

**BEFORE THE
ZONING HEARING BOARD OF
FAIRVIEW TOWNSHIP, ERIE COUNTY, PENNSYLVANIA**

IN THE MATTER OF :
 :
Property owners: : Premises at Water Street
Fairview Evergreen Nurseries, Inc. : Fairview Township, PA
7475 West Ridge Road : Index No. (21) 81-26-24
Fairview, PA 16415 :

FINDINGS OF FACT

1. Property Owner is Fairview Evergreen Nurseries, Inc., 7475 West Ridge Road, Fairview, Pennsylvania, (hereinafter “Property Owner”).
2. Property Owner is the owner of the Subject Property located at 7475 Road, Fairview, Pennsylvania (hereinafter “Subject Property”).
3. The Subject Property is located in Fairview Township, Pennsylvania, and is identified by the Erie County Index No. (21) 81-26-24. The parcel is currently zoned B-2 (along West Ridge Road) with the remainder zoned R-1.
4. Applicant is Up State Tower Co., LLC, 4915 Auburn Avenue, Bethesda, MD, 20814.
5. With Property Owner’s permission, Applicant would like to erect a 160 foot communication tower on the Subject Property. This tower would be located on the Subject Property with an approximate 926 foot front yard setback, 200 foot rear yard setback, and side yard setbacks of 200 feet.
6. Fairview Township Zoning Ordinance, Sections 706(A)(7), 707(A)(7) and 708(A)(6) permit “Utility, communication, communication towers, electric and gas company operations” in the I Districts (I-1, I-2, and I-3).
7. Fairview Township Zoning Ordinance, Section 700(C)(4) requires a minimum side yard for a principal use in the R-1 District of “16 feet total, 6 feet minimum one side”.
8. Fairview Township Zoning Ordinance, Section 700(C)(5) requires a minimum rear yard for a principal use in the R-1 District of “35 feet”.
9. Fairview Township Zoning Ordinance, Section 700(C)(6) provides for a maximum building height in the R-1 District of “40 feet”.

10. Fairview Township Ordinance Sections 706(D)(7), 707(D)(7) and 708(C)(6) contain provisions which allow communication towers to be constructed in excess of 100 feet provided that:

- A. the structures must be in operation and not vacated for more than six months;
- B. the applicant must supply Fairview Township with a bond or suitable form of financial surety for the removal of such structure;
- C. the minimum setback to all property boundaries shall be the height of the structure plus 30 percent.

11. In the present case, the application of Fairview Township Zoning Ordinances would require a communication tower in any of the I Districts to have a side yard setback of 208 feet (160 feet x 130%).

12. Applicant is seeking the following variances:

- A. A Variance to Fairview Township Zoning Ordinance, Section 700 to allow for the erection of a communication tower in an R-1 District; and
- B. A Variance to the height restrictions set forth in Fairview Township Zoning Ordinance, Section 700(C)(6) to allow for the erection of a 160 foot communication tower in the R-1 District.

13. Attorney Thomas Kubinski appeared on behalf of Applicant. He called three witnesses in support of Applicant's request: Hagan Hetz, a representative of the Property Owner, Eric Wong, the Operations Manager for Blue Wireless, and Don Carpenter, a consulting engineer assisting Applicant.

14. Mr. Wong testified that he is an RF design engineer with 17 years experience, currently employed by Blue Wireless, a cellular telephone company seeking to place an antenna on the proposed communication tower. He testified that it his job to find locations to meet the frequency objectives of Blue Wireless.

15. Mr. Wong testified that there is a cellular coverage gap in Fairview, Pennsylvania. He provided a map which showed the weak signal areas in yellow and white (Applicant Exhibit #1). Mr. Wong testified that he identified a general location for a communication tower which would resolve the cellular coverage gap. He called this general location a search ring. Mr. Wong explained that he provided the search ring to Don Carpenter who then identified specific properties for a potential communication tower.

16. Mr. Wong indicated that there currently are four communication towers in Fairview. He explained that co-location on the existing towers would not address the coverage gap in Fairview. Mr. Wong identified two search rings for tower locations in Fairview. Mr. Wong testified that the erection of communication towers within both of the search rings would resolve the coverage gap.

17. Don Carpenter testified that he is a consulting engineer that works with Applicant on site acquisition. He testified that he has been working with Applicant for over a year to identify potential sites for communication towers. He noted that Fairview Township only permits communication towers in the I-1, I-2 and I-3 Districts. With the setbacks required by the Zoning Ordinance, Mr. Carpenter testified that it is virtually impossible to identify a site within the Industrial Districts that meets the Township requirements and does not have an existing use. Mr. Carpenter testified that he has been unable to find any property within the search rings that would be allowed to house a communication tower without first obtaining a variance. Mr. Carpenter noted that the four existing communication towers in Fairview Township would not comply with the current Zoning Ordinance.

18. Mr. Carpenter testified that the Subject Property is the most compliant property he could identify. Mr. Carpenter explained that the Subject Property would be subdivided from its existing parcel so that the communication tower would be the sole use on the Subject Property.

19. Mr. Carpenter explained that the proposed communication towers are designed with engineered break points. With these break points, Mr. Carpenter explained that the necessary fall zone to ensure public safety is effectively reduced to approximately 25 feet. He asserted that with engineering design improvements in the industry greater setbacks are no longer necessary to ensure public safety.

20. Mr. Carpenter explained that a 160 foot communication tower is necessary to address the coverage gap as the top of the tower must be above the tree line.

21. Applicant offered a site selection memorandum explaining the selection of the Subject Property. (Applicant Exhibit #3). This memorandum shows how the communication tower on the Subject Property would improve cellular coverage in the Fairview area.

22. Applicant offered Exhibit #4 to show how the existing four communication towers in Fairview are insufficient to address the coverage gap.

23. There was extensive cross examination of both Mr. Wong and Mr. Carpenter. On cross examination, it was established that:

- A. Applicant signed a lease with Property Owner for the Subject Property in May 2017;

- B. At the time the lease was signed, Applicant was aware that a variance would be needed before a communication tower could be erected on the Subject Property;
- C. The proposed communication tower would be located 926 feet from Water Street;
- D. The closest residential structure is approximately 783 feet from the proposed communication tower;
- E. Applicant did explore the possibility of erecting a communication tower on the “Top Rock Property” but the owner of that property was not willing to sell or lease the property to Applicant;
- F. With a communication tower, vehicle traffic to the Subject Property would occur approximately one time per month;
- G. The proposed communication tower would be used to service not only Blue Wireless but would also be available to four to five other cellular carriers; and
- H. Applicant would need approval of both its proposed communication towers (Appeal #9 and Appeal #10) in order to effectively address the coverage gap.

24. Hagan Hetz testified that he was contacted by Applicant about the possibility of leasing property for cell towers. Mr. Hetz testified that while he understands the opposition to communication towers, he lives closer to the proposed communication tower than any other resident. He testified that he believed the communication towers would be good for both his business and cellular coverage in Fairview Township.

25. Several residents and property owners spoke in opposition to the proposed communication tower. Witnesses testified or argued that:

- A. There are potential health risks associated with communication/cell phone towers;
- B. The erection of the proposed communication tower will have a negative effect on property values;
- C. The Applicant failed to identify a hardship as requested by law;
- D. The Applicant created a hardship by leasing property which is in a zoning district that does not permit communication towers;

- E. The erection of the proposed communication tower will alter the character of the neighborhood; and
- F. Applicant failed to show that the Subject Property is unable to be used in strict conformity with Fairview Township Zoning Ordinance.

26. When asked to identify the hardship, Applicant asserted that the Fairview Township Zoning Ordinance creates the hardship in that the zoning is so restrictive that a communication tower cannot be erected in strict compliance with Fairview Township's Zoning Ordinance.

CONCLUSIONS OF LAW

This Board accepts the testimony of the witnesses offered by Applicant as fact and finds that Applicant has met its burden to entitle it to the following variances:

- A. A Variance to Fairview Township Zoning Ordinance, Section 700 to allow for the erection of a communication tower in an R-1 District; and
- B. A Variance to the height restrictions set forth in Fairview Township Zoning Ordinance, Section 700(C)(6) to allow for the erection of a 160 foot communication tower in the R-1 District.

This Board further finds that the proposed setbacks identified by Applicant are sufficient to protect the safety and interests of the residents and visitors to Fairview Township. This approval is contingent on the successful subdivision proposed by Applicant and the Township's receipt of a bond or suitable form of financial surety for the removal of the communication tower.

DECISION

AND NOW, this _____ day of _____, 2017, the Fairview Township Zoning Hearing Board hereby grants Applicant's request for the above referenced variances on the Subject Property as proposed.

These Findings of Fact, Conclusions of Law, and Decision are signed this _____ day of _____, 2017.

Voting to approve:

Brian McGrain, Chairperson

George Wilkosz

Kellie Tokar

Voting to deny:

Keith Farnham