter of

Civil Citation No. C00052984

Back River Neck Road
Albert C. Jones, President
500 Vogts Lane
Baltimore, MD 21221

810 A Back River Neck Road

Respondent

FINDINGS OF FACT AND CONCLUSION OF LAW
FINAL ORDER OF THE CODE ENFORCEMENT HEARING OFFICER

This matter came before the Code Enforcement Hearing Officer for the Department of Permits and Development Management on November 25, 2008, for a hearing on a citation for violations under the Baltimore County Zoning Regulations (BCZR) section 426.6.A.1, failure to provide and maintain 200 ft. set back from another owner's residential property line on property zoned ML known as 810 A Back River Neck Road, 21221.

On November 7, 2008, pursuant to §3-6-205, Baltimore County Code, Code Enforcement Officer, issued a code enforcement citation. The citation was sent to the Respondent by 1st class mail to the last known address listed in the Maryland State Tax Assessment files.

The citation proposed a civil penalty of \$238,600.00 (two hundred and thirty eight thousand six hundred dollars).

James R. Michal, Esquire appeared representing Back River LLC.

Nancy West, Assistant County Attorney appeared representing Baltimore County.

Subject case returns to this Hearing Officer to determine:

- A. If violation of BCZR 426.6.A.1 continues to exist.
- B. The appropriate civil penalty.

COUNTY 1

1/4/12
IN RE: PETITION FOR VARIANCE
SW/S Back River Neck Road,
330' SE of c/l Pottery Farm Road
(810 Back River Neck Road)
15th Election District
5th Council District

Back River LLC
Petitioner

* BEFORE THE
* ZONING COMMISSIONER
* OF BALTIMORE COUNTY
* Case No. 02-159-A
*

* * * * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Zoning Commissioner for consideration of a Petition for Variance filed by the owner of the subject property, Back River LLC, by Buck Jones, President, and the Contract Lessee, Sprint PCS, by Howard Leger, through their attorney, Jennifer R. Busse, Esquire. A series of variances are requested to accommodate the construction of a 115-foot tall wireless telecommunications tower. Specifically, the Petitioners seek relief from Section 426.6.A.3 of the Baltimore County Zoning Regulations (B.C.Z.R.) to permit setbacks of 75 feet each from the south and west property lines, and 148 feet from the north property line in lieu of the required 200 feet each for the proposed tower. In addition, the Petitioners seek relief from Section 426.6.A.4 to permit setbacks of 40 feet each to the south and west property lines, in lieu of the required 125 feet each, for proposed equipment cabinets to support the proposed tower. The subject property and requested relief are more particularly described on the site plan submitted which was accepted into evidence and marked as Petitioner's Exhibit 14.

Appearing at the requisite public hearing on behalf of the Petition were Buck Jones, President of Back River LLC, property owners; and, Peter Fastnacht, President of Integrated Wireless Analysis, and Hassan Khalil, a Radio Frequency Design Engineer, consultants hired by the Petitioners. Also appearing in support of the requests were Richard L. Smith and Marianne Kiernan, engineers from KCI Technologies, Inc., the consultants who prepared the site plan for this property; and Jennifer R. Busse, Esquire and G. Scott Barhight, Esquire, attorneys for the

PETITIONER'S

EXHIBIT NO. 1

ORDER RECEIVED FOR FILING

Date 1/4/12

By [Signature]

IN THE MATTER OF
THE APPLICATION OF
BACK RIVER LLC, BUCK JONES, PRESIDENT -
LEGAL OWNER; SPRINT PCS - C.P. - PETITIONERS
FOR VARIANCE ON PROPERTY LOCATED ON
THE SW/S BACK RIVER NECK ROAD, 330' SE OF
POTTERY FARM RD (810 BACK RIVER NECK RD)
15TH ELECTION DISTRICT
5TH COUNCILMANIC DISTRICT

* BEFORE THE
* COUNTY BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* CASE NO. 02-159-A

* * * * *

OPINION

This matter is before the Board on an appeal from a decision of the Zoning Commissioner in which the Commissioner granted variances from various setback requirements to accommodate the construction of a 115-foot tall wireless communications tower. The Petition was filed by the Property Owner, Back River LLC, by Buck Jones, President, and the Contract Lessee, Sprint PCS, by Howard Leger, through their attorney. An appeal was filed by the Office of People's Counsel on January 14, 2002. The Back River Peninsula Community Association, Inc., also filed its appeal on January 31, 2002.

A hearing was held on September 25, 2002 and January 21, 2003. The Petitioner was represented by G. Scott Barhight, Esquire, and Jennifer S. Busse, Esquire, of the law firm of Whiteford, Taylor & Preston. The Protestants /Appellants were not represented by counsel. People's Counsel, Peter Max Zimmerman, participated on behalf of the Office of People's Counsel. Public deliberation was held on March 20, 2003.

Facts

Back River Neck LLC is the owner of 4.3 acres zoned M.L. (manufacturing light) at the northern gateway to the Back River Peninsula. Mr. Buck Jones, the builder and owner of the company, purchased the site in early 1999. It is currently improved with two buildings that house Mr. Jones' contracting business and approximately seven other commercial operations. It also has a parking lot which accommodates these uses.

Pet Ex 2

2/5/04

PETITION OF:

Back River, LLC, Buck Jones.
President, Property owner
and
Sprint PCS/APC Realty & Equipment
Company, LLC, Contract Purchaser/Lessee

IN THE

CIRCUIT COURT

IN THE CASE OF

The Application of Back River, LLC
Buck Jones, President- Legal Owner:
Sprint PCS - C.P. Petitioners for Variance
On Property located at 810 Back River
Neck Road, SW Back River Neck Road
33' SE Pottery Farm Road

FOR

BALTIMORE COUNTY

Case No.: 03-C-03-008657

15th Election District, 5th Councilman District
CBA NO. CBA-02-159-A

* * * * *

MEMORANDUM AND ORDER OF COURT

This matter came before this Court regarding the Petition of Back River, LLC and Sprint PCS (Petitioners) for judicial review of the administrative decision of the Baltimore County Board of Appeals ("CBA" "Board"). A hearing was held before this Court on February 2, 2004, at which time arguments were presented by both parties.

Background

This is a zoning appeal from a decision of the Baltimore County Board of Appeals which denied five setback variances to Petitioner. The Board determined that the subject property was not unique so as to justify the variance for Petitioner's wireless telecommunications tower.

Pet Ex 3

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0047

September Term, 2004

SPRINT PCS, ET AL.

v.

BALTIMORE COUNTY, MARYLAND

Eyler, James R.,
Adkins,
Barbera,

JJ.

Opinion by Adkins, J.

Filed: August 3, 2005

3C03005843

Pet. Ex. 4

Department of Permits and Development Management
111 West Chesapeake Avenue
Towson, Maryland 21204
Baltimore County, Maryland

In the Matter of

Civil Citation No. C00052984

Back River Neck Road
Albert C. Jones, President
500 Vogts Lane
Baltimore, MD 21221

810 A Back River Neck Road

Respondent

**FINDINGS OF FACT AND CONCLUSION OF LAW
FINAL ORDER OF THE CODE ENFORCEMENT HEARING OFFICER**

This matter came before the Code Enforcement Hearing Officer for the Department of Permits and Development Management on November 25, 2008, for a hearing on a citation for violations under the Baltimore County Zoning Regulations (BCZR) section 426.6.A.1, failure to provide and maintain 200 ft. set back from another owner's residential property line on property zoned ML known as 810 A Back River Neck Road, 21221.

On November 7, 2008, pursuant to §3-6-205, Baltimore County Code, Code Enforcement Officer, issued a code enforcement citation. The citation was sent to the Respondent by 1st class mail to the last known address listed in the Maryland State Tax Assessment files.

The citation proposed a civil penalty of \$238,600.00 (two hundred and thirty eight thousand six hundred dollars).

James R. Michal, Esquire appeared representing Back River LLC.

Nancy West, Assistant County Attorney appeared representing Baltimore County.

Subject case returns to this Hearing Officer to determine:

- A. If violation of BCZR 426.6.A.1 continues to exist.
- B. The appropriate civil penalty.



Case No: 68-531-SPHX

Case Name: IN The Matter of: Back River LLC - Legal Owner /
810 Back River Neck Rd /
 Exhibit List 15th Election Dist 60th Councilmanic Dist Petitioner

Party: People's Counsel

Date: 12/4/12

[illegible]

COUNTY COUNCIL OF BALTIMORE COUNTY, MARYLAND
Legislative Session 2002, Legislative Day No. 4

Bill No. 17-02

Councilmembers Moxley, McIntire, Skinner & Bartenfelder

By the County Council, February 19, 2002

A BILL
ENTITLED

AN ACT concerning

Wireless Telecommunications Towers - Setbacks

FOR the purpose of revising the setback requirements for wireless telecommunications towers.

BY repealing and re-enacting, with amendments

Section 426.6A

Baltimore County Zoning Regulations, as amended

1 SECTION 1. BE IT ENACTED BY THE COUNTY COUNCIL OF BALTIMORE
2 COUNTY, MARYLAND, that Section 426.6A of the Baltimore County Zoning Regulations, as
3 amended, be and it is hereby repealed and re-enacted, with amendments, to read as follows:

4 Section 426. Wireless Telecommunications Facilities

5 426.6 Setback requirements for wireless telecommunications towers.

EXPLANATION:

CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter stricken from existing law.

~~Strike out~~ indicates matter stricken from bill.

Underlining indicates amendments to bill.

COUNTY COUNCIL OF BALTIMORE COUNTY, MARYLAND
Legislative Session 1998, Legislative Day No. 4

Bill No. 30-98

All Councilmembers

By the County Council, February 17, 1998

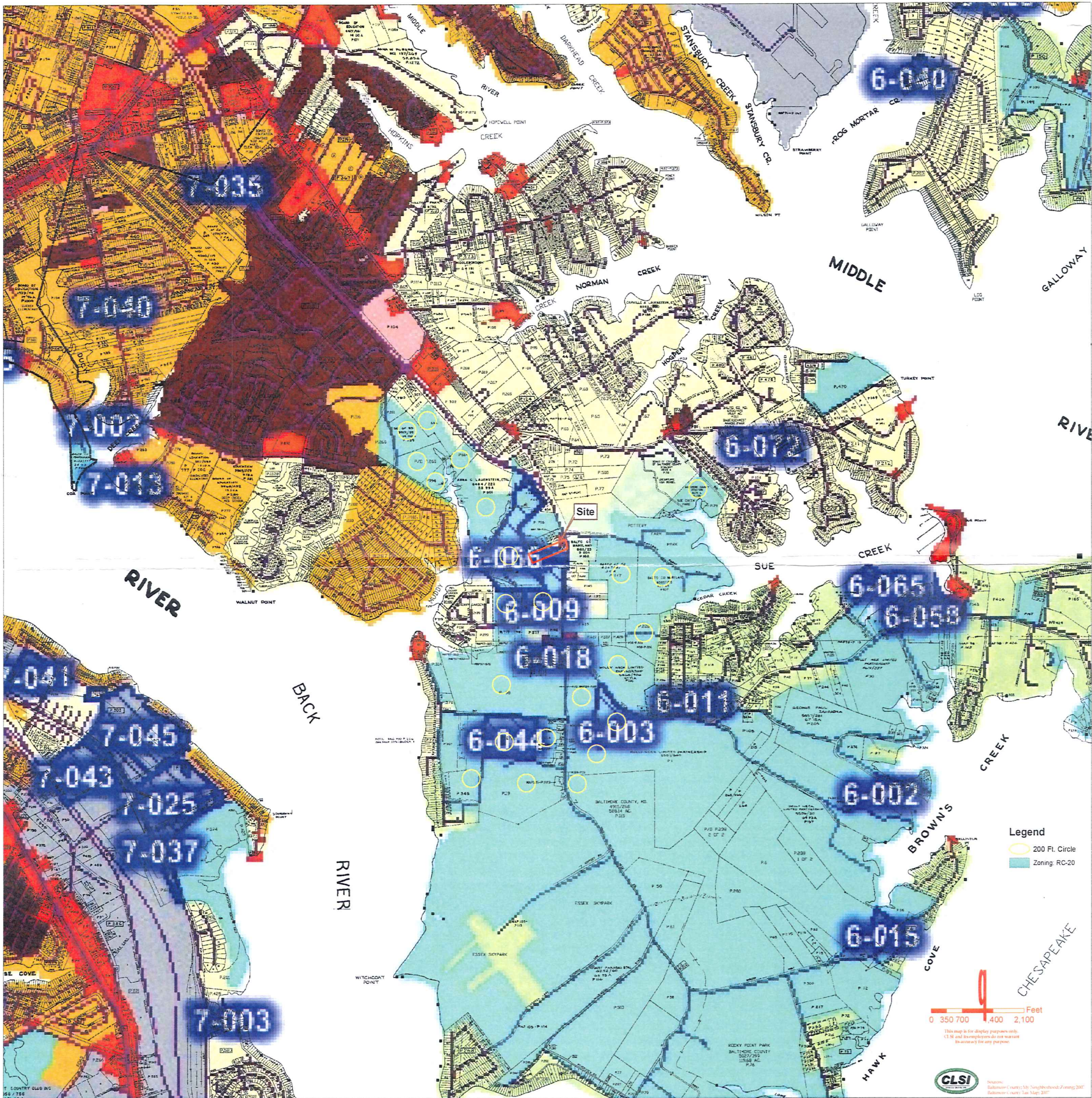
A BILL
ENTITLED

AN ACT concerning

Zoning - Wireless Telecommunications Towers and Antennas

FOR the purpose of amending the Zoning Regulations in order to establish guidelines regarding the regulation of certain towers and antennas; excepting certain towers and antennas from regulation; establishing the Tower Review Committee; requiring certain persons to meet with and submit certain information to the Committee; authorizing the Committee to provide certain comments; authorizing certain towers and antennas to be located in certain zones under certain circumstances; requiring certain towers and structures to meet certain requirements; requiring a security bond; requiring the owner of certain towers and structures to take certain actions; providing for the issuance of certain notices under certain circumstances; providing for the removal of a tower under certain circumstances; requiring towers by special exception to meet certain conditions;

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.
[Brackets] indicate matter stricken from existing law.
~~Strike-out~~ indicates matter stricken from bill.
Underlining INDICATES AMENDMENTS TO BILL.



[illegible]

2008-0531-SPHX



APC REALTY AND
EQUIPMENT COMPANY, LLC

d/b/a
SPRINT

7055 SAMUEL MORSE DRIVE
SUITE 100
COLUMBIA, MD 21046

SUBMITTALS

DATE	DESCRIPTION	REV.
11/01/07	FOR REVIEW	A
02/04/08	CLIENT REVIEW	B

APPROVALS:

SITE ACQUISITION
MANAGER _____

RF ENGINEER _____

RF MANAGER _____

OPERATIONS
MANAGER _____

CONSTRUCTION
MANAGER _____

LANDLORD _____

TAI

ENGINEERS • MANAGERS • TECHNICAL SERVICES
11459 Cronhill Drive, Suite A
Owings Mills, Maryland 21117
tel: 410 356-3108 • fax: 410 356-3109

SEAL:

JOB NO: 28001-WA54XC461

DRAWN: DSS

CHECKED: T.B.

TITLE:

TITLE
SHEET

SAR# WA54XC461
BACK RIVER NECK
810 BACK RIVER NECK RD
BALTIMORE, MD 21221

SHEET NUMBER:

$$Z^{-1}$$

COMMUNICATIONS EQUIPMENT INSTALLATION
OF EXISTING MONOPOLE
ZONING DRAWINGS
SITE ID: SAR# WA54XC461
SITE NAME: BACK RIVER NECK
810 BACK RIVER RD
BALTIMORE, MD 21221

GENERAL NOTES

1. THE CONTRACTOR SHALL BE RESPONSIBLE FOR OBTAINING ALL NECESSARY PERMITS AND APPROVALS FROM THE APPROPRIATE AGENCIES AND AGENCIES PRIOR TO THE SUBMISSION OF BIDS OR COMMENCEMENT OF WORK. THE CONTRACTOR SHALL BE RESPONSIBLE FOR OBTAINING ALL NECESSARY PERMITS AND APPROVALS FROM THE APPROPRIATE AGENCIES AND AGENCIES PRIOR TO THE SUBMISSION OF BIDS OR COMMENCEMENT OF WORK.

2. THE CONTRACTOR SHALL GIVE ALL NOTICES AND COMPLY WITH ALL LAWS, ORDINANCES, RULES, REGULATIONS AND LAWFUL ORDERS OF ANY PUBLIC AUTHORITY, MUNICIPAL AND UTILITY COMPANY SPECIFICATIONS, AND LOCAL AND STATE JURISDICTIONAL CODES BEARING ON THE PERFORMANCE OF THE WORK. THE WORK PERFORMED ON THE PROJECT AND THE MATERIALS INSTALLED SHALL BE IN STRICT ACCORDANCE WITH ALL APPLICABLE CODES, REGULATIONS AND ORDINANCES.

3. THE ARCHITECT/ENGINEER HAVE MADE EVERY EFFORT TO SET FORTH IN THE CONSTRUCTION AND CONTRACT DOCUMENTS THE COMPLETE SCOPE OF WORK. THE CONTRACTOR BIDDING THE JOB IS NEVERTHELESS CAUTIONED THAT MINOR OMISSIONS OR ERRORS IN THE DRAWINGS AND/OR SPECIFICATIONS SHALL NOT EXCUSE SAID CONTRACTOR FROM COMPLETING THE PROJECT AND IMPROVEMENTS IN ACCORDANCE WITH THE INTENT OF THESE DOCUMENTS.

4. THE CONTRACTOR OR BIDDER SHALL BEAR THE RESPONSIBILITY OF NOTIFYING (IN WRITING) THE CLIENT REPRESENTATIVE OF ANY CONFLICTS, ERRORS, OR OMISSIONS PRIOR TO THE SUBMISSION OF CONTRACTOR'S PROPOSAL OR PERFORMANCE OF WORK. IN THE EVENT OF DISCREPANCIES THE CONTRACTOR SHALL PRICE THE MORE COSTLY OR EXTENSIVE WORK, UNLESS DIRECTED IN WRITING OTHERWISE.

5. THE SCOPE OF WORK SHALL INCLUDE FURNISHING ALL MATERIALS, EQUIPMENT, LABOR AND ALL OTHER MATERIALS AND LABOR DEEMED NECESSARY TO COMPLETE THE WORK/PROJECT AS DESCRIBED HEREIN.

6. THE CONTRACTOR SHALL VISIT THE JOB SITE PRIOR TO THE SUBMISSION OF BIDS OR PERFORMING WORK TO FAMILIARIZE HIMSELF WITH THE FIELD CONDITIONS AND TO VERIFY THAT THE PROJECT CAN BE CONSTRUCTED IN ACCORDANCE WITH THE CONTRACT DOCUMENTS.

7. THE CONTRACTOR SHALL OBTAIN AUTHORIZATION TO PROCEED WITH CONSTRUCTION PRIOR TO STARTING WORK ON ANY ITEM NOT CLEARLY DEFINED BY THE CONSTRUCTION DRAWINGS/CONTRACT DOCUMENTS.

8. THE CONTRACTOR SHALL INSTALL ALL EQUIPMENT AND MATERIALS ACCORDING TO THE MANUFACTURER'S/VENDOR'S SPECIFICATIONS UNLESS NOTED OTHERWISE OR WHERE LOCAL CODES OR ORDINANCES TAKE PRECEDENCE.

9. THE CONTRACTOR SHALL PROVIDE A FULL SET OF CONSTRUCTION DOCUMENTS AT THE SITE UPDATED WITH THE LATEST REVISIONS AND ADDENDUMS OR CLARIFICATIONS AVAILABLE FOR THE USE BY ALL PERSONNEL INVOLVED WITH THE PROJECT.

10. THE CONTRACTOR SHALL SUPERVISE AND DIRECT THE PROJECT DESCRIBED HEREIN. THE CONTRACTOR SHALL BE SOLELY RESPONSIBLE FOR ALL CONSTRUCTION MEANS, METHODS, TECHNIQUES, SEQUENCES AND PROCEDURES AND FOR COORDINATING ALL PORTIONS OF THE WORK UNDER THE CONTRACT.

11. THE CONTRACTOR SHALL BE RESPONSIBLE FOR OBTAINING ALL PERMITS AND INSPECTIONS WHICH MAY BE REQUIRED FOR THE WORK BY THE ARCHITECT/ENGINEER, THE STATE, COUNTY OR LOCAL GOVERNMENT AUTHORITY.

12. THE CONTRACTOR SHALL MAKE NECESSARY PROVISIONS TO PROTECT EXISTING IMPROVEMENTS, EASEMENTS, PAVING, CURBING, ETC., DURING CONSTRUCTION. UPON COMPLETION OF WORK, THE CONTRACTOR SHALL REPAIR ANY DAMAGE THAT MAY HAVE OCCURRED DUE TO CONSTRUCTION ON OR ABOUT THE PROPERTY.

13. THE CONTRACTOR SHALL KEEP THE GENERAL WORK AREA CLEAN AND HAZARD FREE DURING CONSTRUCTION AND DISPOSE OF ALL DIRT, DEBRIS, RUBBISH AND REMOVE EQUIPMENT NOT SPECIFIED AS REMAINING ON THE PROPERTY. PREMISES SHALL BE LEFT IN CLEAN CONDITION AND FREE FROM PAINT SPOTS, DUST, OR SMUDGES OF ANY NATURE.

14. THE CONTRACTOR SHALL COMPLY WITH ALL OSHA REQUIREMENTS AS THEY APPLY TO THIS PROJECT.

15. THE CONTRACTOR SHALL NOTIFY THE CLIENT REPRESENTATIVE WHERE A CONFLICT OCCURS ON ANY OF THE CONTRACT DOCUMENTS. THE CONTRACTOR IS NOT TO ORDER MATERIAL OR CONSTRUCT ANY PORTION OF THE WORK THAT IS IN CONFLICT UNTIL CONFLICT IS RESOLVED BY THE CLIENT REPRESENTATIVE.

16. THE CONTRACTOR SHALL VERIFY ALL DIMENSIONS, ELEVATIONS, PROPERTY LINES, ETC., ON THE JOB.

CALL
UTILITIES NOTIFICATION
MISS UTILITY
1-800-257-7777
3 WORKING DAYS PRIOR TO DUGGING
SAFETY PRECAUTIONS SHALL BE IMPLEMENTED BY
CONTRACTOR(S) AT ALL TRENCHING IN ACCORDANCE WITH
CURRENT OSHA STANDARDS



COLOR CODE FOR UTILITY LOCATIONS
ELECTRIC - RED
GAS/OIL - YELLOW
TEL/CATV - ORANGE
WATER - BLUE
SEWER - GREEN
SURVEY - PINK
PROPOSED EXCAVATION - WHITE

SYMBOLS AND ABBREVIATIONS

A	AMPERE	ELEC	ELECTRICAL	MECH	MECHANICAL	SS	STAINLESS STEEL
ADJ	ADJUSTABLE	EL	ELEVATION	MFR	MANUFACTURER	STL	STEEL
AFF	ABOVE FINISHED FLOOR	EQ	EQUAL	WGB	MASTER GROUND BAR	SW	SWITCH
AGL	ABOVE GROUND LEVEL	EQUIP	EQUIPMENT	MIN	MINIMUM	TCC	TOP OF CONCRETE
APPROX	APPROXIMATE	(ϵ), EX	EXISTING	WTL	METAL	TOM	TOP OF MASONRY
C	CONDUIT	EXT	EXTERIOR	NIC	NOT IN CONTRACT	TYP	TYPICAL
CAB	CABINET	FF	FINISHED FLOOR	NTS	NOT TO SCALE	UON	UNLESS OTHERWISE NOTED
CB	CIRCUIT BREAKER	(FLT.)	FUTURE	OC	ON CENTER	V	VOLT
CLG	CEILING	GA	GAUGE	OPP	OPPOSITE	VIF	VERIFY IN FIELD
CONC	CONCRETE	GALV	GALVANIZED	P	POLE	W	WEST
CJ	CONSTRUCTION JOINT	GND, G	GROUND	RWC	RIGID METAL CONDUIT	WNF	WELDED WIRE FABRIC
DIA	DIAMETER	KWH	KILOWATT HOUR	SF	SQUARE FOOT	W/	WITH
DWG	DRAWING	LG	LONG	SHT	SHEET	XFMR	TRANSFORMER
E	EAST	MAX	MAXIMUM	SM	SMALL	&	AND
EA	EACH	MCB	MAIN CIRCUIT BREAKER	SN	SOLID NEUTRAL	ϕ	PHASE

PPC	POWER PROTECTION CABINET		COAXIAL CABLE		SAFETY DISCONNECT SWITCH
A-1	ANTENNA MARK NO.		FRONT OF EQUIPMENT		KILOWATT HOUR METER
	ANTENNA		COMPRESSION FITTING GROUND CONNECTION		TRANSFORMER
	SPOT ELEVATION		COAXIAL CABLE SHIELD GROUND KIT CONNECTION		CIRCUIT BREAKER
			GROUND ROD		COPPER GROUND BAR MOUNTED ON INSULATORS, 1/4"x 4"x 12" UNLESS NOTED OTHERWISE
	CENTERLINE		GROUND TEST PIT		
	EXOTHERMIC WELD CONNECTION		POWER WIRING		
	PLATE		TELECO WIRING		
	DETAIL NUMBER SHEET NUMBER		ABOVE GROUND SEAL TIGHT CONDUIT		
			GROUND WIRING		

REV. B	EQUIPMENT TYPE: CDMA
--------	----------------------

SITE ID No. WA54XC461

SITE NAME: BACK RIVER NECK

EX
100
FLO
(ELE

TOTAL DISTURBED AREA = 0' SF +
 LATITUDE: 39° 17' 12.60" N (NAD 83/91)
 LONGITUDE: 76° 25' 44.78" W (NAD 83/91)
 GROUND ELEVATION: 18' AMSL
 PROPOSED STRUCTURE HEIGHT: 125'
 TOTAL ELEVATION ABOVE MAIN SEA LEVEL: 133'
 THE EXISTING TOWER IS LOCATED AT LEAST ONE HORIZONTAL
 FOOT FOR EACH VERTICAL FOOT OF HEIGHT (125') FROM ANY
 EXISTING OFF-SITE DWELLINGS OR RESIDENTIAL ZONES. NO
 SCHOOLS OR PUBLIC PARKS ADJOIN THIS SITE.
 THE STRUCTURE DOES NOT SUPPORT LIGHTS OR SIGNS.
 THE APPLICANT WILL PROVIDE CERTIFICATION BY A REGISTERED
 PROFESSIONAL ENGINEER THAT THE STRUCTURE WILL MEET
 APPLICABLE DESIGN STANDARDS FOR WIND LOADS IN
 ACCORDANCE WITH THE LATEST TIA/EIA STANDARD.
 NO WATER OR SANITARY SERVICES ARE REQUIRED FOR THE
 OPERATION OF THIS FACILITY.
 WIRELESS TRANSMITTING DEVICES MUST COMPLY WITH ANSI
 STANDARD C95-1982.
 THE INFORMATION AND COMPOUND LOCATION SHOWN HEREON
 HAVE BEEN COMPILED FROM CLIENT RECORDS AND IS
 BELIEVED TO BE RELIABLE. HOWEVER, THE ACCURACY IS NOT
 GUARANTEED AND MAY BE SUBJECT TO REVISION.
 PROPERTY SHOWN HEREON LIES WITHIN ZONE C, AN AREA
 OF MINIMAL FLOODING, AS PER FEMA COMMUNITY PANEL NO.
 240010 0445 C EFFECTIVE DATE, NOVEMBER 17, 1993.
 HOWEVER THIS SITE PLAN REFLECTS UPDATED TOPOGRAPHY
 NOT REFLECTED ON FEMA MAPPING, THE 100 YEAR FLOOD
 BOUNDARY IS SHOWN ON THIS PLAN BASED ON NEW
 TOPOGRAPHY AND THE BASED FLOOD ELEVATION OF
 9.4'.
 THIS SITE IS EXEMPT FROM STORMWATER MANAGEMENT
 REQUIREMENTS.
 THIS SITE IS EXEMPT FROM THE BALTIMORE COUNTY
 WOODLAND CONSERVATION AND TREE PRESERVATION
 ORDINANCE.

	PROP. TREE LINE
	EX. FENCE
	POLE
	PROP. FENCE
	EX. CONTOURS
	PROP. CONTOURS
	INDICATES SURFACE FLOW
	SPOT ELEVATION

SHEET NUMBER:

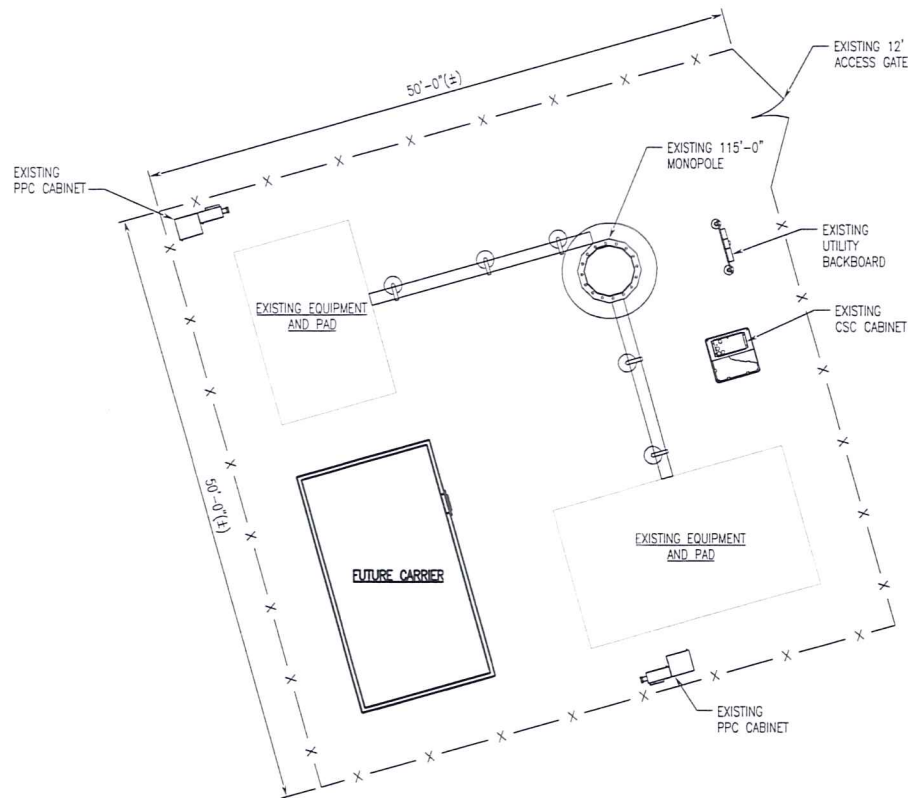
$$Z-2$$

REV. B EQUIPMENT TYPE: CDMA

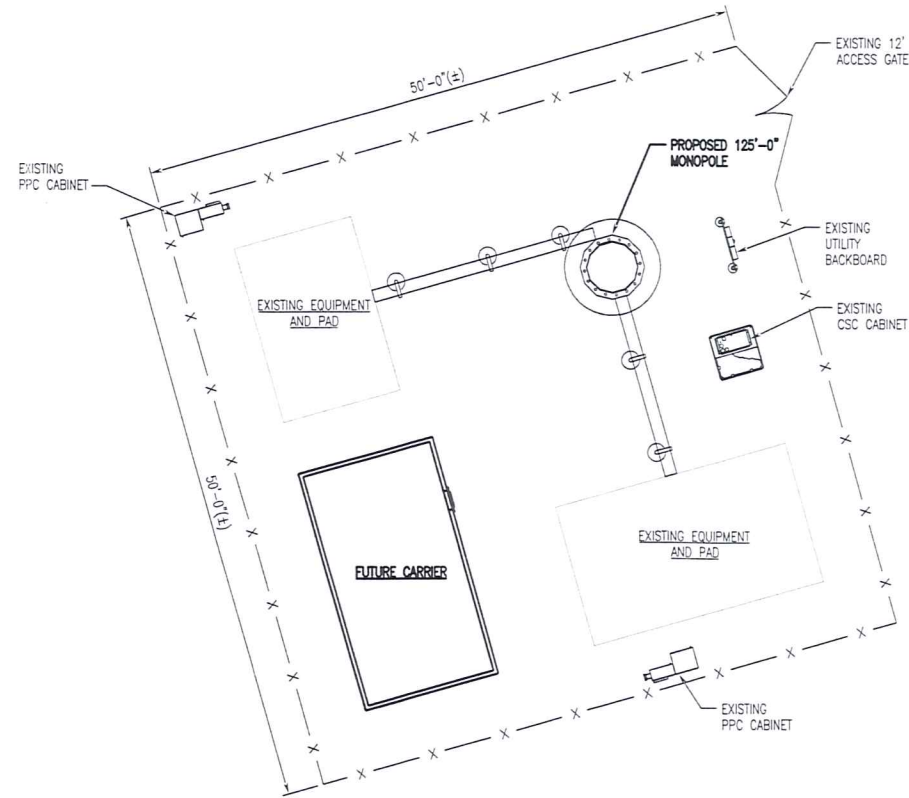
SITE ID No. WA54XC461

SITE NAME: BACK RIVER NECK

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EXISTING COMPOUND PLAN
SCALE: 3/16" = 1'-0"



PROPOSED COMPOUND PLAN
SCALE: 3/16" = 1'-0"



APC REALTY AND
EQUIPMENT COMPANY, LLC

d/b/a
SPRINT

7055 SAMUEL MORSE DRIVE
SUITE 100
COLUMBIA, MD 21046

SUBMITTALS

DATE	DESCRIPTION	REV.
11/01/07	FOR REVIEW	A
02/04/08	CLIENT REVIEW	B

APPROVALS:

SITE ACQUISITION
MANAGER _____
RF ENGINEER _____
RF MANAGER _____
OPERATIONS
MANAGER _____
CONSTRUCTION
MANAGER _____
LANDLORD _____

TAI

ENGINEERS-MANAGERS-TECHNICAL SERVICES
11459 Cronhill Drive, Suite A
Owings Mills, Maryland 21117
tel: 410 356-3108 • fax: 410 356-3109

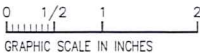
SEAL:

JOB NO: 28001-WA54XC461

DRAWN: DSS

CHECKED: T.B.

SCALE:



TITLE:

EXISTING AND
PROPOSED
COMPOUND
PLAN

SAR# WA54XC461
BACK RIVER NECK
810 BACK RIVER NECK RD
BALTIMORE, MD 21221

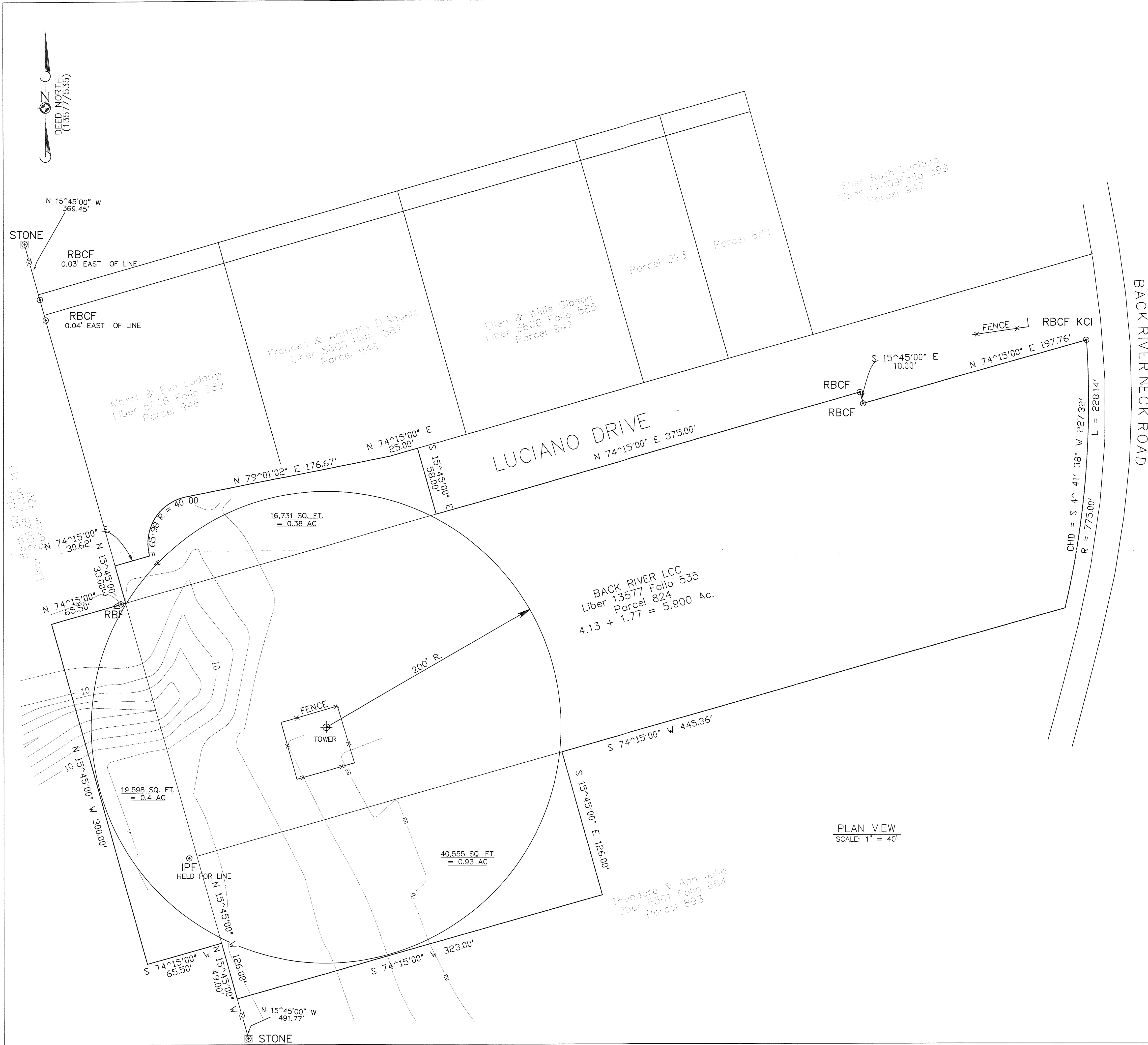
SHEET NUMBER:

Z-3

REV. B EQUIPMENT TYPE: CDMA

SITE ID No. WA54XC461

SITE NAME: BACK RIVER NECK



SITE NOTES:

1. TOWER OWNER: SPRINT PCS/ BACK RIVER NECK LLC.
7055 SAMUEL MORSE DRIVE
SUITE 100
COLUMBIA, MD 21046
CONTACT: C/O JAY O'NEILL
(410) 963-7400
2. PROPERTY OWNER: BACK RIVER LLC.
500 VOGTS LANE
BALTIMORE, MD 21221-1634
3. SITE DATA: TAX MAP 97 GRID 24 PARCEL 824
TAX ACCOUNT NO. 15-2300004470
LIBER 13577, FOLIO 535
TRACT AREA: 5.14 AC
ELECTION DISTRICT: 15
ADD MAP: 37 GRID K-13
ADDRESS: 810 BACK RIVER NECK ROAD
BALTIMORE, MD 21221
EXISTING USE: COMMERCIAL
COUNCILMANIC DISTRICT NO. 6
DEED REFERENCE: 13577/535
WATERSHED: 6 HARRIS MILL CREEK
PROPERTY AREA:
ORIGINAL = 4.13 AC.
NEWLY ACQUIRED = 1.77 AC.
TOTAL = 5.900 AC.
PARKING SPACES: 64
4. CURRENT ZONING: ML /RC-20
ZONING CASE 02-159-A-1-14-2002
ZONING ORDER 1/14/02 GRANTED BY
COMMISSIONER BOARD OF APPEALS
ZONING ORDER 5/14/03 DENIED BY
BOARD
5. PLEASE REFER TO APC REALTY a/b/o SPRINT
SPECTRUM ORIGINAL SUBMISSION DATED 4/3 FOR:
A. PREVIOUS COMMERCIAL PERMIT
B. ZONING HEARINGS/ DISTRICT
C. FLOOD AREA AND OFF-STREET
CALCULATIONS
D. UTILITIES AND FEATURES
6. HEIGHT OF EXISTING MONOPOLE: 115'(+)
A. SETBACKS, PER SECTION 426.6A3 REQUIRED:
REQUIRED: FRONT - 200'
SIDE - 200'
REAR - 200'
PROVIDED: FRONT - 638'
SIDE - 200' MIN / 200' MAX
REAR - 200'
B. EQUIPMENT CABINETS SETBACK:
REQUIRED: FRONT - 125'
SIDE - 125'
REAR - 125'
PROVIDED: FRONT - 620'
SIDE - 200' MIN / 200' MAX
REAR - 165.5'
7. TOTAL DISTURBED AREA = 0' SF
8. LATITUDE: N 39°17'-13"(+)
LONGITUDE: W 78°25'-45"(+)
GROUND ELEVATION: 18'(+/-) AMSL
EXISTING STRUCTURE HEIGHT: 115'(+/-)
TOTAL ELEVATION ABOUT MAIN SEA LEVEL: 133'
9. THE EXISTING TOWER IS LOCATED AT
LEAST ONE HORIZONTAL FOOT FOR
EACH VERTICAL FOOT OF HEIGHT
115'(+/-) FROM ANY EXISTING OFFSITE
DWELLINGS OR RESIDENTIAL ZONES
WITH THE UNDERSTANDING THAT A
VARIANCE WILL BE GRANTED
REGARDING PARCEL 893. NO
SCHOOLS OR PUBLIC PARKS ADJOIN
THIS SITE.
10. THE STRUCTURE DOES NOT
SUPPORT LIGHTS OR SIGNS.
11. THE APPLICANT WILL PROVIDE
CERTIFICATION BY A REGISTERED
PROFESSIONAL ENGINEER THAT THE
STRUCTURE WILL MEET APPLICABLE
DESIGN STANDARDS FOR WIND
LOADS IN ACCORDANCE WITH THE
LATEST TIA/EIA STANDARD.
12. NO WATER OR SANITARY SERVICES
ARE REQUIRED FOR THE OPERATION
OF THIS FACILITY.
13. WIRELESS TRANSMITTING DEVICES
MUST COMPLY WITH ANSI STANDARD
C95-1982.
14. THE INFORMATION AND COMPOUND
LOCATION SHOWN HEREON HAVE
BEEN COMPILED FROM CLIENT
RECORDS AND IS BELIEVED TO BE
RELIABLE. HOWEVER, THE ACCURACY
IS NOT GUARANTEED, AND MAY BE
SUBJECT TO REVISION.
15. PROPERTY SHOWN HEREON LIES
WITHIN ZONE C, AN AREA OF
MINIMAL FLOODING, AS PER FEMA
COMMUNITY PANEL NO. 240010
0445 C EFFECTIVE DATE, NOVEMBER
17, 1983. HOWEVER, THIS SITE PLAN
REFLECTS UPDATED TOPOGRAPHY
NOT REFLECTED ON FEMA MAPPING.
THE 100 YEAR FLOOD BOUNDARY IS
SHOWN ON THIS PLAN BASED ON
NEW TOPOGRAPHY AND THE FEMA
BASED FLOOD ELEVATION OF 9.4'.
16. THIS SITE IS EXEMPT FROM
STORMWATER MANAGEMENT
REQUIREMENTS.
17. THIS SITE IS EXEMPT FROM THE
BALTIMORE COUNTY WOODLAND
CONSERVATION AND TREE
PRESERVATION ORDINANCE.

This particular
site plan was not
scanned

2008-0531-SPHX



Ann M. Muehlen 5/07/08

Drafting/SCH	DATE	REVISIONS
Check: DEN		
Design:		
Check:		



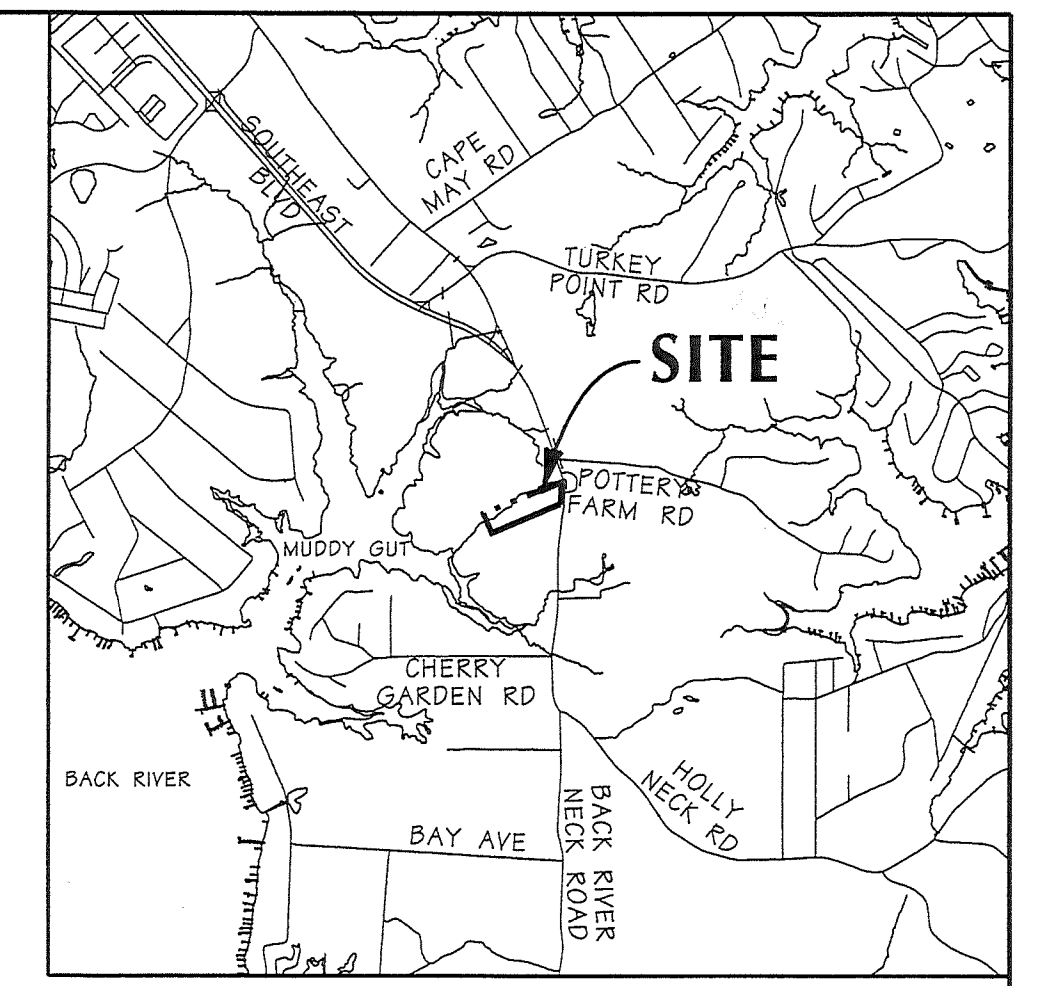
Engineers • Surveyors • Landscape Architects
Land Planning & Environmental Consultants
FREDERICK OFFICE WESTMINSTER OFFICE
8445 Progress Drive, Suite BB 439 East Main Street
Frederick, MD 21701-4879 Westminster, MD 21157-5539
(301) 666-1799 (410) 846-1799
FAX (301) 662-8004 FAX (410) 846-1791

BACK RIVER LLC
810 BACK RIVER NECK ROAD
TAX MAP: 97 PARCEL 824
DEED REF: 135777
15TH ELECTION DISTRICT BALTIMORE COUNTY, MARYLAND

**PLAN TO ACCOMPANY
DRC REQUEST**

SCALE:
HORIZ. - 1" = 40'
VERT. - 1" =

SHEET 1 OF 1	DATE 08/02/07
CARROLL COUNTY	JOB NUMBER 2007144
FILE NO.	



1. Current Owner and street address: Back River LLC
500 Vogts Lane
Baltimore, MD 21221
2. Applicant: Sprint/Nextel
6480 Sprint Parkway
Overland Park, KS 66251
3. Site Area: 4.916 Acres (214,140 sf)
4. Existing Use: Commercial, Telecommunications Facility
5. Site Address: 810 Back River Neck Road
Baltimore, MD 21221
6. Site Data: Tax Map 37, Grid 24, Parcel 824
Tax Account Number: 23000304470
Deed Reference: 13577/535
Zoned: MLRC 20
Councilmanic District: 6
Election District: 15
7. The topographic information shown hereon, inside of the subject property, is taken from a plan prepared by KCI Technologies entitled "SITE PLAN, SITE W&S&C 461 BACK RIVER NECK" dated 8-7-02. The topographic information shown hereon, outside of the subject property, is taken from Baltimore County GIS, dated 1996. Boundary information for the subject property shown hereon is taken from a plan prepared by GSI entitled "PLAN 10 ACCOMPANY DEC REQUEST" dated 8-2-07. Adjoining property lines and information shown herein is taken from MD Property Finder for Baltimore County Tax Map 37 and 38. This plan is not the result of a DWM, Inc. boundary or topographic survey and, therefore, is subject to change. This plan is subject all easements and restrictions either recorded or unrecorded and may or may not be shown hereon. This plan was prepared without the benefit of a title report.
8. Zoning classifications are taken from the 2008 Baltimore County Zoning Maps (GIS).
9. No water or sanitary utilities are required for the wireless facility.
10. This proposed project is within the Chesapeake Bay Critical Area and Flood Zone "C".
11. Applicant agrees to Section 426.6 D & E in Baltimore County Zoning Regulations.
12. Amenity Open Space (AOS) does not apply to this site.
13. The site is not within a Basic Services Maps Moratorium area.
14. No existing or proposed signs are associated with the wireless facility.
15. An "A" Exception was granted for the tower on 4-30-01.
16. Case 3715 - February 27, 1996 the property was rezoned to ML from R-6 and BL.

ZONING HISTORY

Zoning Case Number: 02-159-A

Petition for Variance before the Zoning Commissioner of Baltimore County is ordered by the Zoning Commissioner for Baltimore County this 41st day of January, 2002, that the Petition for Variance seeking relief from Section 426.6.A.3 of the Baltimore County Zoning Regulations (B.C.Z.R.) to permit setbacks of 75 feet each from the south and west property lines, and 140 feet from the north property line, in lieu of the required 200 feet each for the proposed wireless telecommunications tower, and, from Section 426.6.B.1 to permit setbacks of 40 feet each to the south and west property lines, and 140 feet each to the north for the supporting equipment cabinets, in accordance with Petitioner's Exhibit 14, be and is hereby GRANTED, subject to the following restrictions:

Zoning Case Number: 02-159-A

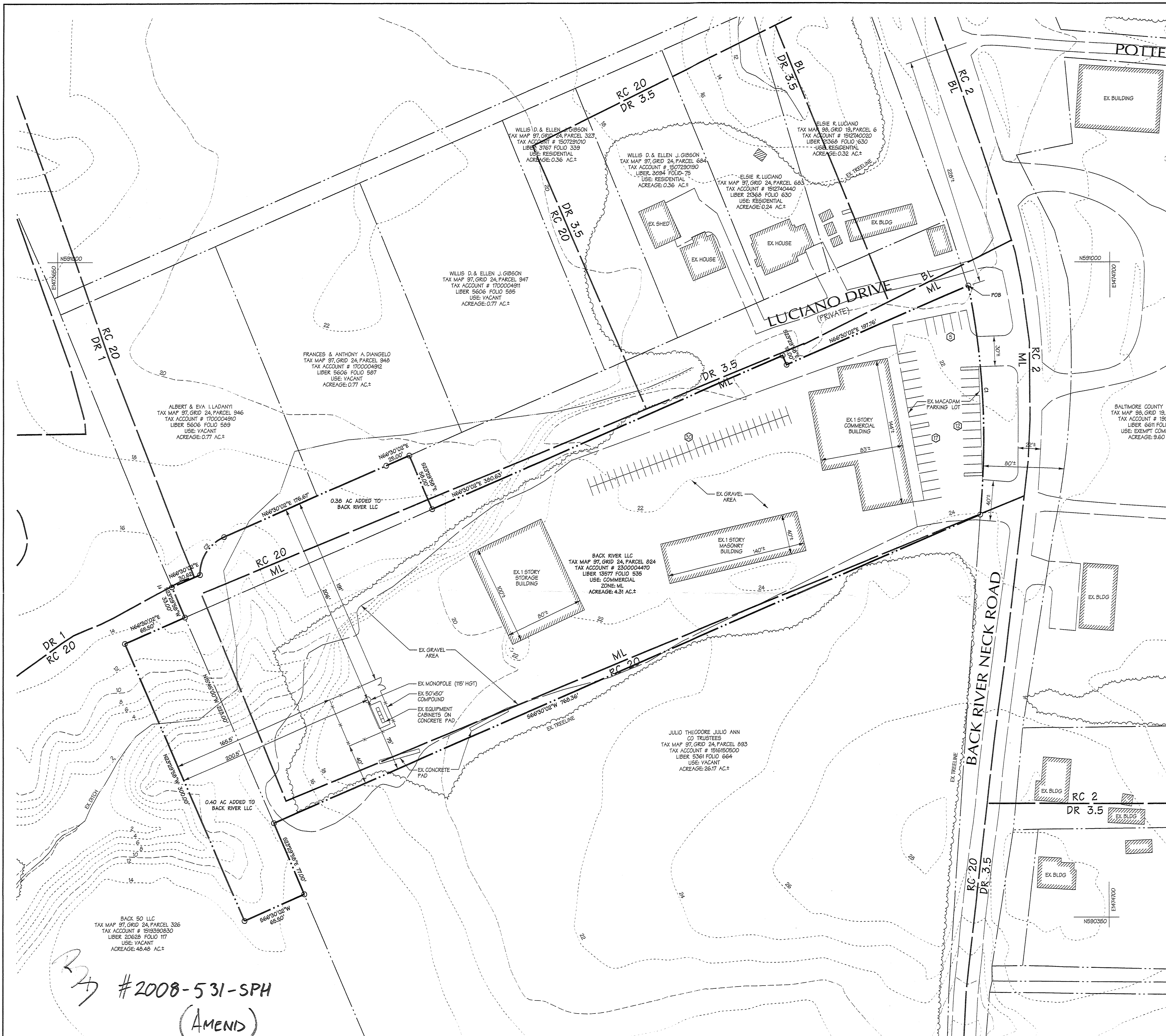
Application of Variance before the County Board of Appeals of Baltimore County. This is the fifth day of May 2003, by the County Board of Appeals of Baltimore County ORDERED that Petitioner's request for a variance from BCCR Section 426.6A.1 to allow a setback of 75 feet at the southern property line (a side setback) in lieu of the required 200 feet, a setback of 135 feet to the western property line (the rear setback) in lieu of the required 200 feet, and a setback of 140 feet to the northern property line (a side setback) in lieu of the required 200 feet for a wireless telecommunications tower and a variance from BCCR Section 426.6A.2 to allow a setback of 140 feet to the southern property line in lieu of the required 125 feet for equipment cabinets for a wireless telecommunications tower be and the same is hereby DENIED.

Zoning Case Number: 03-C-03-008657

Application of Variance in the Circuit Court for Baltimore County.
It is this 5th day of February, 2004, ORDERED that the decision of the Baltimore County Board of Appeals is hereby AFFIRMED.

Zoning Case Number: 0047

Application of Variance in the Court of Special Appeals of Maryland.
We affirm the judgment of the Circuit Court affirming the Board's denial of the variance petition.



ORIGINAL PETITION (2008)

AND

RELATED DOCUMENTS (2007-2008)

From: Patricia Zook
To: Mohler, Mike; West, Nancy
Date: 8/21/2008 11:24:31 AM
Subject: Case No. 2008-0531-SPHX – 810 Back River Neck Road

Nancy and Mike -

Please see Tom Bostwick's memorandum to the case file.

Kristen - the case file is being returned to PDM for safe keeping.

Patti Zook
Baltimore County
Office of the Zoning Commissioner
Jefferson Building, Suite 103
105 West Chesapeake Avenue
Towson MD 21204

410-887-3868

pzook@baltimorecountymd.gov

CC: Bostwick, Thomas; Matthews, Kristen

8/21/08

BALTIMORE COUNTY, MARYLAND

Inter-Office Memorandum

DATE: August 21, 2008

TO: File

FROM: Thomas Bostwick, Deputy Zoning Commissioner

RE: Petition for Special Hearing and Special Exception
Case No. 2008-0531-SPHX – 810 Back River Neck Road

This matter came before me on August 20, 2008 on Petitions for Special Hearing and Special Exception. The Special Hearing was requested to permit a non-density transfer of land and the Special Exception was requested to permit a telecommunications tower at a height of 125 feet in an R.C.20 Zone. The Petitioners are the property owner, Back River LLC by Albert "Buck" Jones and the contract lessee, APC Realty and Equipment Company LLC/Sprint Nextel.

Petitioners' attorney, James Michal, appeared with several witnesses in support of the requests for relief. Also appearing was Assistant County Attorney Nancy West and Mike Mohler, Deputy Director of Permits and Development Management and Head of the Code Inspections and Enforcement Division. Ms. West related that this case has had significant history and that because of this, I should consider postponing the case. The history I gleaned from both parties is as follows:

In 2001, Sprint PCS and Back River LLC petitioned for a variance to erect a 115 foot monopole on the subject property. Then-Zoning Commissioner Lawrence Schmidt granted the variance request and shortly thereafter, Petitioners erected the cell tower. The case was appealed to the Board of Appeals and they denied the variances requested. The Circuit Court affirmed and the Court of Special Appeals affirmed the denial of the variances. During these proceeding four years, the cell tower was erected and continued to operate.

Over the last few years, Code Enforcement has attempted to enforce the Court of Special Appeals decision and have the cell tower taken down. During this period, it also appears that Petitioners have attempted to "right" the situation by trying to take out the need for the variances by acquiring sufficient adjacent land so as not to need the setbacks from the original variance case (Case No. 02-159-A). They have also filed the instant petitions for special hearing for a non-density transfer (assuming they can acquire the requisite land) and special

Item #531

exception to extend the existing tower from 115 feet to 125 feet to accommodate Sprint Nextel on the tower.

In a somewhat related matter, in 2007 and Case No. 07-506-X, Petitioners and property owners Patricia Shaneybrook and Susan Basso and contract lessee Verizon Wireless requested a special exception to erect a cell tower on Back River Neck Road, not far from the subject property where the "illegal" cell tower currently operates. Zoning Commissioner William J. Wiseman, III granted that special exception, noting that the requested tower would essentially be a "replacement" to the tower on the subject property that was denied by the Court of Special Appeals in 2005.

In addition, currently, the Code Enforcement Office and Petitioners and the Shaneybrook and Verizon parties are in discussions in an effort to possibly ultimately allow the existing cell tower to remain and for Verizon to occupy part of that tower to enhance its service. As noted earlier, Petitioners are trying to acquire sufficient adjacent land so they no longer need variance relief, which would in turn legitimize the existence of the tower.

With that backdrop, the County, through Ms. West and Mr. Mohler, requested that the current matter be postponed, believing it was not appropriate for Petitioners to be requesting zoning relief when the parties were in the throes of administrative enforcement proceedings involving removal of the existing "illegal" tower. I agreed with Ms. West and postponed the case. I directed that the parties attempt to resolve the outstanding issues prior to re-scheduling this matter. Otherwise, with the prior Court of Special Appeals mandate, the relief requested in this case may not be appropriate, especially if Petitioner cannot acquire the necessary adjacent land.

The undersigned did open the hearing prior to the postponement. It should be re-scheduled probably for mid to late October or November 2008 and should be assigned to me. It does NOT need to be re-posted and re-published.

c: Nancy West, Assistant County Attorney
Mike Mohler, Deputy Director of Permits and Development Management
and Head of the Code Inspections and Enforcement Division

Item #531

- 8-20-08-

2008-0531-SPHX

- Jim Michal - Pet's Atty
- Nancy West - Asto County Atty

↳ Mike Mohler

↳ after 10/10/08

PPA

Pet - 10/01

Bd of Appeals 5/03

Cty of Sp. Appeals 8/05

3/08 - letter from Bulldog Engeman
Ron Brand

↳ w/ new use + occupancy permit

- Karsenti - represents Vevyir

- Frank Borgarding - represents Stoneybrook

- Back River Nesh Peninsular Comm Association send
letter to Tim back in 6/19/06



Petition for Special Exception

to the Zoning Commissioner of Baltimore County for the property located at 810 Back River Neck Rd., Baltimore, MD 21221

which is presently zoned RC 20

Deed Reference: 13577 / 535 Tax Account # 2300004470

This Petition shall be filed with the Department of Permits and Development Management. 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 Regulations of Baltimore County, to use the herein described property for

To permit a Tower at a height of 125' in a RC.20 zone

Refer to exhibit "B" for a detailed support statement.

Section 1A05.1.C.8; 426

Property is to be posted and advertised as prescribed by the zoning regulations.

I, or we, agree to pay expenses of above Special Exception, advertising, posting, etc. and further agree to and are to be bounded 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/Lessee:

APC Realty and Equipment Company, LLC/Sprint Nextel

Name - Type or Print

Say O'Neill *SAY O'NEILL*

Signature

7055 SAMUEL MORSE DR

Address

Columbia

MD

Telephone No.

21046

City

State

Zip Code

Attorney For Petitioner:

James R. Michal, Esq.

Name - Type or Print

James R. Michal *James R. Michal*

Signature

Jackson & Campbell, PC

Company

1120 20th St NW

Address

Washington

DC

Telephone No.

20036

City

State

Zip Code

Legal Owner(s):

Back River LLC

Name - Type or Print

Albert C Jones

Signature

Name - Type or Print

Signature

810 Back Neck River Rd.

Address

Baltimore

MD

Telephone No.

21221

City

State

Zip Code

Representative to be Contacted:

James R. Michal, Esq

Name

1120 20th St. NW

Address

Washington

DC

Telephone No.

20036

City

State

Zip Code

Case No. 2008-0531-SPHX

OFFICE USE ONLY
ESTIMATED LENGTH OF HEARING _____

UNAVAILABLE FOR HEARING _____

Reviewed By *W*

Date

5/23/08



Petition for Special Hearing

to the Zoning Commissioner of Baltimore County

for the property located at Back River Neck Rd

which is presently zoned RC, 20 portion of the property

(This petition **must** be filed in person, in the zoning office, in triplicate, with original signatures.)

This Petition shall be filed with the Department of Permits and Development Management. 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 Hearing under Section 500.7 of the Zoning Regulations of Baltimore County, to determine whether or not the Zoning Commissioner should approve

(This box to be completed by planner)

To permit a non-density transfer

Property is to be posted and advertised as prescribed by the zoning regulations.

I, or we, agree to pay expenses of above Special Hearing, advertising, posting, etc. and further agree to and are to be bounded 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/Lessee:

APC Realty and Equipment Company LLC/Sprint Nextel

Name - Type or Print

Sam O'Neill Sam O'Neill

Signature

7056 Samuel Morse Dr., Suite 100, 443-278-3890
Address Telephone No.
Columbia MD 21046
City State Zip Code

Attorney For Petitioner:

James R. Michal

Name - Type or Print

James R. Michal

Signature

Jackson & Campbell, P.C.

Company

1120 20th St. NW, Suite 300 202-457-1652
Address Telephone No.
Washington DC 20036
City State Zip Code

Legal Owner(s):

Back River LLC

Name - Type or Print

Albert C Jones

Signature

Albert C. Jones

Name - Type or Print

Signature

810 Back River Neck Rd 410-574-9337

Address

Telephone No.

Essex

MD

21221

City

State

Zip Code

Representative to be Contacted:

James R. Michal

Name

1120 20th St. NW Suite 300

Address

Telephone No.

Washington

DC

20036

City

State

Zip Code

OFFICE USE ONLY

ESTIMATED LENGTH OF HEARING _____

Case No. 2008-0531-SPHX
REV 9/15/98

UNAVAILABLE FOR HEARING
Reviewed By ca Date 5/8/08

2008-0531-SPHX

EXHIBIT B

**JUSTIFICATION STATEMENT IN SUPPORT OF A SPECIAL HEARING AND A
SPECIAL EXCEPTION FOR AN EXISTING PUBLIC UTILITY USE CELLULAR
TELECOMMUNICATION MONOPOLE AND WIRELESS COMMUNICATION
ANTENNAE**

Applicant(s): **Back River, LLC & APC Realty & Equipment Company, LLC/
Sprint Nextel**
Site: **Back River Neck Rd.**
Sprint Site #: **WA54XC641**
Property Address: **810 Back River Neck Rd., Essex, MD 21221**

Introduction

Applicant, APC Realty & Equipment Company, LLC/ Sprint Nextel, (hereinafter "Sprint") is the owner of an existing 115' high wireless communication facility which counts with two wireless carriers, Sprint and T-Mobile Northeast LLC (hereinafter T-Mobile), providing wireless telecommunications network facilities throughout the region and its coverage objective with this application is to maintain its current coverage along *Back River Neck Road and its surrounding environs*. Back River, LLC (hereinafter "Property Owner") is the property owner in which the wireless facility lies. In order to properly establish a link in the network, Applicants seek a special exception to allow the existing wireless facility meet the County of Baltimore's zoning requirements. In addition, Applicants request an extension to the current height (115') of the tower to 125' in order to allow a third carrier to collocate at a 123' RAD center.

Site Description

The existing wireless facility is located on the property owned by Back River, LLC, Liber 13577, Folio 535, Parcel 824. The property is divided into two different zones, the front portion is zoned ML and is improved by a commercial strip and the rear portion of the property, where the existing telecommunication facility is located, is zoned RC.20¹.

Currently, the site counts with two telecommunication providers, Sprint Nextel and T-Mobile. A third carrier, is also interested in collocating at a 123' (h) RAD center.

Access to the proposed facility is via an existing access road to the property off Back River Neck Road.

¹ Applicant, Property Owner, was not able to establish when was the property or portion of the property was reclassified from M.L. to R.C.20 after a decision dated November 15, 1963, which reclassified from R.6. to M.L. per research in county tax and land records. In fact, per Baltimore County tax records, the underlying property, as of date of submission of this application, has been taxed in its entirety as M.L.

Project Description and Need

As an FCC licensee, Sprint and T-Mobile are committed to providing seamless telecommunications service to its users, and seek to create a seamless, state-of-the-art all-digital wireless network. This requires the installation of a network of telecommunications antennas and equipment facilities so as to allow each facility to broadcast and receive radio signals within a strictly limited radio frequency range to each wireless user in the vicinity of the facility. Moreover, each facility must be able to pass the user's signal to an adjacent facility as each user travels out of the coverage area into an adjacent coverage area. Each facility is capable of covering only a limited area, generally determined by the height of the antennas, the local topography and terrain, as well as obstructions such as buildings and structures.

To achieve a desired coverage within the intended geographical coverage area, each antenna facility must be strategically located so as to ensure maximum coverage and a minimum overlap with each other facility. Because of the low power of the system, the antennas are effective only within a limited geographic area. Thus, each facility site is subject to technical and geographical constraints in order to provide reliable and efficient service. The existing pole structure is necessary in order continue providing service to Sprint's and T-Mobile's customers and to permit a future carrier to mount the antennas at a height sufficient to service the intended coverage area and to provide a direct line of sight to the other antenna facilities in their network. Moreover, the proposed height of the antennas is sufficient for the radio signal to clear any obstructions such as trees, buildings, or other structures while simultaneously providing coverage to the intended area.

Poorly located facilities or areas without such a facility will leave "holes", or areas where transmission is not possible. Since one of the primary benefits of the wireless communication system is the ability to communicate to and from any location, a network of facilities that provide seamless coverage is essential. The location and design of each facility in the network is therefore critical to the overall functioning of the entire network. Without a facility at or near this location, Sprint and T-Mobile are unable to provide seamless coverage to its users.

Antenna Description

The panel antennas measure approximately 6'x 2'x 1' or less, refer to Exhibit E for details. The antennae do not generate any noise, dust, fumes, odors, lights, glare, or vibrations. Nor do they interfere with radio, television or telephone reception. The antennae emissions comply with all applicable EPA and FCC emission requirements.

Equipment Description

All of the carrier's related telecommunications equipment cabinets are enclosed within the proposed lease area and are situated near the base of the pole structure. Neither the antennae nor the related equipment will produce any noise, fumes, dust, odors, lights, glare or vibrations.

APPLICABLE LEGAL STANDARDS

Section 704 of the 1996 Telecommunications Act requires that State and local governments "(I) shall not unreasonably discriminate among providers of functionally equivalent [wireless telecommunications] services; and (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services." Accordingly, local governments cannot prohibit, either by law or by action, wireless telecommunications facilities. Regulations cannot have the effect of prohibiting wireless facilities, even though it may purport to allow such facilities. Moreover, local governments must undertake to consider all wireless telecommunications zoning requests on an equal basis.

Applicants submit its proposed facility on the subject property and that with the addition of the new properties acquired by Back River complies with the Baltimore County Zoning Ordinance. The granting of a Special Exception use will be in harmony with the spirit and intent of the Zoning Regulations; and will not be injurious to the neighborhood or otherwise detrimental to the public welfare. The proposed use complies with the special exception criteria. The Baltimore County Special Exception criteria follow in boldface; Applicant's response immediately follows in italics.

ARTICLE 5, ADMINISTRATION AND ENFORCEMENT.

Section 502 Special Exceptions

502.1 Before any special exception may 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;**

Applicants' Response: The existing wireless communication facility has demonstrated not to be detrimental to the health, safety and/or general welfare of the locality involved. In addition, none of the carriers installations have or will interfere with radio, television or telephone reception and the emissions comply with all applicable EPA and FCC emission requirements. Furthermore, neither the antennae nor the related equipment will produce any noise, fumes, dust, odors, lights, glare or vibrations. Finally, the health, safety and general welfare of the locality is currently and will continue to advanced from the approval of the existing wireless telecommunication facility by the governmental agencies, the people and businesses that utilize its services in their daily activities and/or duties.

- B. Tend to create congestion in roads, streets or alleys therein;**

Applicants' Response: The existing monopole is an unmanned facility that requires only one or two monthly maintenance visits and, therefore, it has had and will continue to have a minimal impact in terms of usage or traffic.

C. Create a potential hazard from fire, panic or other danger.

Applicants' Response: The existing wireless communication facility was built to comply with all Federal, State and Local requirements. In addition, history has proven that wireless communication facilities do not create potential fire, panic or other hazards to the surrounding community.

D. Tend to overcrowd land and cause undue concentration of population;

Applicants' Response: See Answer to Paragraph B above.

E. Interfere with adequate provisions for schools, parks, water, sewerage, transportation or other public requirements, conveniences or improvements;

Applicants' Response: The existing facility is unmanned with only 1 or 2 monthly maintenance visits. It has not and will not produce any noise, vibrations, odors or Fumes which may interfere with conveniences or improvements. Further, it does not require water or sewer facilities. Applicants' proffer that the existing facility has enhanced the service provided to the nearby schools, emergency response agencies, businesses and residents which are customers of Sprint and T-Mobile.

F. Interfere with adequate light and air.

Applicants' Response: The existing facility is located to the rear of the property owned by Back River, LLC behind the existing strip mall and is surrounded by dense vegetation. The proposed utility is unobtrusive. It blends with its environment and it does NOT interfere with adequate light and air.

G. Be inconsistent with the purposes of the property's zoning classification nor in any other way inconsistent with the spirit and intent of these Zoning Regulations.

Applicants' Response: Applicant, Back River LLC, has obtained deeds to portions of the properties that abut to the right and to the rear of 810 Back River Neck Rd and also has a contractual agreement for a portion of the property that abuts to the left of 810 Back River Neck Rd in order to meet the County of Baltimore's 200' setback requirements. Hence, the existing wireless communication facility will be consistent with the purposes of the property's zoning classification nor will it in any other way be inconsistent with the spirit and intent of these Zoning Regulations if approved. In addition, a Wireless Telecommunication Facility is permitted by way of Special Exception according to the County of Baltimore's Zoning Ordinance, see Section 1A05.C.8

H. Be inconsistent with the impermeable surface and vegetative retention provisions of these Zoning Regulations.

Applicants' Response: Applicants have taken great care to locate the wireless telecommunication facility away from existing resource protection areas and woods. Furthermore, the existing facility disturbs less than 2,500 sq. ft. of the Back River property. Applicant submits that the existing wireless

facility is not inconsistent with the impermeable surface and vegetative retention provisions of these Zoning Regulations.

- I. Be detrimental to the environmental and natural resources of the site and vicinity including forests, streams, wetlands, aquifers and floodplains in an R.C.2, R.C.4, R.C.5 or R.C.7 Zone.**

Applicants' Response: The property is allegedly located² and surrounded by RC.20 and ML zoning area, hence, none of the zone mentioned will be affected. Also, see response to Paragraph H above.

Article 4. Section 426.6 Setback requirements for wireless telecommunications towers.

- A. A tower shall be set back at least 200 feet from any other owner's residential property line.**

Applicants' Response: See response to Paragraph G above.

- B. A structure housing equipment for a tower shall meet the minimum setback requirements from any other owner's property or zone line.**

Applicants' Response: See response to Paragraph G above.

Conclusion

The growing utilization of wireless technology cannot be doubted. Wireless communication not only facilitates economic growth but is also invaluable in providing emergency and other services to the community of Baltimore County.

The applicants, respectfully request approval of the Special Exception and a 10' (h) extension for the telecommunications monopole located on 810 Back River Neck Rd as described above in this Justification Statement and as indicated in supporting exhibits accompanying this document. The applicant has proved the public need and benefit to the citizens, business owners and emergency services of Baltimore County and its Government. The application is in compliance with the Baltimore County Zoning Ordinance. Granting of the Special Exception, Special Hearing and the 10' (h) extension will, therefore, be appropriate and in the best interest of Baltimore County its citizens and public agencies.

692445v.1

² See Footnote Number 1

439 East Main Street
Westminster, MD 21157-5539



410-848-1790
FAX (410) 848-1791

Back River Neck Road

A description of a 5.9002 acre parcel of land located on the west side of Back River Neck Road in the 15th Election District of Baltimore County, Maryland.

Beginning at a rebar and cap marked "KCI" found on the westerly right-of-way line of Back River Neck Road, thence in a southerly direction with the said right-of-way line.

1. By a non tangent curve to the right having a radius distance of 775.00 feet, an arc length of 228.14 feet being subtended by a chord bearing and distance of South 04 degrees 41 minutes 38 seconds West, 227.32 feet to a point at the end of the 5th or North 63 degrees 47 minutes 49 seconds East, 779.71 foot line of a deed from Henry A. Pettit and Helen G. Pettit his wife to Theodore Julio and Anna Julio dated May 8, 1973 and recorded among The Land Records of Baltimore County, Maryland in Liber 5361, folio 664 thence leaving said right-of-way and binding on and running reversely with a portion of the said 5th line;
2. South 74 degrees 15 minutes 00 seconds West, 445.36 feet to a point, thence leaving said 5th line and running for two (2) new lines of division through the land now or previously owned by Theodore Julio;
3. South 15 degrees 45 minutes 00 seconds East, 126.00 to a point, thence;
4. South 74 degrees 15 minutes 00 seconds West, 323.00 to a point on the 4th or North 26 degrees 12 minutes 11 seconds West, 491.92 foot line of the aforementioned deed 5361/664, thence binding on and running with a portion of said 4th line;
5. North 15 degrees 45 minutes 00 seconds West, 49.00 feet to a point on the 2nd or North 16 degrees 53 minutes West, 1356 foot line in a deed from Robert B. Simms and Brenda J. Scruggs to Back 50, LLC dated August 17, 2004 and recorded among said land records in Liber 20628, folio 117, thence leaving said 2nd line and running for three (3) new lines of division through the land now or previously owned by Back 50, LLC;
6. South 74 degrees 15 minutes 00 seconds West, 65.50 feet to a point, thence;
7. North 15 degrees 45 minutes 00 seconds West, 300.00 feet to a point, thence;

Cont# 2008-0531-SPHY

Serving Maryland, Pennsylvania, Virginia & West Virginia with offices in:

Westminster
439 East Main Street, Westminster, MD 21157
(410) 848-1790 • (410) 848-1791 FAX

Frederick
8445 Progress Drive, Suite BB, Frederick, MD 21701
(301) 662-1799 • (301) 662-8004 FAX



8. North 74 degrees 15 minutes 00 seconds East, 65.50 feet to a point at the beginning of the 4th or South 15 degrees 45 minutes 00 seconds 223.00 foot line of a deed from Anthony D. Luciano, Personal Representative of the Estate of Augustine L. Luciano and Ruth Elise Luciano to Back River, LLC dated February 2, 1999 and recorded among the said land records in Liber 13577, folio 535, thence binding on and running with the aforementioned 2nd line;
9. North 15 degrees 45 minutes 00 seconds West 33.00 feet to a point at the end of the fifth or South 74 degrees 15 minutes West, 30.00 foot line as described in a deed of conveyance from Maria Luciano to Albert Ladanyi and Eva I. Ladanyi, dated January 27, 1976 and recorded among the Land Records of Baltimore County, Maryland in Liber E.H.K. 5606 folio 589 etc.; thence binding on and running reversely with the fifth, fourth and third lines, as follows;
10. North 74 degrees 15 minutes 00 seconds East, 30.62 feet, thence;
11. By a curve to the right an arc length of 65.98 feet having a radius of 40.00 feet and being subtended by a chord bearing and distance of North 31 degrees 45 minutes 42 seconds East 58.75 feet, thence;
12. North 79 degrees 01 minutes 02 seconds East passing over a point the distance of 85.35 feet at the beginning of said third line, said point also being at the end of the fourth or South 79 degree 01 minute West 91.32 foot line as described in a deed of conveyance from Maria Luciano to Frank DiAngelo and Anthony A. DiAngelo, dated January 27, 1967, and recorded among the aforesaid Land Records in Liber E.H.K. 5606 folio 587, in all, a distance of 176.67 feet to a point at the beginning thereof; thence binding on and running with a part of the third or South 74 degree 15 minute West 68.08 foot line of said deed;
13. North 74 degrees 15 minutes 00 seconds East 25.00 feet; thence leaving said line for a new line of division;
14. South 15 degrees 45 minutes 00 seconds East 58.00 feet to a point on the third or South 74 degree 15 minute West 650.00 foot line as described in the abovementioned conveyance from Luciano et al to Back River, LLC (13577/535); thence binding on and running reversely with a part of said third line;
15. North 74 degrees 15 minutes 00 seconds East, 375.00 feet to a rebar and cap marked "KCI" at the end of the 2nd or North 15 degrees 45 minutes 00 seconds West, 10.00 foot line of the aforementioned deed 13577/535, thence binding on and running reversely with the 2nd and 1st lines of said deed;

DEPARTMENT OF **PLANNING, REVENUE AND DEVELOPMENT MANAGEMENT**
ZONING REVIEW

ADVERTISING REQUIREMENTS AND PROCEDURES FOR ZONING HEARINGS

The Baltimore County Zoning Regulations (BCZR) require that notice be given to the general public/neighboring property owners relative to property which is the subject of an upcoming zoning hearing. For those petitions which require a public hearing, this notice is accomplished by posting a sign on the property (responsibility of the petitioner) and placement of a notice in a newspaper of general circulation in the County, both at least fifteen (15) days before the hearing.

Zoning Review will ensure that the legal requirements for advertising are satisfied. However, the petitioner is responsible for the costs associated with these requirements. The newspaper will bill the person listed below for the advertising. This advertising is due upon receipt and should be remitted directly to the newspaper.

OPINIONS MAY NOT BE ISSUED UNTIL ALL ADVERTISING COSTS ARE PAID.

For Newspaper Advertising:

Item Number or Case Number: 2008 - 0531-SPHX
Petitioner: Back River LLC
Address or Location: 810 Back River Neck Rd

PLEASE FORWARD ADVERTISING BILL TO:

Name: Jay O'Neil
Address: 7055 Samuel Morse Dr Suite 100
Columbia Md. 21046
Telephone Number: 202-457-1652

Revised 2/20/98 - SCJ

Certificate of Posting

RE: Case NO. 2008-0531-SPHX

Petitioner/Developer _____

Back River, LLCDate of Hearing/Closing 8/20/08

Baltimore County
Department of Permits and Development Managements
County Office Building - Room 111
111 W. Chesapeake Ave.
Towson, Md. 21204

Attention:

This letter is to certify, under penalties of perjury, that the necessary sign(s) as required by law, were posted conspicuously on the property located at _____

810 Back River Neck Road

The sign(s) were posted on 8/5/08
(Month, Day, Year)

Sincerely,

(Signature of sign Poster and date)Richard E. Hoffman
(Printed Name)

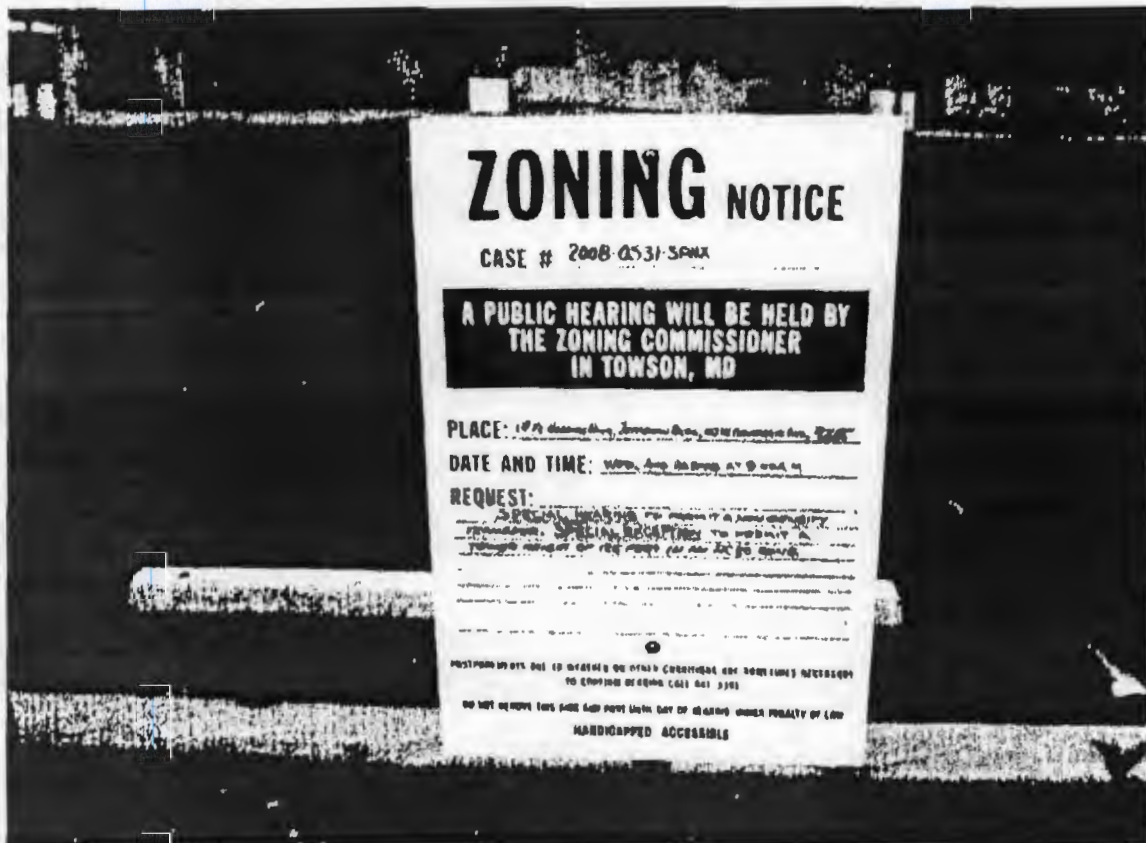
See Attached
Photograph

904 Dellwood Drive
(Address)Fallston, Md. 21047
(City, State, Zip Code)410-879-3122
(Telephone Number)

Certificate of Posting
Photograph Attachment

Re: 2008-0531-SPHX

Petitioner/Developer: _____

Back River, LLCDate of Hearing/Closing: 8/20/08

810 Back River Neck Road

Posted: 8/5/08Richard E. Hoffman

BALTIMORE COUNTY, MARYLAND
OFFICE OF BUDGET AND FINANCE
MISCELLANEOUS RECEIPT

No. **13962**

Date:

5/9/08

PAID RECEIPT

BUSINESS ACTUAL TIME ORN
 5/12/2008 5/09/2008 15:33:31 2

REC 805 WALKIN DDOL DHD
 >>RECEIPT N 444097 5/09/2008 01LN

Fund	Agcy	Orgn	Sub Orgn	Rev Source	Sub Rev	Rept Catg	BS Acct	Amount
001	006			6150				205.00
001	006			6150				705.00

Total: **705.00**

5 528 ZONING VERIFICATION

013962

Recpt Tot \$705.00

\$705.00 OK \$1.00

Baltimore County, Maryland

Rec

From:

Back River LLC

2008-0531 SPH

For:

**810 Back River Neck
 Essex MD 21221**

DISTRIBUTION

WHITE - CASHIER

PINK - AGENCY

YELLOW - CUSTOMER

**CASHIER'S
 VALIDATION**

**NEW NOTICE
OF ZONING HEARING**

The Zoning Commissioner of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County will hold a public hearing in Towson, Maryland on the property identified herein as follows:

Case: # 2008-0531-SPHX
810 Back River Neck Road
West/South of Back River Neck
Road, 207 feet S/of Potter
Farm Road

15th Election District
6th Councilmanic District
Legal Owner(s): Back River,
LLC

Contract Purchaser: APC Real-
ty & Equipment Co., LLC/Sprint
Nextel

Special Hearing: to permit a
non-density transfer. **Special
Exception:** to permit a tower
height of 125 feet in an RC20
zone.

Hearing: Wednesday, August
20, 2008 at 9:00 a.m. in 1st
Floor Hearing Room, Jeffer-
son Building, 105 West Ches-
apeake Avenue, Towson
21204.

WILLIAM J. WISEMAN, III
Zoning Commissioner for Balti-
more County

NOTES: (1) Hearings are
Handicapped Accessible; for
special accommodations
Please Contact the Zoning
Commissioner's Office at
(410) 887-4386.

(2) For information concern-
ing the file and/or hearing,
Contact the Zoning Review Of-
fice at (410) 887-3391.

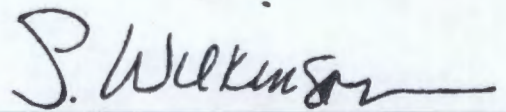
JT 8/601 Aug. 5 179905

CERTIFICATE OF PUBLICATION

8/7/, 2008

THIS IS TO CERTIFY, that the annexed advertisement was published
in the following weekly newspaper published in Baltimore County, Md.,
once in each of 1 successive weeks, the first publication appearing
on 8/5/, 2008.

- ☒ The Jeffersonian
- ☐ Arbutus Times
- ☐ Catonsville Times
- ☐ Towson Times
- ☐ Owings Mills Times
- ☐ NE Booster/Reporter
- ☐ North County News



LEGAL ADVERTISING

*adjacent tower
nearby*

IN RE: **PETITION FOR SPECIAL
EXCEPTION**

SW/S Back River Neck Road, 800' N
of c/line Pottery Farm Road
(720 Back River Neck Road)
15th Election District
6th Council District

Patricia Shaneybrook & Susan Basso
Owners

Cellco Partnership, *Contract Lessee*
Petitioners

BEFORE THE

ZONING COMMISSIONER

OF

BALTIMORE COUNTY

Case No. 07-506-X

* * * * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Zoning Commissioner for consideration of a Petition for Special Exception filed by the legal owners of the subject property, Patricia Shaneybrook and Susan Basso and the Contract Lessee, Cellco Partnership d/b/a Verizon Wireless, through their attorney, David H. Karceski, Esquire. The Petitioners request a special exception pursuant to Sections 1A05.2.C.8, 1B01.1.C.24, 426.5.D and 502.1 of the Baltimore County Zoning Regulations (B.C.Z.R.), to permit a wireless telecommunications tower/facility on the property. The subject property and requested relief are more particularly described on the site plan submitted which was accepted into evidence and marked as Petitioners' Exhibit 1A.

Appearing at the requisite public hearing in support of the request on behalf of the owners was Brian G. West, Esquire. Jay Schapiro, Verizon's Real Estate Site Acquisition Manager, and Scott Kass, its RF Engineer, appeared on behalf of Verizon Wireless along with David Karceski, Esquire and Christopher D. Mudd, attorneys for Cellco Partnership. Also appearing were Thomas E. Wolfe, registered landscape architect, and Brian E. Siverling, professional engineer, with Morris & Ritchie Associates, Inc., the firm responsible for the

preparation of the site plan. There were no Protestants or other interested persons present, however, it is noted that a letter was received from the Back River Neck Peninsula Community Association supporting the proposed tower at this location which was accepted into evidence as Petitioners' Exhibit 5.

Testimony and evidence revealed that the subject property is an unimproved parcel located adjacent to and on the west side of Back River Neck Road just south of Turkey Point Road in Essex across from the Chesapeake High School and the site of the Turkey Point Middle School.¹ The property consists of a gross area of 9.76 acres, more or less, predominantly zoned R.C.20 with a small sliver of D.R.3.5 and B.L. in the southeastern corner of the site. Petitioners seek to install a new telecommunications tower and equipment shelter on the property, as illustrated on Petitioners' Exhibit 1B. The location proposed for this telecommunications compound is to the western or rear portion of the site. Specifically, Verizon Wireless proposes to install a 120-foot tall telecommunications monopole with antennas and related equipment shelters on the property. As confirmed by its representatives at the hearing, they conducted an extensive search for an appropriate site for either antennas or a new tower to address the service problems in the area. That search resulted in the identification of the subject property as a potential location for a new tower after other possibilities, such as existing buildings or structures or commercially zoned properties, were exhausted. A drive test confirmed the suitability of the site, and Verizon Wireless then worked with both the property owners and the surrounding community to come up with a tower proposal that satisfied everyone's needs and concerns.

¹ The history of this property indicates a Petition for Special Exception approving an adult day care center was granted in Case No. 00-139-X. B.C.Z.R. Section 502.3 requires a utilization of such a use take place within a two-year period. This time restriction having passed and no extensions granted, the Order is now void.

The proposed tower is in essence a replacement tower for an existing wireless communications facility located at 810 Back River Neck Road previously approved by the then Zoning Commissioner Lawrence E. Schmidt in Case No. 02-159-A. On appeal, however, certain setback relief necessary for that tower's existence was ultimately denied. The Office of Planning, in its July 26, 2007 Zoning Advisory Committee (ZAC) comment, recognized that the 810 Back River Neck Road tower is now operating illegally on that property. For this reason, and the reasons more fully set forth in the unreported Court of Special Appeals decision entitled *Sprint PCS, et al v. Baltimore County*, Md. Case No. 0047 (September term 2004), the Petitioner filed the instant Petition for Special Exception.

The Office of Planning issued an original comment, dated July 19, 2006. In its comment, Planning recommended approval of the requested relief provided that the Petitioner presented evidence that best efforts in minimizing the visual impact of the proposed tower was presented given the towers location in a resource conservation zone. Additionally, the July 19th comment requested that an approval for this tower be restricted to the removal of an existing monopole tower presently located at 810 Back River Neck Road. In its revised July 26, 2007 ZAC comment, the Office of Planning indicating that the Code Enforcement Office should take the necessary steps needed for the removal of the tower within 180 days from the date the subject replacement tower is constructed and determined to be operational. Jeffrey Long, Deputy Director for the Office of Planning, attended the hearing in this regard. During the presentation of the case, he reviewed Petitioners' photographs that revealed the limited visibility of the proposed tower (*See* Petitioner's Exhibit 9) and confirmed his office's satisfaction regarding the tower's location on the property. Additionally, Mr. Long confirmed his office's position regarding the 810 Back River Neck Road tower and its removal as contained in the July 26th

ZAC comment. After reviewing the Courts opinion as articulate in *Sprint v. Baltimore County* (Petitioners' Exhibit 10), I concur with the Office of Planning's viewpoint regarding the removal of the existing tower following the installation and activation of Petitioners' tower.

The Department of Environmental Protection and Resource Management (DEPRM) submitted a ZAC comment following the public hearing in this case on August 2, 2007. DEPRM's comment indicated that the property was within the Resource Conservation Area of the Chesapeake Bay Critical Area. DEPRM's reviewer, Kevin Brittingham, outlined the required goals to be met. As a condition of approval, I will incorporate these comments and attach them to this Order.

As Verizon Wireless confirmed, a 120-foot tower is tall enough to serve its purposes and allow for potential co-location, yet low enough that the impacts on the residents of the surrounding neighborhood are minimized. The location of the tower on the property also helps minimize its appearance.

Having considered all of the evidence and testimony on these points, I am persuaded to grant the Petition for Special Exception. Verizon Wireless's efforts in trying to find an appropriate site and in working with the community to come up with an acceptable proposal are evidenced by the letter of support from the community written by Mr. Celmer and from the lack of any opposition at the hearing. I have examined the proposal in the context of B.C.Z.R. Sections 426 and 502.1, and find that Petitioners have produced strong and substantial evidence at the hearing that the proposed telecommunications tower/facility is appropriate at this site, meets the County's requirements for a new tower, and will have little or no impact, visual or otherwise, on the surrounding community. Petitioners are, therefore, entitled to the relief

requested. It is clear that they have made every effort to identify a suitable location and have taken steps to minimize the impacts in its design, placement and construction.

Pursuant to the advertisement, posting of the property, and public hearing on this Petition held, and for the reasons set forth above, the Petition for Special Exception shall be granted.

THEREFORE, IT IS ORDERED by the Zoning Commissioner of Baltimore County this _____ day of August 2007, that the Petition for Special Exception for a wireless telecommunications tower/facility pursuant to Sections 1A05.2.C.8, 1B01.1.C.24, 426.D and 502.1 of the Baltimore County Zoning Regulations (B.C.Z.R.), in accordance with Petitioners' Exhibits 1A and 1B, be and is hereby GRANTED, subject to the following restriction:

1. Petitioners may apply for building permits and be granted same upon receipt of this Order; however, Petitioners are hereby made aware that proceeding at this time is at their own risk until such time as the 30-day appellate process from this Order has expired. If, for whatever reason, this Order is reversed, the relief granted herein shall be rescinded.
2. Compliance with the ZAC comment submitted by DEPRM relative to compliance with the Chesapeake Bay Critical Area regulations as contained in the Baltimore County Code as well as the Resource Conservation Area comments set forth in the revised remarks, dated August 2, 2007, a copy of which is attached hereto and made a part hereof.

Any appeal of this decision must be made within thirty (30) days of the date hereof.

WILLIAM J. WISEMAN, III
Zoning Commissioner
for Baltimore County

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0047

September Term, 2004

SPRINT PCS, ET AL.

v.

BALTIMORE COUNTY, MARYLAND

Eyler, James R.,
Adkins,
Barbera,

JJ.

Opinion by Adkins, J.

Filed: August 3, 2005

RECEIVED
JUL 24 2007

PETITIONER'S

BY:.....

3C03005849

EXHIBIT NO. _____

Sprint PCS and Back River, LLC,¹ appellants, petitioned Baltimore County zoning authorities for setback variances so that they could build a wireless telecommunications tower. The Baltimore County Zoning Commissioner granted the variances on the ground that the subject property is "unique" in that the setback requirements for such a tower preclude this permitted use of the property due to the narrow width of the property. On de novo appeal, however, the Baltimore County Board of Zoning Appeals (the Board) denied the variances on the ground that the property is not unique. The Board's decision was affirmed by the Circuit Court For Baltimore County. Sprint asks us to overturn the circuit court's affirmance of the Board's decision.

FACTS AND LEGAL PROCEEDINGS

Back River LLC owns the subject property, which is a 4.31 acre parcel located at 810 Back River Neck Road on the Back River Peninsula in eastern Baltimore County, near the intersection of Pottery Farm Road. The parcel has a long rectangular shape. Its width, the frontage on Back River Neck Road, is 223 feet. Its length is approximately 850 feet on the northern boundary and 763 feet along the southern.

The property is designated by the Baltimore County Master Plan 2010 as a "gateway" to the peninsula. It is zoned Manufacturing Light (ML) and has been the site of commercial uses for more than

¹Back River LLC owns the subject property, and leases a portion of it to Sprint PCS. For convenience, we shall refer to both appellants collectively as Sprint.

60 years. There are currently two one-story commercial buildings, one of which is a strip business center housing the owner's construction business, a dry cleaner, landscaper, beauty salon, and carpet store. The other building is a storage facility.

These buildings, along with a macadam parking lot, are located in the "front" half of the parcel nearest the road. Across the street is a medic station and a former elementary school that has most recently been used as a community center. Along the northern boundary in that portion of the lot is a private drive serving three residential properties with existing dwellings. The "rear" part of the parcel is not developed, except that a large part of it is graveled so that it can be used for storage of construction vehicles, boats, etc. This portion of the property is bordered on the north by three vacant and wooded lots, all of which are zoned Rural Conservation 20 (RC20). The southern boundary is bordered by RC20 property on which there is a residence.

Sprint seeks to improve network coverage for its cellular services, due to customer complaints and company studies suggesting that Sprint's service is unreliable in this area. Studies showed that, in order to bridge the gaps in network service, Sprint would have to add wireless facilities within a "search ring" determined by its radio frequency engineers. This search ring measures approximately one mile north to south and 1/4 mile east to west along Back River Neck Road.

recommendation from the Baltimore County Tower Review Committee (TRC), whose members represent the Office of Planning, the Office of Budget and Finance, and the community. The TRC concluded that Sprint "provided ample documentation that the 115-foot monopole . . . is indeed required for the network." It recommended that the construction be approved if Sprint agreed that two other carriers could also use the tower and appropriate landscaping was installed as a buffer for the tower and equipment cabinets.

On May 14, 2001, the Baltimore County Development Review Committee (DRC), "which is composed of each of those departments involved in land-use decisions[,] " issued an administrative order finding the proposed facility "meets the requirements of a limited exemption under Section 26-171(A) (7)" of the Baltimore County Code. The DRC authorized Sprint to "proceed with building permit application."

With these in hand, Sprint petitioned for setback variances on October 19, 2001. In support of its application, Sprint asserted that the shape of the parcel and its location in the midst of surrounding vegetation distinguishes this parcel from other properties in the area. Sprint presented evidence that one of the other parcels is zoned Business Light and is located immediately northeast of this site, approximately 165 feet deep and 221 feet wide. Another parcel is zoned ML and located on the east side of Back River Neck Road to the south of the subject property, but it

DISCUSSION

Setbacks And Variances For Wireless Telecommunications Towers

Baltimore County Zoning Regulations (BCZR) establish front, rear, and side setbacks based primarily upon three factors: (1) the use for the subject property, (2) the zoning classification of the subject property, and (3) the zoning classifications of neighboring properties. For ML sites surrounded by residentially zoned properties, the standard rear and side setback is 50 feet. See BCZR § 255.1, § 243.2, § 243.3. But a wireless telecommunications tower on such a site must satisfy a greater setback requirement - at least 200 feet from any residential boundary. See BCZR 426.6.A.1. And "[a] structure housing equipment for a tower" must be set back 120 feet from "any other owner's property or zone line."

Relief from these setbacks is available via an area variance. Under BCZR section 426.6.11 governing setbacks for wireless telecommunications towers, "[t]he Zoning Commissioner, and Board of Appeals upon appeal, may grant a variance to a[n] . . . area requirement, including any setback[.]" "A variance refers to administrative relief which may be granted from the strict application of a particular development limitation in the zoning ordinance (i.e., setback, area and height limitations, etc.)." *Mayor and Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md.

514, 537 (2002). A variance authorizes the property owner "to use his property in a manner forbidden'" by applicable zoning restrictions. See *Cromwell v. Ward*, 102 Md. App. 691, 700 (1995). In contrast to special exceptions, which "contemplate a permitted use . . . [once] the prescribed conditions are met[.]" a variance "contemplates a departure from the terms of the [zoning] ordinance in order to preclude confiscation of the property[.]" *Id.* at 699-700 (citations omitted).

The test that governs variance requests generally also governs tower variance requests:

The zoning commissioner of Baltimore County and County Board of Appeals, upon appeal, shall have and they are hereby given the power to grant variances from height and area regulations . . . only in cases **where special circumstances or conditions exist that are peculiar to the land or structure which is the subject of the variance request** and where strict compliance with the Zoning Regulations for Baltimore County would result in practical difficulty or unreasonable hardship. . . . [A]ny such variance shall be granted only if in strict harmony with the spirit and intent of said . . . area . . . regulations, and only in such manner as to grant relief without injury to public health, safety and general welfare. They shall have no power to grant other variances. . . .

BCZR § 307.1 (emphasis added); see BCZR § 426.11 (area setback for wireless telecommunications tower and related equipment may be granted "in accordance with Section 307").

"The burden of showing facts to justify . . . [a] variance rests upon the applicant[.]" *Easter v. Mayor and City Council of*

Baltimore, 195 Md. 395, 400 (1950). Both the "special circumstances or conditions" requirement, which is typically referred to as the "uniqueness" element, and the "practical difficulty" element of the two-pronged test must be satisfied. "[T]he law in Maryland and in Baltimore County under its charter and ordinance remains as it has always been--a property's peculiar characteristic or unusual circumstances relating only and uniquely to that property must exist in conjunction with the ordinance's more severe impact on specific property because of the property's uniqueness before any consideration will be given to whether practical difficulty or unnecessary hardship exists." *Cromwell*, 102 Md. App. at 721. Here, the Board did not reach a decision regarding practical difficulty because it concluded that Sprint failed to prove uniqueness. Our focus, therefore, is on the Board's factual finding that the property is not unique.

Judicial Review Of The Board's Decision

In reviewing the denial of an area variance request, we examine whether the Board, "as an administrative agency, correctly reached the conclusions required by the Zoning Ordinance for the [denial] of a variance[,]" which means that "we must review the administrative decision itself." *Mastandrea v. North*, 361 Md. 107, 133 (2000); see also *Stansbury v. Jones*, 372 Md. 172, 182 (2002) (standard of appellate review is "the same whether the agency grants or denies" the variance). This means that our role is "to

repeat the task" performed by the circuit court. See *Red Roof Inns, Inc. v. People's Counsel for Baltimore County*, 96 Md. App. 219, 224 (1993).

We may "uphold the decision of the Board only 'on the basis of the agency's reasons and findings.'" *Umerley v. People's Counsel for Baltimore County*, 108 Md. App. 497, 504, cert. denied, 342 Md. 584 (1996). For factual findings, "the correct test . . . is whether the issue before the administrative body is 'fairly debatable,' that is, whether its determination is based upon evidence from which reasonable persons could come to different conclusions." *White v. North*, 356 Md. 31, 44, 50 (1999); see *Stansbury*, 372 Md. at 182. If we find evidence to support the Board's action, we may not substitute our judgment even if the evidence also supports different factual inferences. See *Mastandrea*, 361 Md. at 133.

Consequently, we must decide whether the Board erred in concluding that the parcel has no special circumstances or conditions that make it unique for variance purposes.

Special Circumstances Or Conditions

As we noted above, the "special circumstances or conditions" prong of the variance test is commonly referred to as a "uniqueness" requirement, even though it is not necessary for the applicant to show truly unique circumstances. Uniqueness has a "rather specialized meaning" in zoning law. See *Umerley*, 108 Md.

App. at 506. As Judge Cathell explained when he was a member of this Court,

"[u]niqueness" of a property for zoning purposes requires that the subject property have an inherent characteristic not shared by other properties in the area, i.e., its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions) or other similar restrictions. .

An example of uniqueness is found in the use variance case of *Frankel v. Mayor and City Council*, 223 Md. 97, 104 (1960), where the Court noted: "[H]e met the burden: the irregularity of the ... lot that it was located on a corner of an arterial highway and another street, that it is bounded on two sides ... by parking lots and public ... institutions, that immediately to its south are the row houses...."

In some zoning ordinances, the specialness or uniqueness requirement is more explicitly set out. The Court of Appeals, in *Ad + Soil, Inc. v. County Comm'rs*, 307 Md. 307, 339 (1986), quoted from the Queen Anne's County ordinance:

"Where by reason of the exceptional narrowness, shallowness, or unusual shape of a specific ... property ..., or by reason of exceptional topographic conditions or other extraordinary situation or special condition of ... property ... the literal enforcement ... would make it exceptionally difficult ... to comply ... and would cause unwarranted hardship and injustice...."

The general thrust of the meaning of special features or uniqueness of property for variance purposes relates to the type of uniqueness discussed by the Court in *Ad + Soil, Inc.*

North v. St. Mary's County, 99 Md. App. 502, 514-15, cert. denied sub nom. *Enoch v. North*, 336 Md. 224 (1994) (emphasis added). See also *Lewis v. Dep't of Natural Resources*, 377 Md. 382, 434 (2003) (adopting this standard).

Thus, "the initial and essential first step in the determination of appropriateness of an area variance" is whether "the subject property is so inherently unique that the ordinance's impact thereon would be disproportionate when compared to other lands in the district." *Chester Haven Beach P'ship v. Bd. of Appeals for Queen Anne's County*, 103 Md. App. 324, 338 (1995); see also *Umerley*, 108 Md. App. at 506 ("the zoning authority must determine whether the subject property is unique and unusual in a manner different from the nature of the surrounding properties such that the uniqueness or peculiarity of the property causes the zoning provision to have a disproportionate impact on the property").

The Court of Appeals has recognized that special conditions may exist when "'property, due to unique circumstances applicable to it, cannot reasonably be adopted to use in conformity with the restrictions of the zoning ordinance[.]'" *Salisbury Bd. of Zoning Appeals v. Bounds*, 240 Md. 547, 554 (1965) (citation omitted).

Thus, the fundamental issue in an area variance petition is "whether the property owner . . . is being denied a reasonable use of property" if the variance is denied. *Lewis*, 377 Md. at 419. In such cases, the grant of a variance may be appropriate relief. See *Bounds*, 240 Md. at 554.

Our review of Maryland case law reveals a number of appellate cases addressing uniqueness. In many cases denying a variance on this ground, the petitioner did not satisfy its burden of proof because the unique circumstances were caused by the plight of the property owner rather than by a characteristic of the land itself. See *Cromwell*, 102 Md. App. at 719.

For example, in *Ad + Soil, Inc. v. County Comm'rs*, 307 Md. 307, 339 (1986), the petitioner sought setback variances for four acres it had purchased to develop as a sludge storage and distribution facility, but later learned of local restrictions on where the facility could be situated within the parcel. The setback variances were denied because the lot was large enough to comply fully with the mandatory setbacks simply by relocating the proposed facility on the property. The Court of Appeals agreed with the Queen Anne's County Board of Appeals that the need for the variance did not result from exceptional or extraordinary characteristics of the land itself. See *id.* at 340-41.

Similarly, in *Umerley*, the applicants sought setback variances so that they could continue to operate their trucking facility,

which pre-dated Baltimore County zoning regulations prohibiting such facilities within certain distances of residential zones, wetlands, and a major road. This Court held that the Board of Appeals erred in failing to consider whether the property was unique, but proceeded to determine as a matter of law that there was insufficient evidence to support a finding of uniqueness. See *Umerley*, 108 Md. App. at 506-08. Because neither the long-term violation of the zoning laws, nor the importance of the business to the county and state economy, could be considered "an inherent characteristic[,]'" there was no evidence from which a uniqueness finding could be made. See *id.* at 508.

In *Evans v. Shore Communications, Inc.*, 112 Md. App. 284 (1998), we affirmed the denial of a height variance necessary to build a wireless telecommunications tower in Talbot County. We specifically rejected the applicant's arguments that the property was unique because it satisfied the technological requirements for wireless service and because it had an elevation that reduced the need for a higher tower on that property or elsewhere. See *id.* at 308.

There are, however, Maryland cases in which courts have acknowledged a showing of uniqueness for purposes of a variance petition. In *Alviani v. Dixon*, 365 Md. 95, 121 (2001), the Court of Appeals affirmed the grant of area variances enabling construction of a automotive service facility in Anne Arundel

County. The 1.2 acre property in question was circular and surrounded by roads and access ramps along US Route 50, as a result of the State having previously obtained portions of that same parcel in order to construct those adjacent roadways. The Court approved the Board's finding that a seven-foot variance from the required 150 feet of road frontage was justified, because "the Petitioners cannot change their amount of lot frontage" given that the parcel "is surrounded on all sides by either unbuildable road rights-of-way or actual road bed[.]" See *id.* at 104.

Writing for the Court, Judge Cathell also pointed to substantial evidence supporting the Board's grant of a 25-foot variance from the 60-foot setback requirement for structures on a highway. See *id.* at 10506. Specifically, the Court agreed that the variance was justified because

the circular shape of the property and its proximity to Route 50 and its service ramps would leave [the petitioners] with "no reasonable possibility of developing the lot with a canopy over the pump islands which meets the requirements of the Zoning Regulations."

Id. at 105-06.

In *Stacy v. Montgomery County*, 239 Md. 189, 193 (1965), the Court of Appeals affirmed the grant of a *de minimis* side setback variance that allowed the applicant to operate a child care home within 25 feet of the property line. That property was a "surveyor's nightmare" in that its front and side boundaries

changed course several times, and the rear property line was approximately 46 feet narrower than the front property line. The Court of Appeals agreed with the Board that "there is no doubt that the shape of the subject property presented the hardship" justifying a setback variance. *Id.* at 194.

Two cases involving the critical area law are of interest. Most recently, in *Lewis*, the Court of Appeals found substantial evidence of uniqueness that would support a critical area variance.⁴ The applicant owned an island on which he wished to build a hunting lodge, but critical area setbacks limited the buildable area of the island to three small, irregularly-shaped, non-contiguous, and heavily vegetated areas. The original building plans were disapproved due to their environmental impact on these buildable areas. Wicomico County zoning authorities concluded that less damage would be done by building within the critical area buffer zone. The property owner began construction of the lodge in critical areas without obtaining the necessary variances, but later applied for them. The County denied the variance requests.

⁴Variance requirements for critical buffer areas differ in some respects from those in non-critical areas. See *Mastandrea*, 361 Md. 107, 139-40 (2000). But an applicant for a setback variance from a 100 foot critical area buffer must show that "strict implementation" of the setback would impede the proposed use due to "the features of the site or other circumstances other than financial considerations[.]" See *id.* at 141-42.

The Court of Appeals vacated that decision and remanded for further administrative proceedings. Writing for a majority of the Court, Judge Cathell explained that, for purposes of the variance application, the material issue was the uniqueness of this property, rather than the applicant's unauthorized construction on it.

[T]he issue of petitioner's construction of his six hunting camp buildings prior to his applying for a variance request is a "red herring." As previously mentioned, under the County Code and, more importantly, **because of the physical characteristics of Phillips Island, petitioner needed a variance to build any camp on the island regardless of whether he had started construction before applying for the variance due to the small, irregular, non-contiguous shape of the non-Buffer area on Phillips Island. . . . Essentially, his claim is that his property has unique physical characteristics which entitle him to receive a variance in order to avoid an unwarranted hardship. The Board should have analyzed petitioner's request in this light and not in the context of a self-created hardship. . . . [H]is hardship was a result of the unique physical features of his property and not because of actions taken by petitioner[.]**

Lewis, 377 Md. at 425-26 (emphasis added).

In *Mastandrea v. North*, 361 Md. 107 (2000), the Court affirmed the grant of a critical area setback variance allowing construction of a brick pathway for the owners' wheelchair-bound daughter to enjoy the waterfront. The petitioners offered evidence that the heavy clay soil substantially inhibited wheelchair travel along the shoreline. The Court of Appeals held that the Talbot

County Board of Appeals "did not have to consider whether denying the variance would have denied the [petitioners] a reasonable and significant use of the 'entire' lot." *Id.* at 136-37. "Rather, the Board was required to (and did) consider whether the property owners, in light of their daughter's disability, would be denied a reasonable and significant use of the waterfront of their property without the access that the path provided." *Id.* at 136. The Board properly "recognized that a literal application of the [setback requirements] would deprive [the daughter] of an ability to enjoy the property on which she resides as others in the area similarly situated may enjoy theirs without the need for a similar path." *Id.* at 138. These facts supported the Board's conclusion "that there was a special condition or circumstance unique to the lot." *Id.* at 137.

Unlike other cases, in *Mastandrea*, the Court found at least part of the uniqueness related to a family member's individual disability that created special needs with respect to the land, rather than the land itself. But it also found that the soil near the river was uniquely unsuited for wheelchair travel because it was "'one of the heaviest clay soils' [the Mastandreas'] expert 'had ever tested[.]'" *Id.* at 136. It did not require that the Mastandreas prove that the soil conditions on neighboring properties were better, largely because the "Commission neither offered any evidence to the contrary nor questioned the

Mastandreas' expert witness on this point[.]” *Id.* at 136-37. Moreover, in reaching its decision, the Court placed paramount emphasis on the daughter's disability and public policy favoring accommodation of disabilities. See *id.* at 137-38. This case may be limited in its application to situations involving special needs for enjoyment of property arising from disabilities.

The Board's Decision

Baltimore County Zoning Regulations permit both the Zoning Commissioner and the Board to grant setback variances. See BCZR § 307.1 (Zoning Commissioner and, upon appeal, the Board have “power to grant variances”); BCZR § 426.11 (Board “may grant a variance . . . in accordance with Section 307”). Here, the Zoning Commissioner found that the narrow shape of the parcel is an inherent and unchangeable characteristic of the property that makes it unique within the meaning of Baltimore County's zoning ordinances. In his memorandum decision, the Commissioner stated:

it is clear that the subject site is a unique property. The uniqueness is driven by the narrowness of the lot. Although the property contains in excess of 4.0 acres in area, it is but 223 feet wide. Section 426.6 of the B.C.Z.R. requires a 200-foot setback from the nearest property line to the tower. In view of the width of the property, this setback cannot be maintained. That is, any site must be a minimum of 400 feet in width to provide appropriate setbacks on all sides. E75-76. (Emphasis added.)

On appeal, the Board disagreed with the Zoning Commissioner's determination that the property is unique:

As to the uniqueness of this particular property, the property is rectangular and flat; there is no unique subsurface conditions, historical significance, or environmental factors to take into consideration. There is no access or non-access to navigable waters and there are no obstructions or abutting properties. The fact that there are trees on the property does not make it unique, since there are numerous properties in the area that possess trees. While this may be the only M.L. property within the "search ring" established by Sprint, this does not make the property unique. The search ring is an artificial area established by Sprint and does not necessarily indicate that there are not other properties in the area where a tower could be located through the granting of a special exception. The fact that a piece of property is zoned M.L. and therefore would allow a tower to be erected on that property as a matter of right does not make the property "unique." E280

Sprint argues:

[T]he subject property is rectangular in shape and only 233' wide at its widest point and, therefore, so narrow that no matter where the telecommunications facility is placed on the property, the setbacks required under the County Zoning Ordinance cannot be satisfied. The record also shows that nearby residentially zoned adjacent properties are shaped wider and are large enough to accommodate the required setbacks, albeit a special exception would be required if the facility were to be placed on such properties. . . . This undisputable fact renders the Property unique, as compared to its neighboring properties. The Board, however, completely ignored this evidence[.]

Because we think the issues of whether the Board made sufficient factual findings to support its decision, and whether the property is "undisputabl[y]" unique, are intertwined, we address them

together.

The problem with Sprint's argument is that this property is not especially narrow.⁵ The property has a width of 223 feet in the area selected for the monopole, which is 140% of the width of a college football field. Residences and businesses are commonly built on properties less than half of this width. See, e.g., V. Woener, Annotation, *Validity and Construction of Zoning Regulations Prescribing a Minimum Width or Frontage For Residence Lots*, 96 A.L.R.2d 1367, § 4 (1964) (citing cases involving various minimum lot frontage or width requirements). Although the length of the property is 3.8 times its width (850 along the northern boundary and 768 along the southern boundary), there was no showing or contention that the length was problematic. As the Board found, it is "currently improved with two buildings that house [a] contracting business and approximately seven other commercial operations[,] as well as "a parking lot which accomodates these uses." The record reveals that, even with these existing uses in the front, there was also space available for another ML use in the rear of the property.

⁵BCZR §307.1 does not specifically identify narrowness or shallowness as a "special circumstance or condition." We assume, but do not decide, that narrowness could also be considered in support of a variance in the absence of explicit mention in the ordinance. As Judge Cathell pointed out with respect to a St. Mary's County ordinance that did not refer explicitly to narrowness or shallowness, "[t]he general thrust of the meaning of special features or uniqueness of property for variance purposes relates to the type of uniqueness discussed by the Court [of Appeals] in *Ad + Soil, Inc.*" See *North*, 99 Md. App. at 515.

Although the standard for uniqueness is not whether there is any other reasonable use for the property, an applicant for a variance must still show "special circumstances or conditions" not shared by other properties in the area, which would cause him unwarranted hardship. See *Lewis*, 377 Md. at 417, 421; *Umerley*, 108 Md. App. at 506. "[A] property's peculiar characteristic or unusual circumstances relating only and uniquely to that property must exist in conjunction with the ordinance's more severe impact on the specific property because of the property's uniqueness[.]" *Cromwell*, 102 Md. App. at 721.

Sprint failed to show that the so-called narrowness of this property differed from other properties in the area. When Marianne Kiernan, an engineer who was Sprint's expert on the zoning criteria, was asked what was unique about the property, she replied:

The property itself is unique in the narrowness of the property itself. It's a long, rectangular parcel approximately 850 feet deep, 223 wide, plus or minus. That makes the property unique in itself.

The setting of the property is unique in this area also. It is surrounded by woodland on the northern, western and southern boundaries. There are two existing structures located on the very front of the property.

The property itself is primarily graveled in the southwestern corner of the property where the subject site is located. There's an open gravel area.

So the property is unique in it[s]

narrowness and in the setting itself basically with the existing structure on the front, near Back River Neck Road, and the open area towards the rear of the parcel.

Thus, Ms. Kiernan gave three reasons for the property's uniqueness:

1) its narrowness; 2) that it was surrounded by woodland on the north, west and south, and 3) the location of the existing structures in the front, with the open area in the back. None of these reasons meets the legal requirement for establishing a variance.

She did not explain why a property that was 223 feet wide was unique in its narrowness. When asked on cross what other properties in the area she compared in order to decide this width was unique, she pointed to no other properties in the area that were any wider. Indeed, she pointed to no other properties at all. Moreover, she acknowledged that she was not saying that "there's no other piece of property in Baltimore County designated M.L. that's shaped like a rectangle that's 200-some feet wide[.]" The following colloquy occurred on cross:

Q: This property is unique compared to what other properties? That's what I meant to ask you.

[Ms. Kiernan]: Okay. If I could explain, I am also bounded within the search ring area that's issued by Sprint PCS. Their intent is to place a telecommunication tower in a particular area.

That area is defined by Sprint RF engineers. Mr. Hassan who testified prior explained how the area itself was defined to

meet Sprint's coverage objective. Within that particular search ring, this subject parcel is unique.

When asked if she was saying: "just because Sprint has identified a [search ring], that makes this piece of property unique compared to other properties in Baltimore County[,]" she simply repeated her mantra, "Yes, I believe the property is unique."

Ms. Kiernan's second and third reasons for calling the property unique related not to a limiting aspect of the property, but rather to factors that made the property a good one for a Sprint tower - that it was surrounded by woodlands, and there was plenty of space in the back of the property. Neither of these factors make it "exceptionally difficult to comply" with the setback, cause unwarranted hardship, or cause the setback to have a "disproportionate impact" on the property. Rather, these are **positive** factors about the site because the woodlands and the buildings on the front provide screening to hide the unappealing visual appearance of the tower. Such positive factors do not support a claim for uniqueness in this context.

By itself, the fact that a property cannot accommodate an otherwise permitted use without an area variance generally does not **require** the grant of a variance.⁶ A contrary result would permit "the exception to swallow the rule," because zoning authorities

⁶If the permitted uses in a particular zone were quite limited, we might apply an exception to this rule. That is not the case in this ML zone.

would be obligated to grant a setback variance simply because the setback requirements would prevent a permitted use. Yet, this appeal rests almost solely on Sprint's theory that the property is unique because it was not wide enough to meet the setback requirements for the monopole.

In its brief, Sprint asserts that "[t]he record also shows that nearby residentially zoned adjacent properties are shaped wider and are large enough to accommodate the required setbacks, albeit a special exception would be required if the facility were to be placed on such properties." We have reviewed the three record extract pages Sprint identifies as support for this assertion. None of the pages contains any evidence that adjacent residentially zoned properties could accommodate the required setbacks.

Extract page 392 is a site plan of the subject property, showing seven adjacent residential lots, two of which are shown to be improved with dwellings. The site plan contains dimensions for the subject property, but none for these adjacent lots. Sprint points to no testimony about the dimensions of these lots, and we have found none. There is no indication about whether these lots are drawn to scale,⁷ so there was no way for the Board to visually

⁷They appear not to be, and two different site plans in the record depict these lots in different sizes relative to the subject property. In other words, in one site plan they appear to be narrower than the subject property, and in another, they appear

(continued...)

compare the sizes from the site plans. Finally, Sprint points to no place in the record where it asked the Board to compare these lots to the subject property for the purposes of determining uniqueness. The memorandum submitted for Sprint in lieu of closing argument contained no such request and never mentioned that these residential lots were larger or that they would suffer less impact from this setback requirement. Sprint cannot complain, on appeal, about the Board's failure to make a factual finding that they never asked the Board to consider.

Extract page 519, an exhibit introduced by Sprint, is a map that depicts the area of the "search ring." It was introduced through the testimony of the president of a site acquisition firm "contracted by Sprint to do site acquisition work and zoning work[.]" He explained that he was given a map by Sprint, showing the search area, and the exhibit was "a blow-up of the map[.]" He explained why the subject property was desirable for purposes of a cellular tower. He did not testify about the size of any other properties depicted on the map, and did not compare the size of other properties with the subject property. Again, this map is not drawn to scale.

Sprint has pointed to no other testimony, and we have found none, about other nearby properties, wider then the subject

⁷(...continued)
broader. In both site plans, the subject properties are drawn to scale.

property, that could accommodate the monopole because of enhanced width. In its closing memorandum submitted to the Board, Sprint claimed that the testimony of People's Counsel's land use expert, Jack Dillon, "supports the uniqueness of the property." His testimony does not support this claim. Dillon said that there were four sites within Sprint's "search ring" on which cellular towers were permitted by right, subject to setback requirements. E. 649. When asked, "are any of those sites at least 400 feet wide and deep at the same time," Dillon answered:

The B.L. to the north is about 300 feet wide, 250 deep. This site is 200 feet wide and 600 feet deep [sic]. The M.L. down further, it's very narrow along the frontage, actually looks like it's probably less than fifty feet wide along the frontage, and extends about 500 feet deep, and widens out in the back to maybe 250 feet, and the B.L. further down is only approximately 200 feet wide and roughly 200 feet deep.

In its closing memorandum, Sprint claimed that the following question and answer by Dillon established uniqueness:

Q: But those four sites [i.e., the three mentioned above plus the subject property] are various shapes and configurations?

A. That's true.

The varying sizes of the four properties does not establish uniqueness because there was no showing that any of them could meet the setback requirement for cellular towers without a variance. As we have explained before, uniqueness is established when the owners of one property suffer a disproportionate impact from the setback

requirement than other nearby owners. See *Umerley*, 108 Md. App. at 505 (for variance, "zoning authority must determine whether the subject property is unique and unusual in a manner different from the nature of the surrounding properties").

Further, the parcel cannot be characterized as unique based solely upon Sprint's search ring.⁸ As *Evans* teaches, the fact that this parcel falls within a geographic area selected by Sprint for technological reasons is not a characteristic that is inherent to the property. See *Evans*, 112 Md. App. at 308.

In short, Sprint points to no evidence, and we are aware of none, that would permit the inference that the alleged narrowness of the subject property means that Sprint suffers a disproportionate impact from the setback requirements, as compared to other nearby property owners. For this reason, we reject Sprint's complaint that the Board erred by not making a factual finding about whether the subject property's alleged narrowness made it unique. Unlike the zoning board's opinion in *Lewis*, in which it failed to say whether the property was unique, here the

⁸In support of its uniqueness claim, Sprint also argues that "the [p]roperty is the largest parcel located within the Search Ring, upon which a telecommunications facility is permitted by right under the BCZR." Further, they contend that "location of Sprint's facility on the [p]roperty also satisfies Sprint's coverage objectives in the area and fulfills a much-needed service in the area[.]"

Board explicitly found that it was not unique.⁹

Additionally, the Board described the variances that were requested, indicating the setbacks required:

75 feet at the southern property (a side setback) in lieu of the required 200 feet, a setback of 135 feet to the western property line (the rear setback) in lieu of the required 200 feet, and a setback of 148 feet to the northern property line (a side setback) in lieu of the required 200 feet for a wireless telecommunications tower and a variance from BCZR § 426.6A.2 to allow a setback of 40 feet to the southern property line in lieu of the required 125 feet for equipment cabinets for a wireless telecommunications tower[.]

Thus, it clearly considered the width of the property, since the width determined the necessity and extent of the side setbacks. Although it did not write a lengthy analysis of why a width of 223 feet was not unique, under these circumstances, that was not necessary. Without any witnesses or other evidence that provided factual support for any legally viable theory for how a 223 foot wide property is uniquely narrow, the Board was not required to concoct its own "straw man" theory, and then knock it down.

The Board, knowing the property's undisputed dimensions, must only decide whether those dimensions make it unique. The Board found no uniqueness. As we said before, if we were to hold that a

⁹Moreover, the unique aspect to the Lewis property was the shape of the buildable area of the property, which consisted of three small, irregularly-shaped, non-contiguous and heavily vegetated areas. See *Lewis*, 377 Md. at 425.

variance **must** be granted, simply because a property cannot accommodate one otherwise permitted use without an area variance, we would be permitting "the exception to swallow the rule." Moreover, for all the reasons set forth previously, had the Board found that the property's "narrowness" made it unique, we would not uphold that finding because the evidence was not sufficient to establish that.

The Telecommunications Act of 1996

Sprint argues that the Board's denial of its petition for variance violates the Telecommunications Act of 1996 ("the Act"). See 47 U.S.C. § 332(c)(7)(B)(iii). It argues that "a zoning body's denial of wireless telecommunications facility must be supported by substantial evidence in the record," citing the statute, and *New Par v. City of Saginaw*, 161 F. Supp. 2d 759, 764 (E.D. Mich. 2001) *aff'd*, 301 F.3d 390 (6th Cir. 2002). We reject this argument largely for the reasons explained in the previous section.

The ML zone permits cellular towers by right, subject to a 200 foot setback requirement "from any other owner's residential property line." BCZR § 426.6(A)(1). Because the setback requirement could not be met, it was necessary for Sprint to prove grounds for a variance. Sprint does not contend that the Act overrides local setback requirements. Indeed, it states that "except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government

or instrumentality thereof over decisions regarding the placement, construction . . . of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A). See also *Voicestream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818, 830 (7th Cir. 2003) ("the [Act's] substantial evidence test is a procedural safeguard which is centrally directed at whether the local zoning authority's decision is consistent with the applicable [local] zoning requirements") (citations omitted). This decision is supported by substantial evidence in the record.

The standard for review of a zoning authority's decision under the Act mirrors administrative agency standards under Maryland law. See *Am. Tower LP v. City of Huntsville*, 295 F.3d 1203, 1207 (11th Cir. 2002) ("The 'substantial evidence' standard envisioned by Section 332 is the traditional substantial evidence standard used by courts to review agency decisions. The usual standard defines 'substantial evidence' as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'").

For the reasons stated in the previous section, Sprint failed to prove grounds for the variances requested here, and therefore the Board's denial of its petition did not violate the Act.

Conclusion

For the foregoing reasons, we affirm the judgment of the

circuit court affirming the Board's denial of the variance petition.

JUDGMENT AFFIRMED. COSTS TO BE
PAID BY APPELLANTS.



2008-0531-SPHX

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0047

September Term, 2004

SPRINT PCS, ET AL.

v.

BALTIMORE COUNTY, MARYLAND

Eyler, James R.,
Adkins,
Barbera,

JJ.

Opinion by Adkins, J.

Filed: August 3, 2005

RECEIVED
JUL 24 2007

PETITIONER'S

BY:.....

3C03005849

EXHIBIT NO. _____

TO: PATUXENT PUBLISHING COMPANY
Thursday, July 17, 2008 Issue - Jeffersonian

Please forward billing to:

Jay O'Neil
7055 Samuel Morse Drive, Ste. 100
Columbia, MD 21046

202-457-1652

NOTICE OF ZONING HEARING

The Zoning Commissioner of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County, will hold a public hearing in Towson, Maryland on the property identified herein as follows:

CASE NUMBER: 2008-0531-SPHX

810 Back River Neck Road

West/South of Back River Neck Road, 207 feet S/of Potter Farm Road

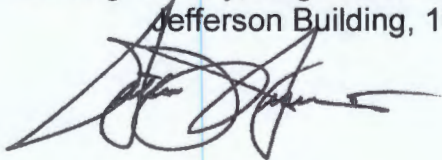
15th Election District – 6th Councilmanic District

Legal Owners: Back River, LLC

Contract Purchaser: APC Realty & Equipment Co., LLC/Sprint Nextel

Special Hearing to permit a non-density transfer. Special Exception to permit a tower height of 125 feet in an RC20 zone.

Hearing: Friday, August 1, 2008 at 10:00 a.m. in Hearing Room 1, 2nd Floor,
Jefferson Building, 105 W. Chesapeake Avenue, Towson 21204



WILLIAM J. WISEMAN III
ZONING COMMISSIONER FOR BALTIMORE COUNTY

- NOTES: (1) HEARINGS ARE HANDICAPPED ACCESSIBLE; FOR SPECIAL ACCOMODATIONS, PLEASE CONTACT THE ZONING COMMISSIONER'S OFFICE AT 410-887-4386.
- (2) FOR INFORMATION CONCERNING THE FILE AND/OR HEARING, CONTACT THE ZONING REVIEW OFFICE AT 410-887-3391.



BALTIMORE COUNTY
MARYLAND

JAMES T. SMITH, JR.
County Executive

June 19, 2008
TIMOTHY M. KOTROCO, Director
Department of Permits and
Development Management

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Legal Owners: Back River, LLC

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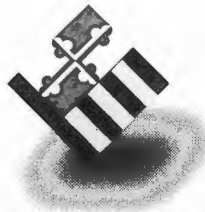
Hearing: Friday, August 1, 2008 at 10:00 a.m. in Hearing Room 1, 2nd Floor,
Jefferson Building, 105 W. Chesapeake Avenue, Towson 21204

Timothy M. Kotroco
Director

TK:klm

C: James Michal, Jackson & Campbell, 1120 20th St. NW, Washington DC 20036
Jay O'Neill, APC Realty & Equip., 7055 Samuel Morse Drive, Columbia 21046
Albert Jones, Back River, 810 Back River Neck Road, Baltimore 21221

- NOTES: (1) **THE PETITIONER MUST HAVE THE ZONING NOTICE SIGN POSTED BY AN APPROVED POSTER ON THE PROPERTY BY THURSDAY, JULY 17, 2008.**
- (2) HEARINGS ARE HANDICAPPED ACCESSIBLE; FOR SPECIAL ACCOMMODATIONS PLEASE CALL THE ZONING COMMISSIONER'S OFFICE AT 410-887-4386.
- (3) FOR INFORMATION CONCERNING THE FILE AND/OR HEARING, CONTACT THE ZONING REVIEW OFFICE AT 410-887-3391.



BALTIMORE COUNTY
M A R Y L A N D

JAMES T. SMITH, JR.
County Executive

TIMOTHY M. KOTROCO, *Director*
Department of Permits and
Development Management

August 13, 2008

James R. Michal, Esq.
Jackson & Campbell, PC
1120 20th St. NW
Washington, DC 20036

Dear: James R. Michal, Esq.

RE: Case Number 2008-0531-SPHX, 810 Back River Rd.

The above referenced petition was accepted for processing **ONLY** by the Bureau of Zoning Review, Department of Permits and Development Management (PDM) on May 23, 2008. This letter is not an approval, but only a **NOTIFICATION**.

The Zoning Advisory Committee (ZAC), which consists of representatives from several approval agencies, has reviewed the plans that were submitted with your petition. All comments submitted thus far from the members of the ZAC are attached. These comments are not intended to indicate the appropriateness of the zoning action requested, but to ensure that all parties (zoning commissioner, attorney, petitioner, etc.) are made aware of plans or problems with regard to the proposed improvements that may have a bearing on this case. All comments will be placed in the permanent case file.

If you need further information or have any questions, please do not hesitate to contact the commenting agency.

Very truly yours,

W. Carl Richards, Jr.
Supervisor, Zoning Review

WCR:lnw

Enclosures

c: People's Counsel
Albert C. James: Back River LLC, 810 Back River Rd., Baltimore, MD 21221
Jay O'Neil, 7055 Samuel Morse Dr., Columbia, MD 21046

TB 8/20
9AM

BALTIMORE COUNTY, MARYLAND

Inter-Office Correspondence



RECEIVED
JUL 03 2008

BY:.....

TO: Timothy M. Kotroco
FROM: Dave Lykens, DEPRM - Development Coordination *JWL*
DATE: July 2, 2008
SUBJECT: Zoning Item # 08-531-SPH
Address 810 Back River Neck Road
(Back River, LLC Property)

Zoning Advisory Committee Meeting of June 17, 2008

- _____ The Department of Environmental Protection and Resource Management has no comments on the above-referenced zoning item.
- X The Department of Environmental Protection and Resource Management offers the following comments on the above-referenced zoning item:
- X Development of this property must comply with the Chesapeake Bay Critical Area (CBCA) Regulations (Sections 33-2-101 through 33-2-1004, and other Sections, of the Baltimore County Code).

Additional Comments: Comments concerning CBCA requirements cannot be completed due to unknown issues. The forest adjacent to the proposed location of the antenna meets the criteria for forest interior dwelling bird species habitat. DEPRM needs more information on the implications of the 200-foot radius from the tower and the adjusted property limits on the FIDS habitat and required stream, tidal/nontidal wetland buffers, and forest protection. There is a stream on and offsite to the northwest and west of the tower site.

Reviewer: Paul Dennis

Date: June 30, 2008



Martin O'Malley, Governor
Anthony G. Brown, Lt. Governor

State Highway
Administration

John D. Porcari, Secretary
Neil J. Pedersen, Administrator

Maryland Department of Transportation

Date: 6-20-2008

Ms. Kristen Matthews
Baltimore County Office of
Permits and Development Management
County Office Building, Room 109
Towson, Maryland 21204

RE: Baltimore County
Item No 2008-0531-SPH
810 BACK RIVER NECK RD
BACK RIVER, L.L.C. PROPERTY
SPECIAL HEARING
SPECIAL EXCEPTION

Dear Ms. Matthews:

Thank you for the opportunity to review your referral request on the subject of the above captioned. We have determined that the subject property does not access a State roadway and is not affected by any State Highway Administration projects. Therefore, based upon available information this office has no objection to Baltimore County Zoning Advisory Committee approval of Item No. 2008-0531-SPH.

Should you have any questions regarding this matter, please contact Michael Bailey at 410-545-2803 or 1-800-876-4742 extension 5593. Also, you may E-mail him at (mbailey@sha.state.md.us).

Very truly yours,


For Steven D. Foster, Chief
Engineering Access Permits
Division

SDF/MB

My telephone number/toll-free number is _____

Maryland Relay Service for Impaired Hearing or Speech: 1.800.735.2258 Statewide Toll Free

Street Address: 707 North Calvert Street • Baltimore, Maryland 21202 • Phone: 410.545.0300 • www.marylandroads.com



BALTIMORE COUNTY, MARYLAND

INTEROFFICE CORRESPONDENCE

TO: Timothy M. Kotroco, Director
Department of Permits &
Development Management

DATE: June 19, 2008

FROM: ^{DAK}Dennis A. Kennedy, Supervisor
Bureau of Development Plans
Review

SUBJECT: Zoning Advisory Committee Meeting
For June 23, 2008
Item Nos. 08-456, [REDACTED] 0543, 0558, 0559, 0560,
0561, 0562, 0563, 0566, 0567, 0568, and 0571

The Bureau of Development Plans Review has reviewed the subject-zoning items, and we have no comments.

DAK:CEN:lrk

cc: File

ZAC-06192008-NO COMMENTS

TB
8-20-08

BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

TO: Timothy M. Kotroco, Director
Department of Permits and
Development Management

DATE: August 12, 2008

FROM: Arnold F. 'Pat' Keller, III
Director, Office of Planning

RECEIVED
AUG 18 2008

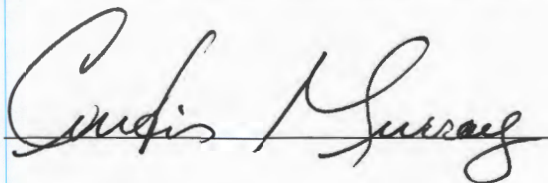
BY:

SUBJECT: Zoning Advisory Petition(s): **Case(s) 08-531- Special Exception**

The Office of Planning has reviewed the above referenced case(s) and has no comments to offer.

For further questions or additional information concerning the matters stated herein, please contact Laurie Hay in the Office of Planning at 410-887-3480.

Prepared By:



Division Chief:
CM/LL

CASE NAME _____
CASE NUMBER 2008-0531-SPHX
DATE 8-20-08

[illegible]

PLEASE PRINT CLEARLY

CASE NAME

CASE NUMBER 2008-0531-SPHX

DATE 8-20-08

CITIZEN'S SIGN-IN SHEET

NAME

ADDRESS

CITY, STATE, ZIP

E-MAIL

CARL MAYNARD

1546 DENTON RD

BALTO MD 21221



Catherine Travis
2019 Silver Lane Rd.
Baltimore, MD 21221

PLEASE PRINT CLEARLY

CASE NAME _____
CASE NUMBER _____
DATE _____

COUNTY REPRESENTATIVE'S SIGN-IN SHEET

NAME

ADDRESS

CITY, STATE, ZIP

E-MAIL

MIKE MOTHLEK

Balti Co PDM

305 W. Chesapeake Ave Towson

m.mothlek@baltimorecountymd.gov

NANCY WEST

Balti Co. Oppony Law

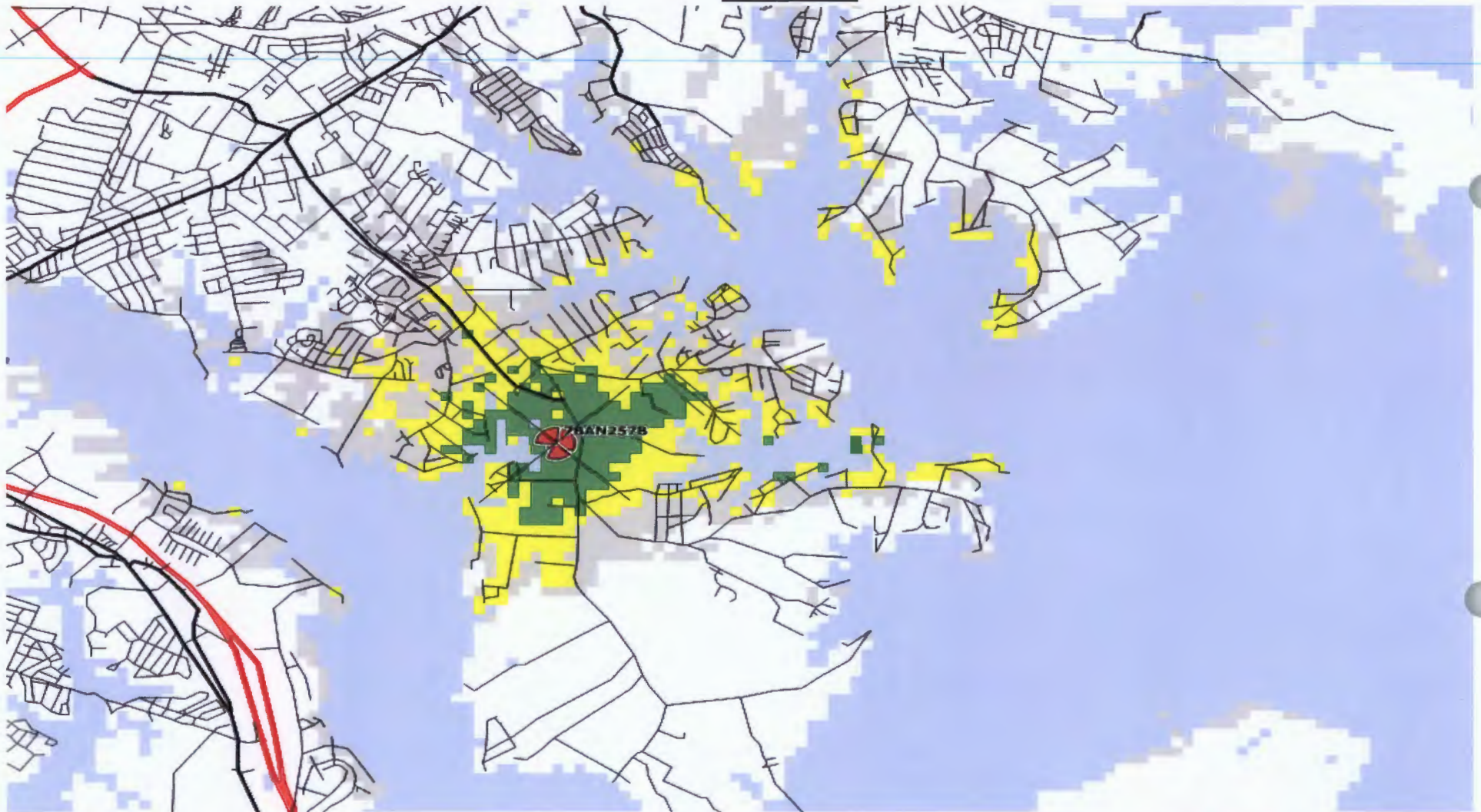
400 Wash. Ave. Towson MD

nwest@baltimorecountymd.gov

...T-Mobile...



BAN257



- -76.0 ≤ x dBm -76 dBm
- -84.0 ≤ x < -76.0 dBm -84 dBm
- -91.0 ≤ x < -84.0 dBm -91 dBm

2008-0531 - SPHX

ROCKSOLID
COVERAGE

...T...Mobile...



Existing Coverage without BAN257

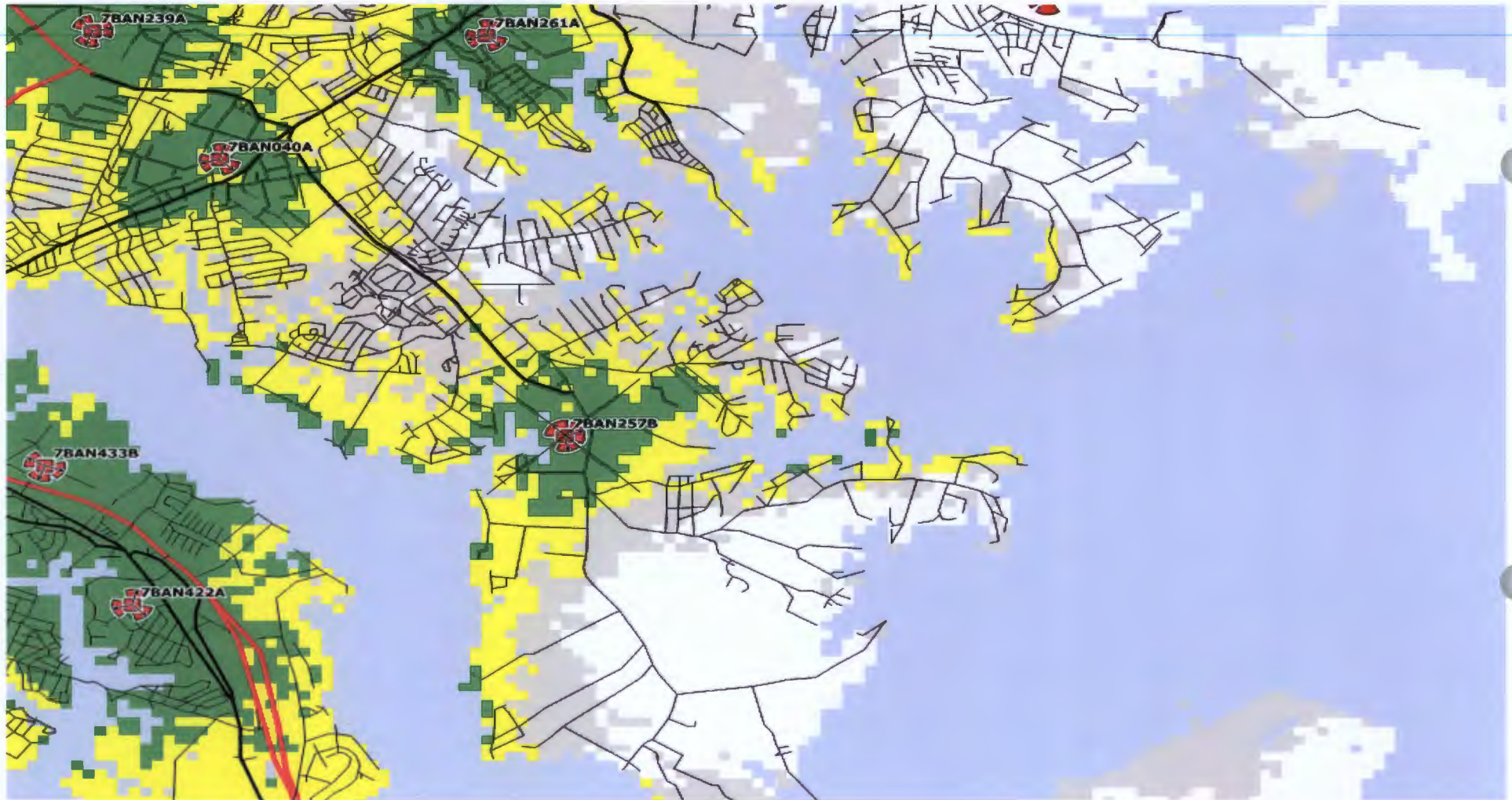


- $-76.0 \leq x \text{ dBm}$ -76 dBm
- $-84.0 \leq x < -76.0 \text{ dBm}$ -84 dBm
- $-91.0 \leq x < -84.0 \text{ dBm}$ -91 dBm

ROCKSOLID
COVERAGE



BAN257 and surrounding coverage



■ -76.0 ≤ x dBm -76 dBm
■ -84.0 ≤ x < -76.0 dBm -84 dBm
□ -91.0 ≤ x < -84.0 dBm -91 dBm

ROCKSOLID
COVERAGE

EXHIBIT C

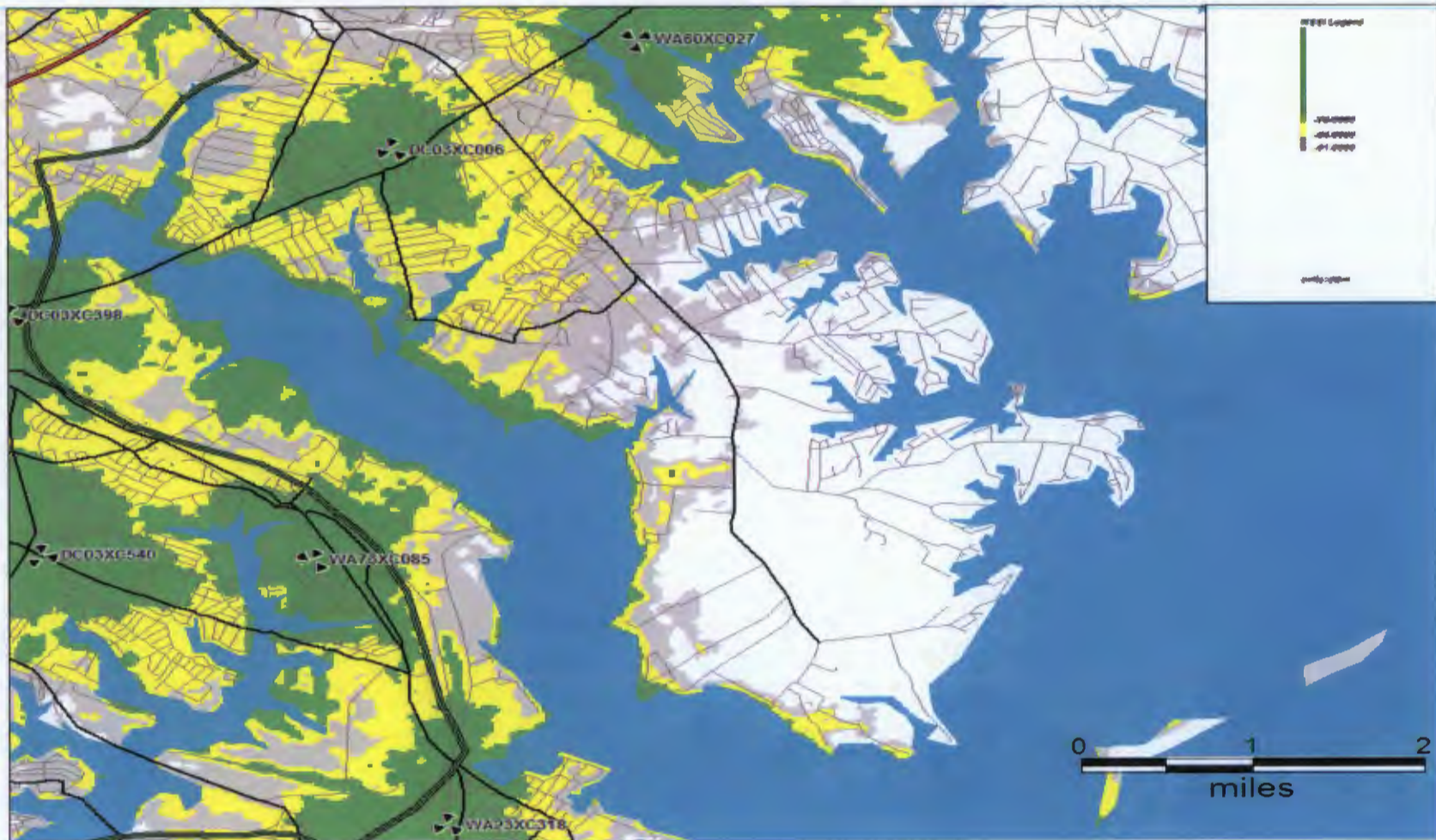
WA54XC461



2008-0531-SPHX

© 2006 Sprint Nextel. All Rights Reserved.

EXISTING COVERAGE WITHOUT WA54XC461



WA54XC461 AND SURROUNDING COVERAGE

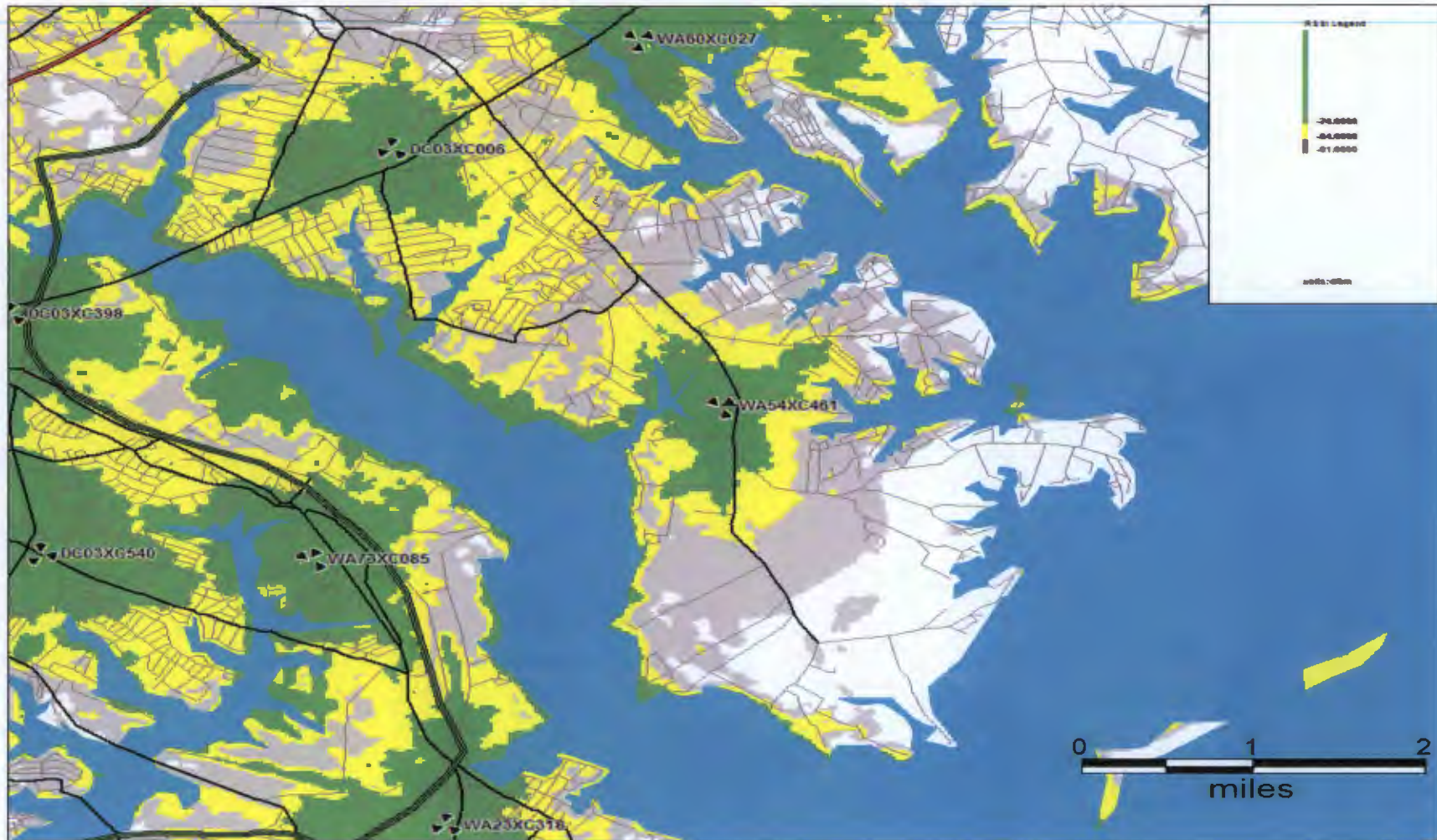
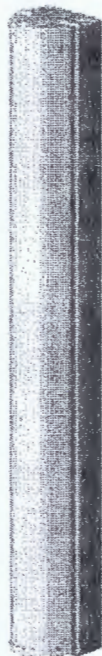


EXHIBIT E

/Products /Base Station Antennas /Directional /Cellular /PCS /
GSM 1900 (1850-1990)
PCSA065-16

PDF

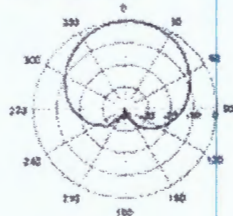
PCSA065-16



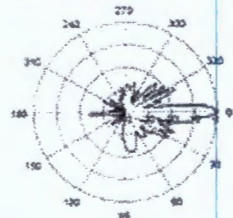
Cellular 1850 - 1990 MHz
V-Pol / 65° Az / 18.8 dBi

Type	PCSA065-16-x
Product Code	PCSA065-16-x
Frequency Range (MHz)	1850 - 1990
Gain	18.8 dBi (16.7 dBd)
Input Impedance (Ohms)	50
VSWR	< 1.4 : 1
Polarisation	Vertical
Electrical Downtilt (x)	0°, 2°, 5°
Horizontal Beamwidth (-3 dB)	65°
Vertical Beamwidth (-3 dB)	5.7°
1st Upper Sidelobe	< -18 dB
1st Null:	> -20 dB
Front to Back Ratio	> 25 dB
Intermodulation	< -153 dBc for 2 x 20 W carriers
Input Power (Watts)	250
Input Connector Type / Location	7/16-DIN Female / Rear
Operating Temperature	-40° F (-40° C) to +140° F (+60° C)
Wind Speed	150 mph (241 km/h; 67 m/s)
Wind Loads (160 km/h)	Front: 63 lbf (280 N) Side: 56 lbf (247 N)
Antenna Weight	20.6 lbs (9.4 kg)
Dimensions (In)	Height: 62.7 Width: 8.5 Depth: 7.5 (1595 x 215 x 190 mm)

Horizontal Plane



Vertical Plane



Pole Mounting Kit: MKS02P01 - Weight: 6.5 lbs (2.9 kg)
Scissor Tilt Mounting Kit: MKS02T06 - Weight: 8.3 lbs (3.8 kg)
Bar Tilt Mounting Kit Option: MKS02T07 - Weight: 8.7 lbs (3.9 kg)

Jaybeam Wireless reserve the right to amend any specification or antenna without prior notice
The specification shown above is indicative of the product and full technical details can be obtained directly from the company

England : Rutherford Drive - Park Farm South - Wellingborough - Northamptonshire NN8 6AX -

Tel : + 44 (0)1933 40 84 08 - Fax : + 44 (0) 1933 40 84 04

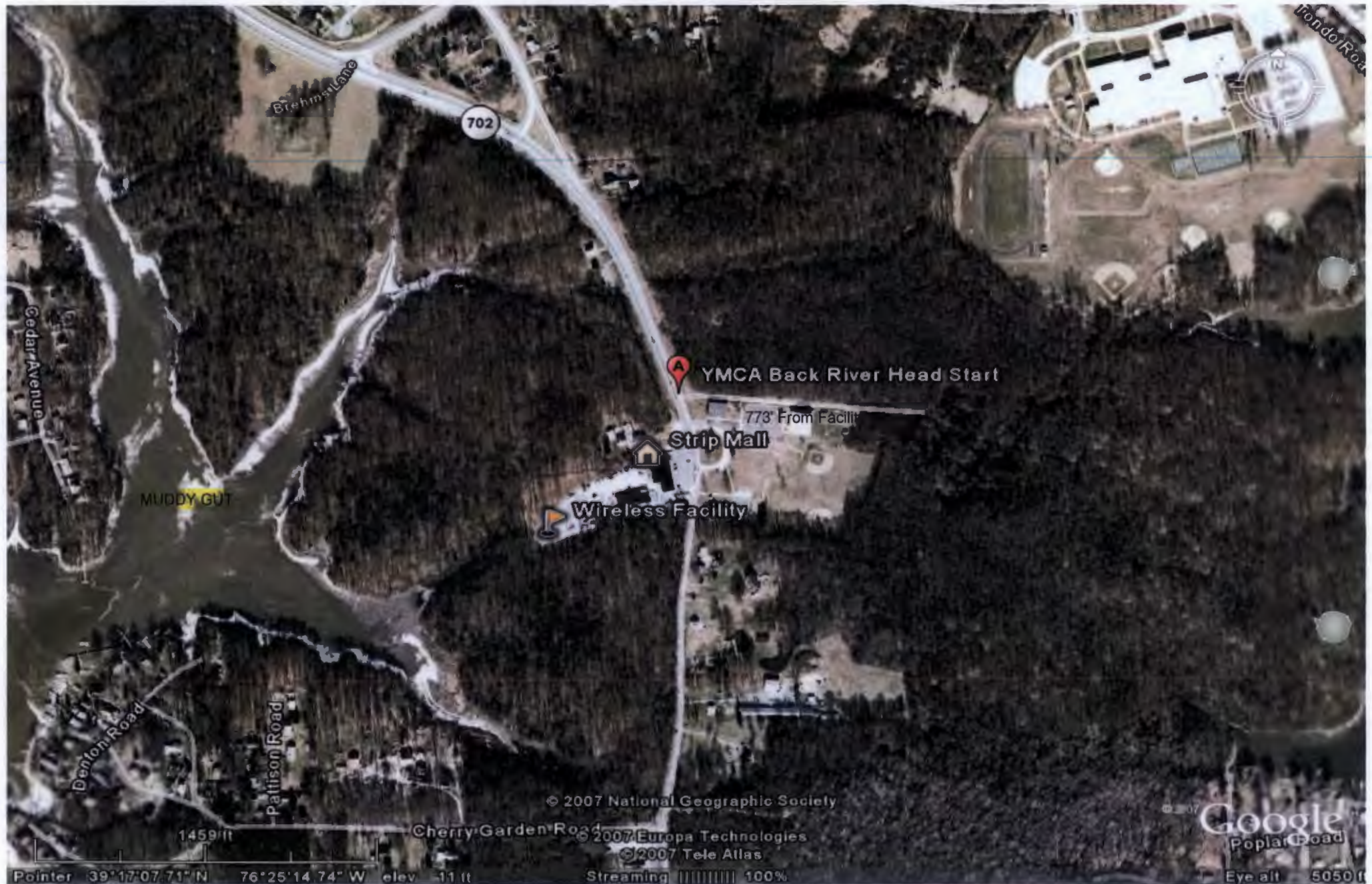
France : ZI La Boitardière, Chemin du Roy, 37400 Amboise,

Tel : +33 2 47 30 69 70, Fax : +33 2 47 57 35 06

United States : 730 21st Street Drive, SE, Hickory, North Carolina 28602,

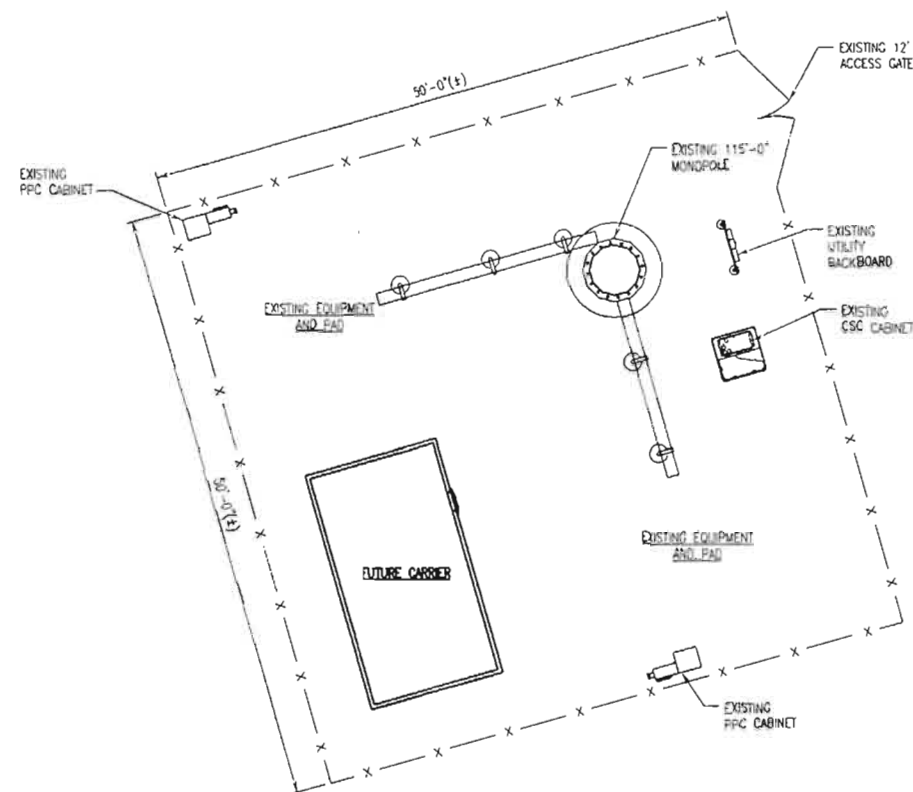
Tel: +1-828-324-6971 ext. 302, Fax: +1-828-327-6027

EXHIBIT F

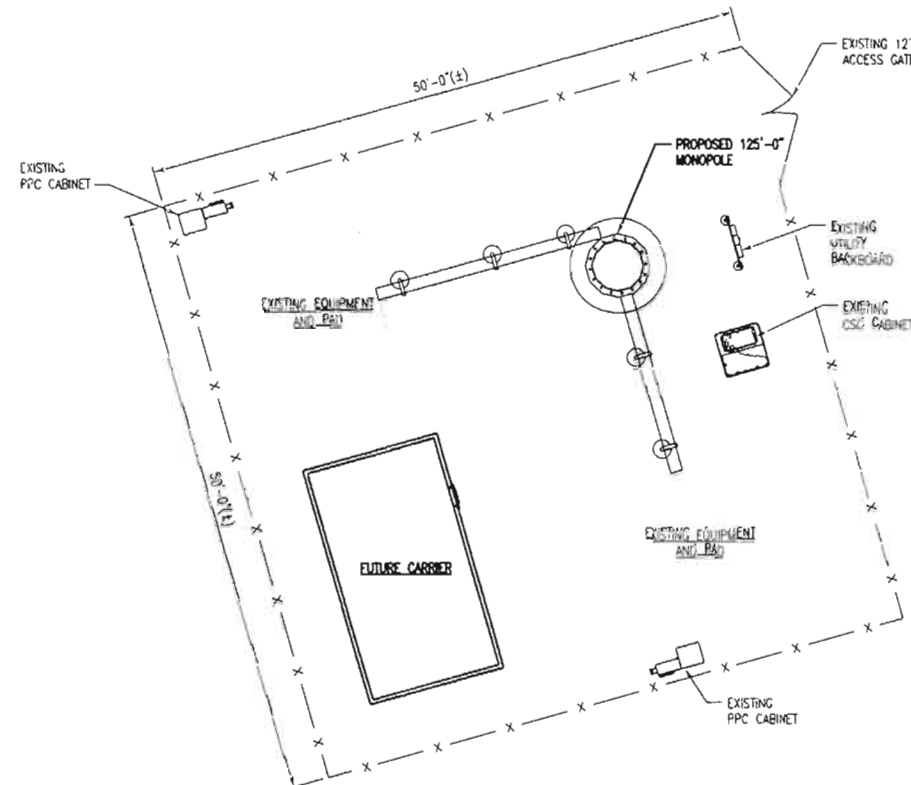


2008-0531 - SPHX

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EXISTING COMPOUND PLAN
SCALE: 3/16" = 1'-0"



PROPOSED COMPOUND PLAN
SCALE: 3/16" = 1'-0"



APR REALTY AND
EQUIPMENT COMPANY, LLC

d/b/a
SPRINT

7055 SAMUEL MORSE DRIVE
SUITE 100
COLUMBIA, MD 21046

SUBMITTALS

DATE	DESCRIPTION	REV.
11/01/07	FOR REVIEW	A
02/04/08	CLIENT REVIEW	B

APPROVALS:

SITE ACQUISITION
MANAGER

RF ENGINEER

RF MANAGER

OPERATIONS
MANAGER

CONSTRUCTION
MANAGER

LANDLORD

TAI

ENGINEERS, MANAGERS, TECHNICAL SERVICES
11459 Greenbriar Drive, Suite A
Owings Mills, Maryland 21117
Tel: 410-350-3108 • Fax: 410-350-3109

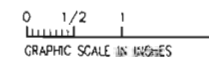
SEAL:

JOB NO: 28001-WA54XC461

DRAWN: DSS

CHECKED: T.B.

SCALE:



TITLE:

EXISTING AND
PROPOSED
COMPOUND
PLAN

SAR# WA54XC461
BACK RIVER NECK
810 BACK RIVER NECK RD
BALTIMORE, MD 21221

SHEET NUMBER:

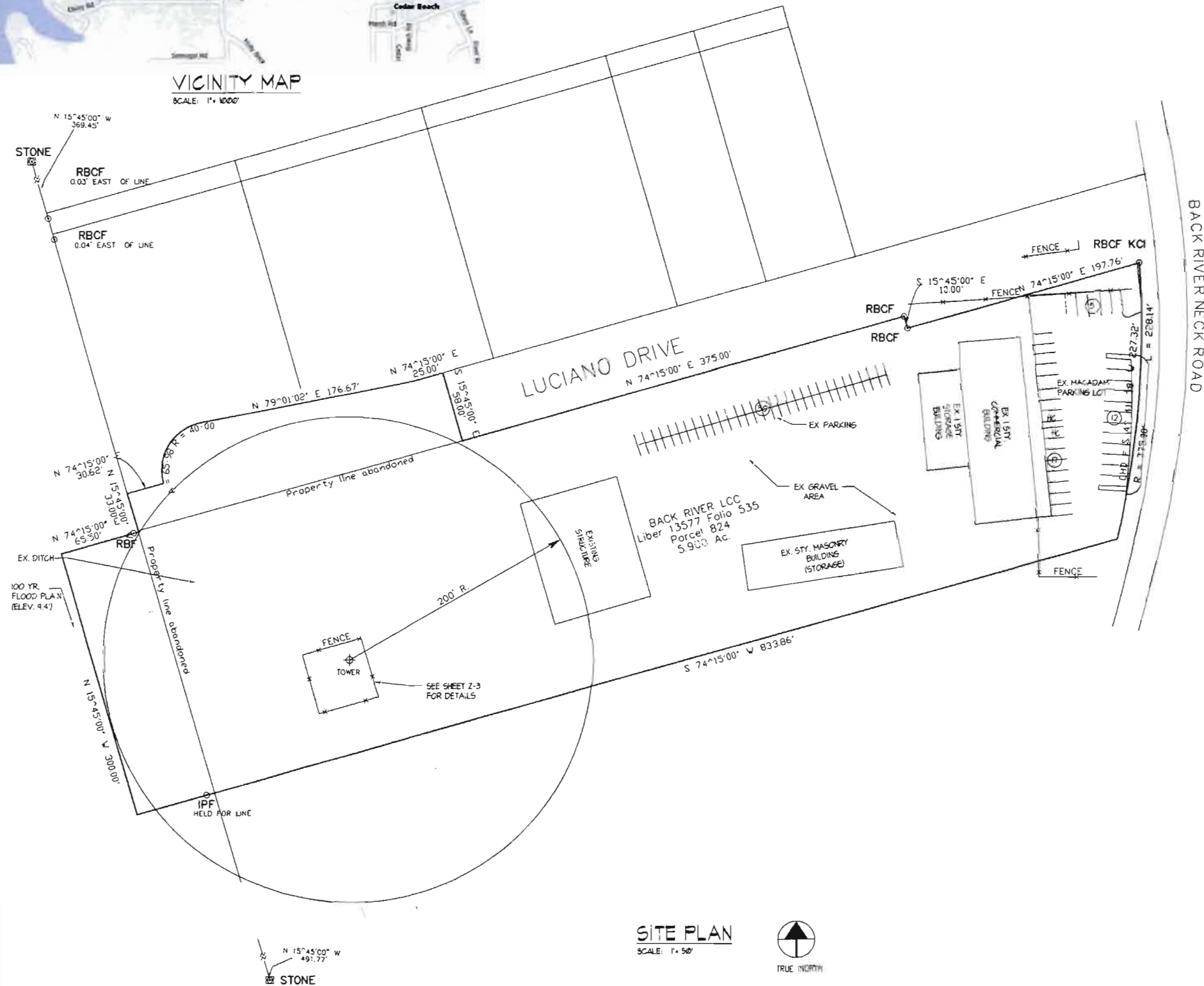
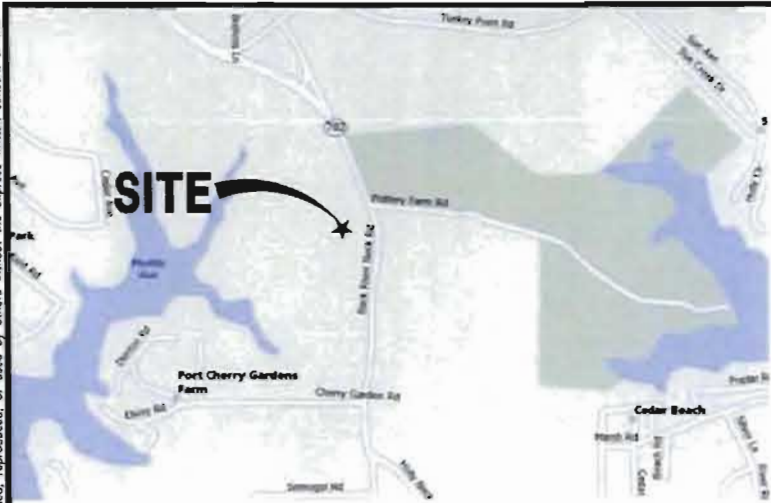
Z-3

REV. B EQUIPMENT TYPE: CDMA

SITE ID No. WA54XC461

SITE NAME: BACK RIVER NECK

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SITE NOTES:

- APPLICANT: SPRINT PCS
7055 SAMUEL MORSE DRIVE
SUITE 100
COLUMBIA, MD 21046
CONTACT: C/O JAY O'NEILL
(410) 963-7400
- PROPERTY AND TOWER OWNER: BACK RIVER LLC
800 VOIGT LANE
BALTIMORE, MD 21221-1634
- SITE DATA: TAX MAP 97 GRID 24 PARCEL 824
TAX ACCOUNT NO. 15-2300004470
LIBER 13577, FOLIO 535
TRACT AREA: 5.89 AC
ELECTION DISTRICT: 15
ADC MAP: 37 GRID K-13
ADDRESS: 810 BACK RIVER NECK ROAD
BALTIMORE, MD 21221
EXISTING USE: COMMERCIAL
COUNCILMAN'S DISTRICT NO. 5
DEED REFERENCE: 13577/535
WATERSHED: 6 HARRIS MILL GREEK
PROPERTY AREA 5.8947 AC(±)
PARKING SPACES: 64
- CURRENT ZONING: ML /RC-20
- A MONOPOLE AND TELECOMMUNICATIONS ANTENNA ARE A PERMITTED USE BY RIGHT, IN THE ML ZONE.
A. HEIGHT OF PROPOSED MONOPOLE: 125'
B. SETBACKS, PER SECTION 426.6A3 REQUIRED:
REQUIRED: FRONT - 200'
SIDE - 200'
REAR - 200'
PROVIDED: FRONT = 638'
SIDE = 200' MIN / 200' MAX
REAR = 200'
EQUIPMENT CABINETS SETBACK:
REQUIRED: FRONT = 125'
SIDE = 125'
REAR = 125'
PROVIDED: FRONT = 620'
SIDE = 200' MIN / 200' MAX
REAR = 100'
- TOTAL DISTURBED AREA = 0' SF ±
- LATITUDE: 39° 17' 12.60" N (NAD 83/91)
LONGITUDE: 76° 25' 44.78" W (NAD 83/91)
GROUND ELEVATION: 18' AMSL
PROPOSED STRUCTURE HEIGHT: 125'
TOTAL ELEVATION ABOUT MAIN SEA LEVEL: 133'
- THE EXISTING TOWER IS LOCATED AT LEAST ONE HORIZONTAL FOOT FOR EACH VERTICAL FOOT OF HEIGHT (125') FROM ANY EXISTING OUTSIDE DWELLINGS OR RESIDENTIAL ZONES. NO SCHOOLS OR PUBLIC PARKS ADJOIN THIS SITE.
- THE STRUCTURE DOES NOT SUPPORT LIGHTS OR SIGNS.
- THE APPLICANT WILL PROVIDE CERTIFICATION BY A REGISTERED PROFESSIONAL ENGINEER THAT THE STRUCTURE WILL MEET APPLICABLE DESIGN STANDARDS FOR WIND LOADS IN ACCORDANCE WITH THE LATEST TIA/EIA STANDARD.
- NO WATER OR SANITARY SERVICES ARE REQUIRED FOR THE OPERATION OF THIS FACILITY.
- WIRELESS TRANSMITTING DEVICES MUST COMPLY WITH ANSI STANDARD C95-1982.
- THE INFORMATION AND COMPOUND LOCATION SHOWN HEREON HAVE BEEN COMPILED FROM CLIENT RECORDS AND IS BELIEVED TO BE RELIABLE. HOWEVER, THE ACCURACY IS NOT GUARANTEED AND MAY BE SUBJECT TO REVISION.
- PROPERTY SHOWN HEREIN LIES WITHIN ZONE C, AN AREA OF MINIMAL FLOODING, AS PER FEMA COMMUNITY PANEL NO. 240010 0445 C EFFECTIVE DATE, NOVEMBER 17, 1993. HOWEVER THIS SITE PLAN REFLECTS UPDATED TOPOGRAPHY NOT REFLECTED ON FEMA MAPPING. THE 100 YEAR FLOOD BOUNDARY IS SHOWN ON THIS PLAN BASED ON NEW TOPOGRAPHY AND THE FEMA BASED FLOOD ELEVATION OF 9.4'.
- THIS SITE IS EXEMPT FROM STORMWATER MANAGEMENT REQUIREMENTS.
- THIS SITE IS EXEMPT FROM THE BALTIMORE COUNTY WOODLAND CONSERVATION AND TREE PRESERVATION ORDINANCE.

LEGEND

- PROP. TREE LINE
- EX. FENCE
- POLE
- PROP. FENCE
- EX. CONTOURS
- PROP. CONTOURS
- INDICATES SURFACE FLOW
- SPOT ELEVATION



APC REALTY AND EQUIPMENT COMPANY, LLC

a/b/o SPRINT

7055 SAMUEL MORSE DRIVE
SUITE 100
COLUMBIA, MD 21046

SUBMITTALS

DATE	DESCRIPTION	REV.
11/01/07	FOR REVIEW	A
02/04/08	CLIENT REVIEW	B

APPROVALS:

SITE ACQUISITION MANAGER

RF ENGINEER

RF MANAGER

OPERATIONS MANAGER

CONSTRUCTION MANAGER

LANDLORD

TAI

ENGINEERS-MANAGERS-TECHNICAL SERVICES
11469 Cranhill Drive, Suite A
Owings Mills, Maryland 21117
tel: 410 358-3108 • fax: 410 358-3109

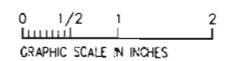
SEAL

JOB NO: 28001-WA54XC461

DRAWN: DSS

CHECKED: T.B.

SCALE:



TITLE:

SITE PLAN
AND NOTES

SAR# WA54XC461
BACK RIVER NECK
810 BACK RIVER NECK RD
BALTIMORE, MD 21221

SHEET NUMBER:

Z-2

REV. B EQUIPMENT TYPE: CDMA

SITE ID No. WA54XC461

SITE NAME: BACK RIVER NECK