

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

CUAP NUMBER CUAP # 22-0313

SMECO RIDGE COMMUNICATION TOWER

FIRST ELECTION DISTRICT

DATE HEARD: April 13, 2023

ORDERED BY:

**Mr. Ichniowski, Mr. Bradley, Ms. Delahay,
Mr. Miedzinski, and Mr. Richardson**

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: MAY 11, 2023

Pleadings

The Southern Maryland Electric Cooperative, Inc. (“SMECO,” and hereinafter “Applicant”) seeks conditional use approval for Use Type 91 – Communications Tower and a variance from Schedule 63.3.a to modify the required buffer yard.

Public Notification

The hearing notice was advertised in *The Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on March 24, 2023 and March 31, 2023. The hearing notice was also posted on the Property. The file contains the certification of mailing to all adjoining landowners, including those located across a street. The agenda was also posted on the County’s website on April 7, 2023. Therefore, the St. Mary’s County Board of Appeals (“Board”) finds and concludes that Applicant has complied with the notice requirements.

Public Hearing

A public hearing was conducted at 6:30 p.m. on April 13, 2022 at the St. Mary’s County Governmental Center, 41770 Baldrige Street, Leonardtown, Maryland. All persons desiring to be heard were heard after being duly sworn, the proceedings were recorded electronically, and the following was presented about the Applicant’s request.

The Property

The property is situated 49311 Bennett Drive, Ridge, MD (hereinafter “the Subject Property”). It consists of 1.47 acres, more or less, is zoned Village Center Mixed Use (“VMX”) and may be found at Tax Map 71, Grid 1, Parcel 206.

The Conditional Use & Variance Requested

The Applicant requests conditional use approval pursuant to Chapter 25 of the St. Mary’s County Comprehensive Zoning Ordinance for use type 91, Communications Tower, Commercial

within the Village Center Mixed Use (VMX) zoning district and a variance from Schedule 63.3.a to modify the buffer yard planting requirements.

The St. Mary's County Comprehensive Zoning Ordinance

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

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

Schedule 63.3.a requires a 65-foot Type B buffer yard along Bennett Drive and a 30-foot Type C Buffer yard adjacent to any residential properties.

The Evidence Submitted at the Hearing by LUGM

Stacy Clements, Environmental Planner of the St. Mary's County Department of Land Use and Growth Management ("LUGM"), presented the following evidence:

- The Subject Property is 1.47 acres in size and is currently used as a SMECO substation for the southern portion of the County.
- Ridge is a Village Center and a designated growth area, per CZO Section 30.2.1.a.
- The Applicant requests conditional use approval for a 160' tall commercial communications tower to be located within the substation site. The new tower will be replacing an existing tower that has become outdated.
- The Site Plan is currently under review by LUGM. The Health Department, Metropolitan Commission, Soil Conservation District, Department of Public Works and Transportation, and State Highway Administration have all approved the proposed project.
- Per Section 63.3, a 65' type B buffer yard is required by Use Type 91 whenever the proposed use abuts a Transportation, Communication, and Utility use such as Bennett Drive. Any adjacent commercial property will require a 65' Type B buffer yard as well.

Adjoining residential properties require a 30' Type C buffer yard. Applicant requests all required buffer yards be reduced to 15' buffers of their respective type.

- The prescribed Type B Buffer Yard shall ordinarily be 65 feet in depth and contain 4 canopy trees, 5 understory trees, 22 shrubs, and 11 evergreens / conifers planted for every 100 feet along the property line. A 30-foot Type C Buffer Yard requires 5 canopy trees, 7 understory trees, 27 shrubs, and 14 evergreens / conifers planted for every 100 feet along the property line.
- The following Attachments to the Staff Report were introduced:

Attachment 1: Standards Letter

Attachment 2: Location Map

Attachment 3: Zoning Map

Attachment 4: Site Plans

Attachment 5: Schedule 63.3.b. Buffer Yard Requirements

Attachment 6: Schedule 63.3.a. Buffer Yard Standards

Attachment 7: Tower Design Plans

Attachment 8: Radio Frequency Site Compliance Report

Attachment 9: Federal Communications Commission Registration

Attachment 10: Fall Zone Letter

Attachment 11: Staff TEC Comments

Applicants' Testimony and Exhibits

Applicants were represented before the Board by Louis Jenkins, Esq. and the civil engineering firm Lorenzi, Dodds & Gunnill, Inc. Applicants presented testimony that included a slideshow. The following evidence was among that presented:

- Due to the nature of the use and overhead power lines, SMECO is requesting that vegetation that be planted in the required buffer yards have a maximum height of 12' at maturity.
- The new communications tower will be 20' higher than the existing tower. The existing tower is 70 years old, corroded, and in need of replacement.
- The new tower will be constructed roughly 30 feet away from the existing tower, which shall remain in use until the replacement tower is constructed.
- The new tower will have a 60' fall radius.
- Applicant provided summary of the many conditional use standards associated with Use Type 91, and demonstrated compliance with each standard.
- Existing vegetation will remain, but no vegetation will be planted directly underneath the overhead lines.

Public Testimony

No members of the public appeared to testify for or against the requested variance and conditional use approval.

Decision

County Requirements for Granting Conditional Uses

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

1. The conditional use complies with the standards of the district in which it is to be located and standards applicable to that use;
2. The establishment, maintenance, and operation of the conditional use will not be detrimental to or endanger the public health, safety, convenience, morals, order, or

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

Id. Moreover, CZO § 51.3.91 lists fourteen (14) separate standards that must be satisfied to grant a conditional use. Upon review of the facts and circumstances, the Board concludes that the Applicants have met the general standards for granting a conditional use under CZO § 25.6 and the specific standards under CZO § 51.3.88.a. Several factors support this decision.

General Standards under CZO § 25.6

First, the proposed conditional use is allowed within the VMX zoning district because the use is permitted. Therefore, the first standard is met.

To the second standard, the Property has been host to a communications tower for decades already. No evidence has been presented that the modest increase in height will intensify any burdens or impacts associated with the use. Moreover, testimony was received that the existing cell tower is corroded and in need of a replacement with a new cell tower built to modern standards.

For the same reasons above, the Board finds the new use will not be more injurious to neighboring properties, satisfying the third standard, and will not have any adverse impacts above and beyond those normally associated with such communications towers.

To the fifth standard, the site plan addresses and ensures that adequate facilities, including access roads, will be provided. Furthermore, the permit site plan review process, administered by LUGM, will ensure that adequate utilities, road access, and stormwater management will be provided.

Sixth, the existing point of ingress and egress shall be maintained. It is also noted by the Board that a communications tower will not generate additional traffic or road congestion beyond the minimal traffic necessary to periodically maintain the structure.

Seventh, expanding adequate cellular and digital communications compatibility comports with the Comprehensive Plan, which seeks to “[p]rovide the infrastructure to ensure adequate capacity” by “[a]ccommodat[ing] efficient and equitable distribution of . . . communication utility services to meet the needs of the population and support the land use, design, and environmental concepts of this plan.” Comprehensive Plan, §§ 10.2.2.A, 10.2.2.A.ii.

Additionally, Applicant addressed each specific conditional use standard and concluded it was met; the Board concurs, and incorporates the Applicant’s testimony to this effect as though fully set forth herein.

County Requirements for Granting Variances

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

- (1) Because of particular physical surroundings such as exceptional narrowness, shallowness, size, shape, or topographical conditions of the property involved, strict enforcement of this Ordinance will result in practical difficulty;
- (2) The conditions creating the difficulty are not applicable, generally, to other properties within the same zoning classification;
- (3) The purpose of the variance is not based exclusively upon reasons of convenience, profit, or caprice. It is understood that any development necessarily increases property value, and that alone shall not constitute an exclusive finding;
- (4) The alleged difficulty has not been created by the property owner or the owner's predecessors in title;
- (5) The granting of the variance will not be detrimental to the public welfare or injurious to other property or improvements in the neighborhood and the character of the district will not be changed by the variance;
- (6) The proposed variance will not substantially increase the congestion of the public streets, or increase the danger of fire, or endanger the public safety, or substantially diminish or impair property values within the neighborhood; and
- (7) The variance complies, as nearly as possible, with the spirit, intent, and purpose of the Comprehensive Plan.

Id.

Findings – Standard Variance Requirements

Upon review of the facts and circumstances, the Board finds and concludes that the Applicant is entitled to relief from the St. Mary's County Comprehensive Zoning Ordinance. Several factors support this decision.

First, the Board finds that strictly interpreting the CZO would result in practical difficulty due to the particular physical surroundings of the Property. § 24.3(1). In *McLean v. Soley*, 270 Md. 208 (1973), the Maryland Court of Appeals established the standard by which a zoning board is to review “practical difficulty” when determining whether to grant a variance:

1. Whether compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.
2. Whether a grant of the variance applied for would do substantial justice to the applicant as well as to other property owners in the district, or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners.
3. Whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured.

Id. at 214–15.

Denial of this variance would impose a practical difficulty upon Applicant. Applicant seeks to locate the communications tower on the same parcel as a substation. Working within those constraints is necessarily difficult; as Applicant notes, this property has been a substation since the 1950s. Applicant’s testimony that there is no other site on the area able to provide the same wireless communication coverage for SMECO’s needs is compelling. Therefore, the Board does find that strict enforcement of the buffer yard planting requirements would impose a practical difficulty upon Applicant.

Conditions creating the difficulty are not generally applicable to other similarly situated

properties. As Applicant noted, this spot is uniquely situated for a communications tower; it is not reasonable to ask Applicant, or the County's citizens, to expect a cell tower be located elsewhere and accept any decrease in SMECO's ability to provide wireless coverage. Most sites are not encumbered by an existing substation, either, limiting the available build space.

To the third standard, the purpose of seeking the variance is not "based exclusively upon reasons of convenience, profit or caprice." Rather, Applicant has demonstrated a practical difficulty meeting this requirement of the Comprehensive Zoning Ordinance. Given the constrained buildable area of the lot, the siting of the proposed tower and the required reductions in buffer yards are difficulties borne from necessity, rather than functions of whim or simple ease for Applicant.

Fourth, the need for the variance does not arise from actions of the Applicant. As noted previously, Applicant's need for a variance stem from the physical characteristics of the Property, existing site constraints, and the site's particular ability to provide adequate wireless coverage.

Fifth, the variance will neither detrimentally affect the public welfare, injure other properties or improvements, nor change the character of the district. The neighboring property owners were notified of the variance request and given an opportunity to speak on the matter; none availed themselves of this opportunity. The Board finds that public welfare will not be jeopardized if the project is allowed to proceed.

Sixth, the proposed development will not increase the residential use of the property and the Board, as discussed above, does not find that it will increase congestion or the risk of fire, endanger public safety, or substantially diminish or impair property values in the neighborhood.

Finally, the Board finds that granting the variance will be in harmony with the general spirit, intent, and purpose of the Comprehensive Plan.

ORDER

PURSUANT to the application of SMECO, requesting conditional use approval pursuant to Chapter 25 of the St. Mary's County Comprehensive Zoning Ordinance for Use Type 91, Communications Tower, Commercial within the Village Center Mixed Use (VMX) zoning district and for a variance from Schedule 63.3.a to modify the buffer yard planting requirements; and

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

ORDERED, by the St. Mary's County Board of Appeals, that the Applicants are granted a conditional use to allow Use Type 91 at the Property and for a variance that the required 65-foot Type B buffer yard along Bennett Drive be reduced to a 30-foot Type B buffer yard, that the required 65-foot Type B buffer yard adjacent to commercial properties be reduced to a 15' Type B buffer yard, that the required 30-foot Type C buffer yard adjacent residential properties be reduced to a 15' Type B buffer yard as delineated on the site plan shown on Exhibit 2 Attachments;

UPON THE FOLLOWING CONDITIONS THAT:

- (1) Tower shall be constructed so as to provide adequate capacity for future co-location of other commercial and/or government-operated antennae unless the applicant demonstrates why such design is not physically feasible. The system design plan shall delineate areas near the base of the tower to be used for the placement of additional equipment buildings for other users;
- (2) No signals, lights or illumination shall be permitted on the tower unless required by the Federal Communications Commission, the Federal Aviation Administration, or the County;
- (3) No commercial advertising or other signage shall be permitted on the tower;
- (4) All obsolete or unused facilities, including buildings, towers, and all other improvements associated with the tower, shall automatically be deemed abandoned upon 24 months of continuous cessation of operations and shall be removed at such time without cost to

the County. The Applicant shall provide a bond, letter of credit, or other appropriate surety at time of approval as approved by the County to cover the cost for demolition of the facility and site restoration;

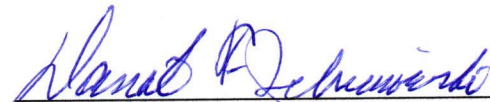
(5) Contact information shall be prominently displayed on the fence enclosing each facility. This information shall be current and shall identify the company name, responsible individual, and phone number for the contact person;

(6) Final site plan approval shall be required;

AND UPON FURTHER CONDITION THAT, the foregoing conditional use is also subject to the following condition that the Applicants shall comply with any instructions and necessary approvals from the Department of Land Use and Growth Management.

This Order does not constitute a building permit. In order for the Applicants to construct the structures permitted in this decision, they must apply for and obtain the necessary building permits, along with any other approvals required to perform the work described herein.

Date: MAY 11 , 2023

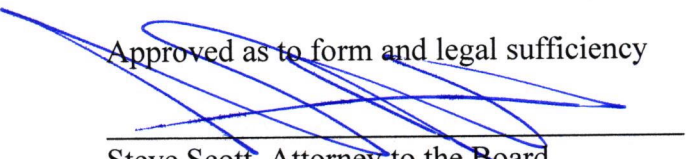

Daniel F. Ichniowski, Chairman

Those voting to grant the conditional use:

Mr. Ichniowski, Mr. Bradley, Ms. Delahay,
Mr. Miedzinski, and Mr. Richardson

Those voting to deny the conditional use:

Approved as to form and legal sufficiency


Steve Scott, Attorney to the Board

NOTICE TO APPLICANT

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

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

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