

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS
Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

IN THE MATTER OF: *
OAKVIEW RECREATION CORPORATION *
and *
OMNIPOINT COMMUNICATIONS CAP *
OPERATIONS, LLC *
 Petitioners *
 *
 Mikel Budde *
 Douglas Brown *
 For the Petition *
 *
Thomas Carroll, Esquire *
 Attorney for Petitioners *
 * * * * *

Board of Appeals Case No. S-2669
(OZAH Referral No. 06-25)

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER’S REPORT AND RECOMMENDATION

TABLE OF CONTENTS

	PAGE
I. STATEMENT OF THE CASE	2
II. FACTUAL BACKGROUND.....	3
A. The Subject Property and the General Neighborhood	3
B. Proposed Use	6
C. Need for the Proposed Facility	18
D. Impact of the Proposed Facility on the Neighborhood.....	21
E. The Master Plan.....	23
III. SUMMARY OF HEARING.....	23
IV. FINDINGS AND CONCLUSIONS.....	28
A. Standard for Evaluation.....	28
B. General Conditions	30
C. Specific Standards	35
D. Additional Applicable Standards	41
V. RECOMMENDATION	44

I. STATEMENT OF THE CASE

Petition No. S-2669, filed on January 30, 2006, by Oakview Recreation Corporation (Oakview) and Omnipoint Communications CAP Operations, LLC (Omnipoint),¹ sought a special exception, pursuant to §59-G-2.43 of the Zoning Ordinance, to permit construction of an unmanned, wireless telecommunications facility on a 120 foot tall monopole at 1101 Corliss Street, Silver Spring. The subject site is in the R90 Zone, which permits telecommunications facilities by special exception., and the Tax Account Number is 05-00272677. A community swimming pool facility is already operating at the site under Special Exception CBA-379, which will have to be modified to specify the additional use. That matter is not before the Hearing Examiner in this proceeding.²

On February 7, 2006, the Board of Appeals issued a notice that a hearing in this matter would be held before the Office of Zoning and Administrative Hearings on June 16, 2006, at 9:30 a.m., in the Second Floor Hearing Room of the Stella B. Werner Council Office Building (Exhibit 13). Technical Staff at the Maryland-National Capital Parks and Planning Commission (M-NCPPC), in a report issued May 26, 2006, recommended approval of the special exception, and a number of conditions (Exhibit 15).³ The Planning Board, in a letter dated June 13, 2006, also unanimously recommended approval of the Petition, with conditions (Exhibit 17).

A public hearing was convened as scheduled on June 16, 2006, and Petitioners, at the request of the Hearing Examiner, moved to amend the petition (Exhibit 18), pursuant to Zoning Ordinance §59-A-4.24, to accurately reflect the correct section of the Code (Section 59-G-2.58) currently

¹ Omnipoint is a subsidiary of T-Mobile, USA, which holds a license issued to it by the Federal Communications Commission ("FCC") to provide personal communication service ("PCS") throughout the greater Baltimore-Washington, DC metropolitan areas, including all parts of Montgomery County.

² Petitioner has asked the Board for administrative modification of CBA-379 to be considered when the Board reviews the petition in the instant case, S-2669. Tr. 7 and Exhibit 14(b).

³ The Technical Staff report is frequently quoted and paraphrased herein.

applicable to telecommunications facilities.⁴ Petitioners submitted a revised Statement reflecting the proper reference to Section 59-G-2.58 and describing how the application meets the requirements of that section of the Zoning Ordinance. Exhibit 20. The change in the section numbers of the Ordinance does not materially affect the substance of the regulations and does not materially change the substance of the submitted application.

In addition, the Petitioners submitted a revised site plan (Exhibit 19) to reflect the fact that a portion of the subject property has been sold to the Montgomery County Board of Education (MCBE), reducing the site's size from 2.89 acres to 2.07 acres. The sale of this piece of property also does not materially affect the substance of the application, as will be discussed below. A reduction of certain setback requirements for the north and west sides was sought in the original application, and continues to be part of the application, as permitted by Zoning Ordinance §59-2.58(a)(1)(d).⁵

Petitioners called two witnesses, and there were no other participants at the hearing, which concluded on the same day. The record was held open until July 7, 2006, so that a notice of the motion to amend could be issued and time given for public comment. That notice was in fact issued on June 16, 2006 and sent to all parties entitled to receive notice of the hearing (Exhibit 27). The only response received was from Technical Staff, who filed a supplemental report on June 27, 2006 (Exhibit 29) indicating their continued approval of the petition. The record closed, as scheduled on July 7, 2006, and the petition remains unopposed.

II. FACTUAL BACKGROUND

A. The Subject Property and the General Neighborhood

As noted above, the address of the subject property is 1101 Corliss Street, Silver Spring

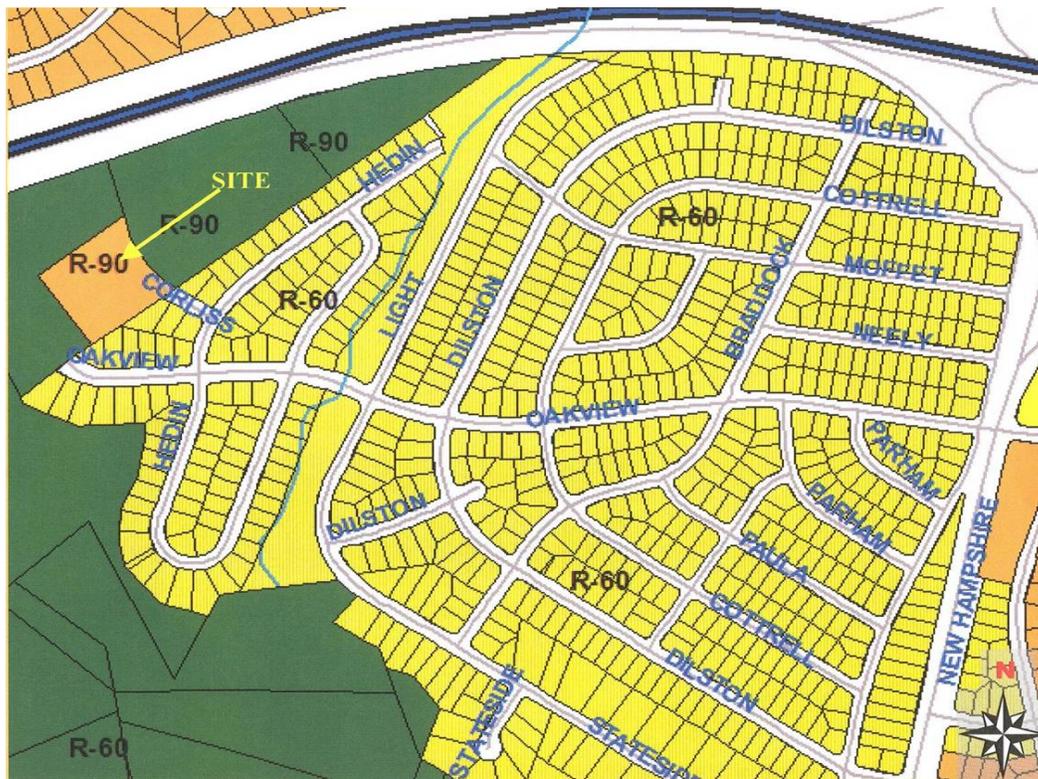
⁴ Under a zoning text amendment (ZTA 05-10, Ordinance No. 15-54, effective December 26, 2005), the regulations applicable to telecommunications facilities are now located in Section 59-G-2.58, instead of Section 59-G-2.43.

⁵ It should be noted that this request to reduce the setback requirements in §59-G-2.58 is not a variance request because the applicable setbacks for the zone will be adhered to, and §59-G-2.58 itself authorizes the Board to reduce the setbacks specified in this provision if certain criteria are met.

Maryland. The subject site is owned by co-applicant, Oakview Recreation Corporation, which operates a community swimming pool facility at the site under Special Exception CBA-379. This property is not located within a Special Protection Area or Primary Management Area. There are no steep slopes, no erodible soils, no wetlands and no streams or associated environmental buffers. Exhibit 15, p. 5.

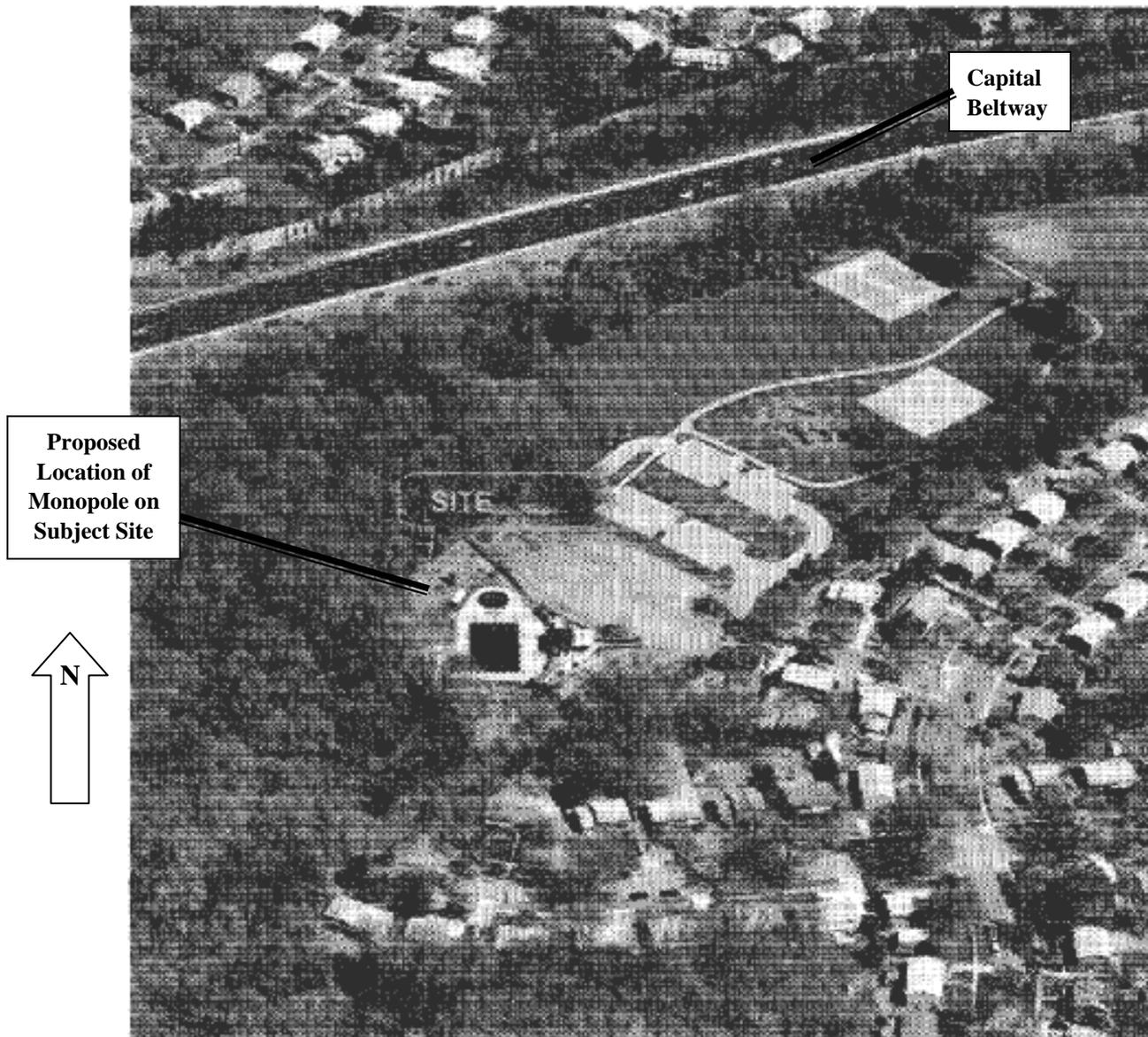
The lease agreement between Oakview and Omnipoint is included in the record as Exhibit 11.

Technical Staff reports that the site is located approximately 70 feet from the northern terminus of Oakview Drive and at the terminus of Corliss Drive. The property consists of approximately 2.07 acres of land⁶ and is improved with a community swimming pool facility and associated parking lot. It has approximately 60 feet of frontage on Corliss Drive (south) from which it is accessed. The following map attached to the Technical Staff report shows the site's general location:

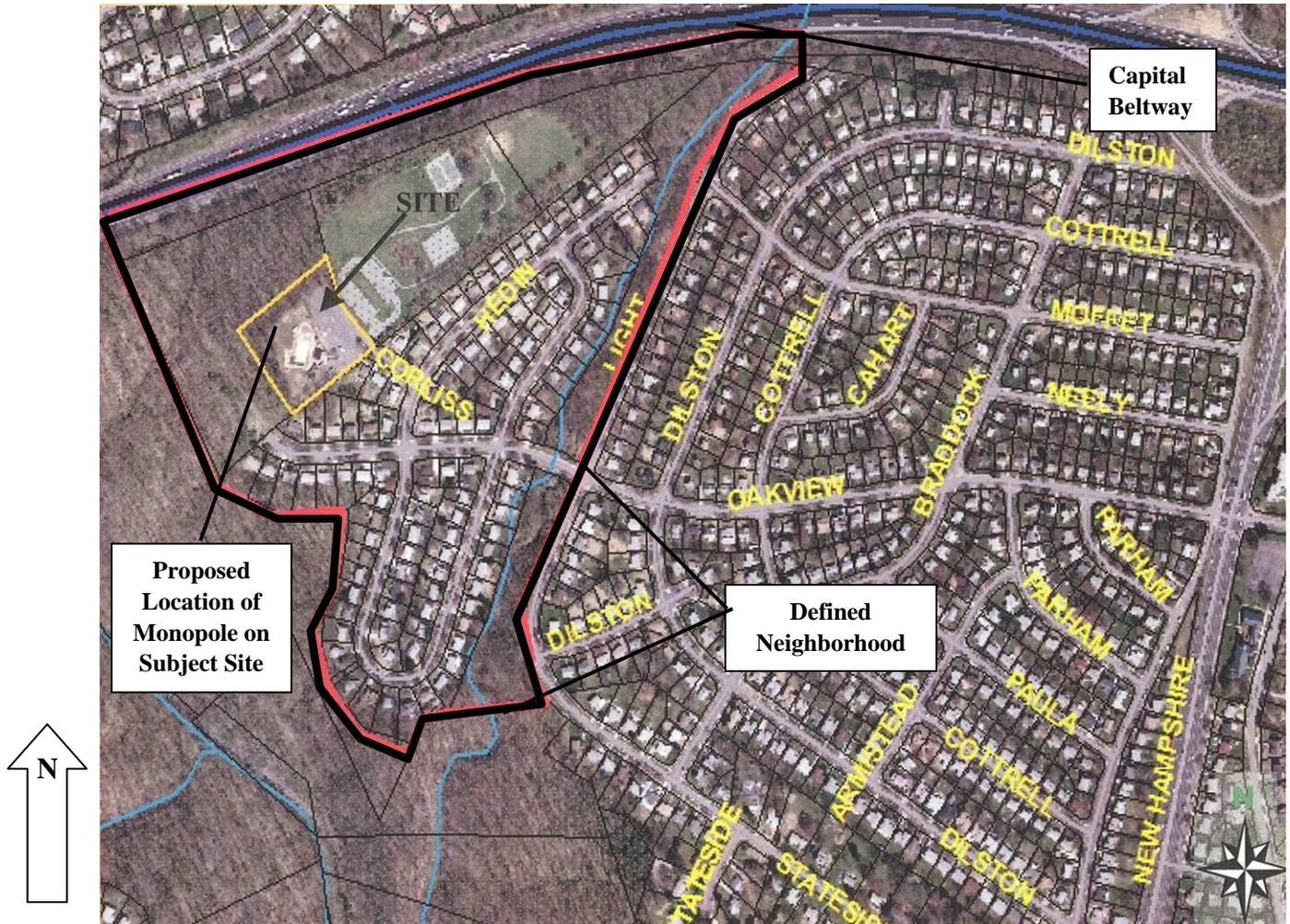


⁶ When Technical Staff analyzed the property, it was thought to consist of 2.89 acres, but Oakview sold a portion of the land to MCBE, reducing its size. Technical Staff determined (Exhibit 29) that this reduction in size, which also reduced the setback from 271 feet to 151 feet from the eastern property line, did not alter its recommendation of approval because the new setback distance would still be within the required one to one setback, which in this case is 120 feet.

Also from the Technical Staff report is an aerial photo of the site, shown below:



Technical Staff proposes to define the general neighborhood within which the subject site is located as bordered by the Capital Beltway (I-495) to the north, East Light Drive to the east and the Northwest Branch Park to the west and south, as can be seen on the outline provided by Technical Staff in another aerial photo attached to their report, and reproduced on the following page. The Hearing Examiner accepts this definition of the general neighborhood.



The neighborhood is predominantly residential in the R-60 Zone, with some public and institutional uses in the R-90 Zone. Those include the Oakview community swimming pool (on the subject site), the Brookview Elementary School (immediately to the northeast of the site), and M-NCPPC's Brookview Park (adjacent to the site, on the north and west). Just north of the Brookview Park is the Capital Beltway. Adjacent to the site on the southeast are single-family dwellings in the R-60 Zone.

B. The Proposed Use

The proposed use is a telecommunications facility with three panel antennas flush mounted to a 120 foot monopole. The panel antennas measure approximately fifty-four inches long, twelve

Taken from .09 miles (about 475 feet)

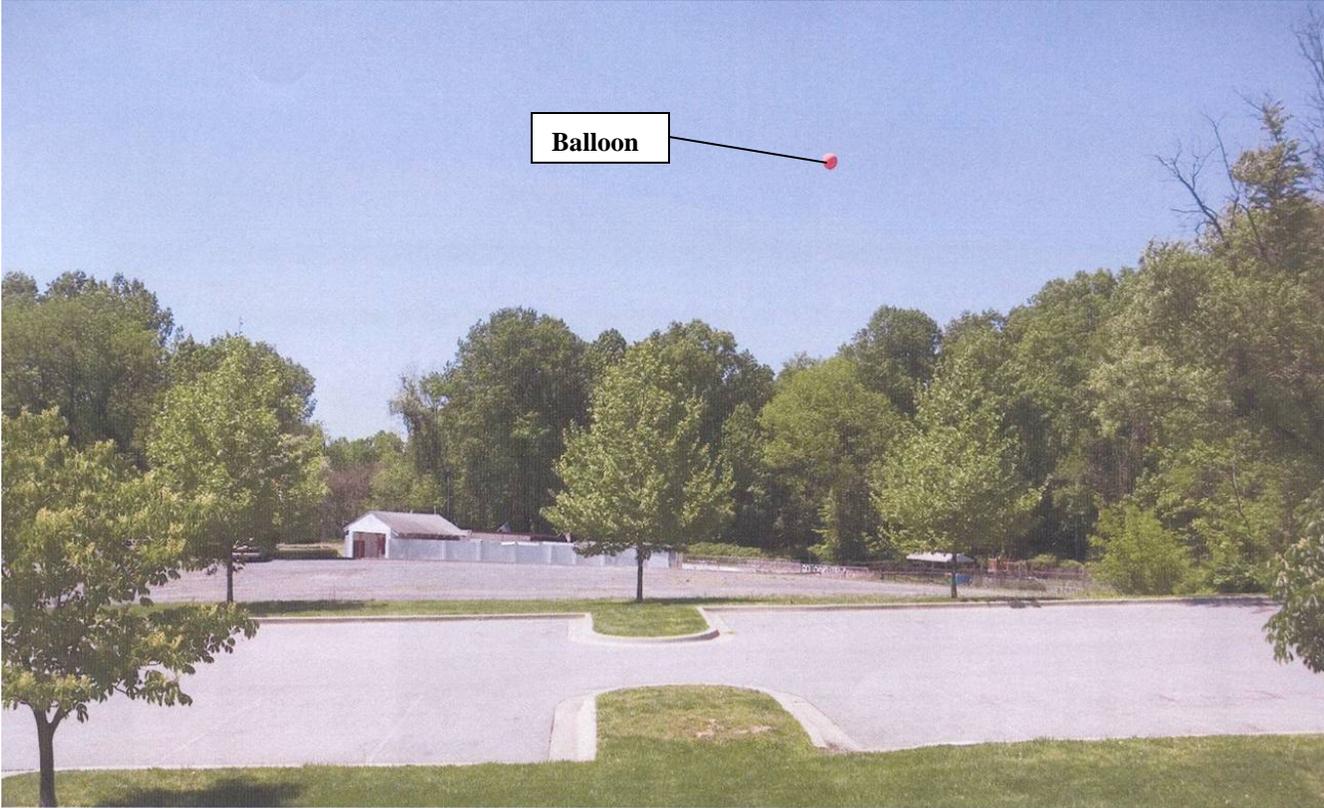
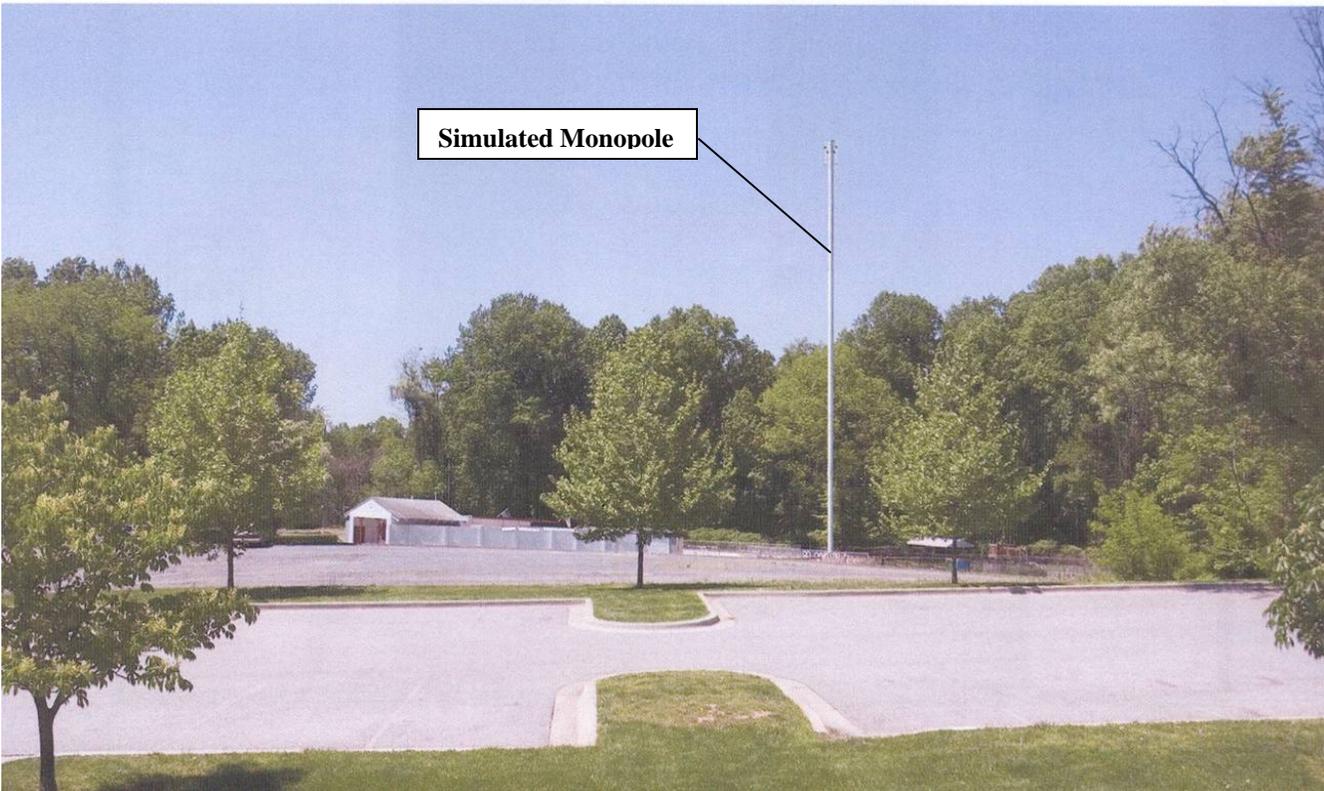


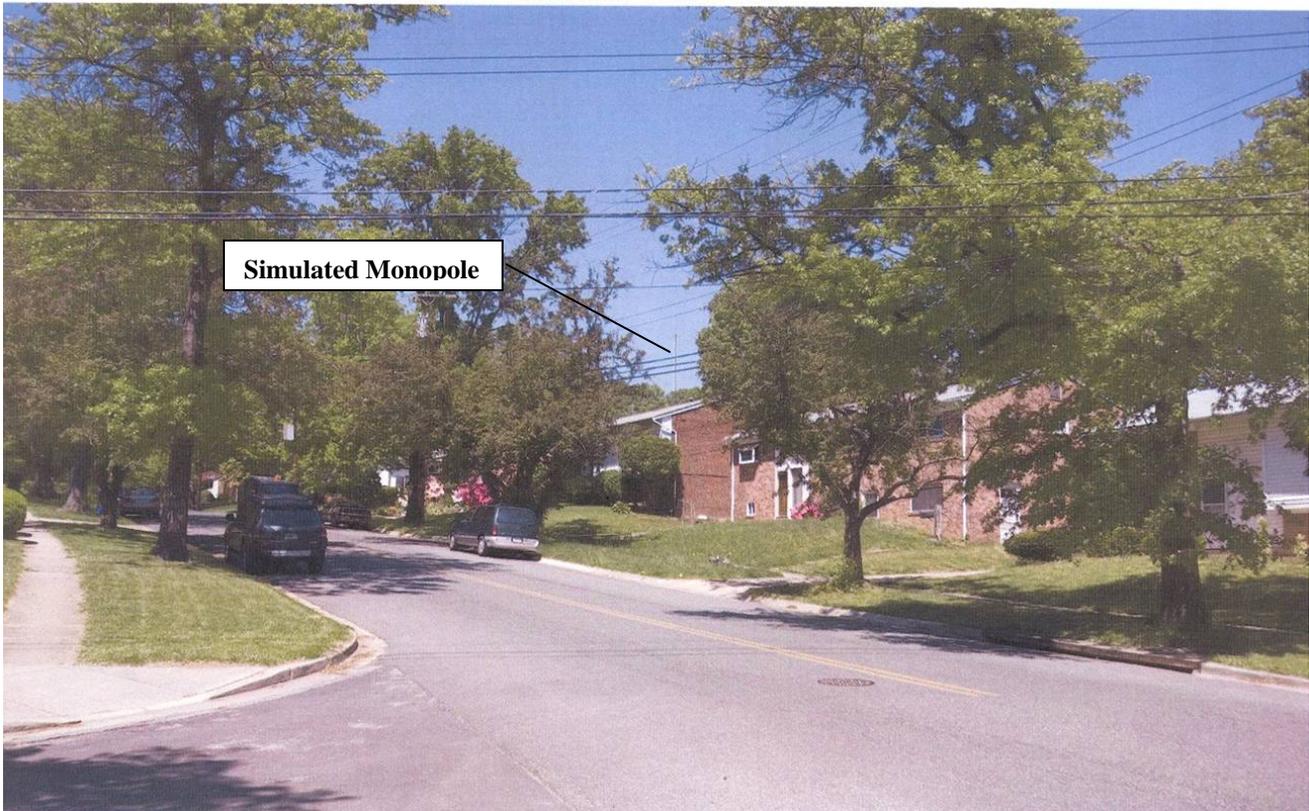
PHOTO - 6



Taken from .19 miles (about 1,000 feet)



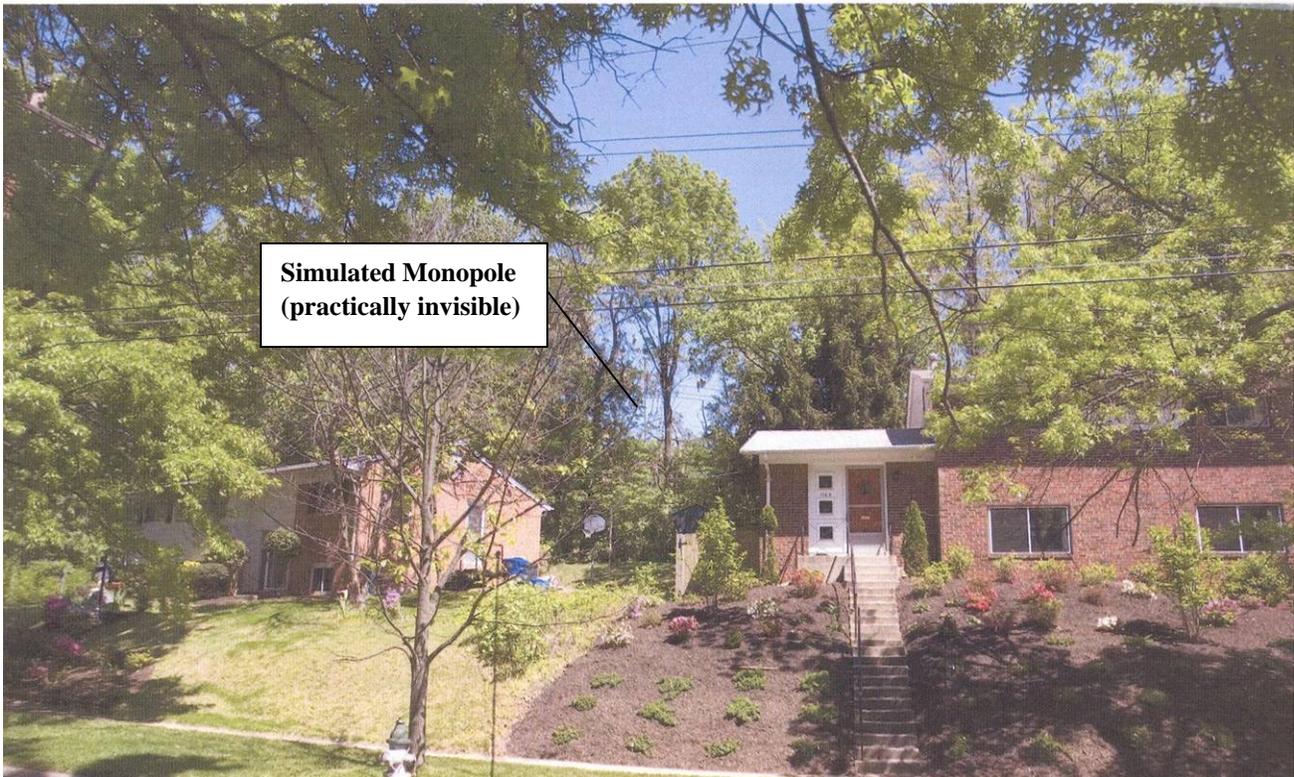
PHOTO - 1



Taken from .21 miles (about 1,100 feet)



PHOTO - 2



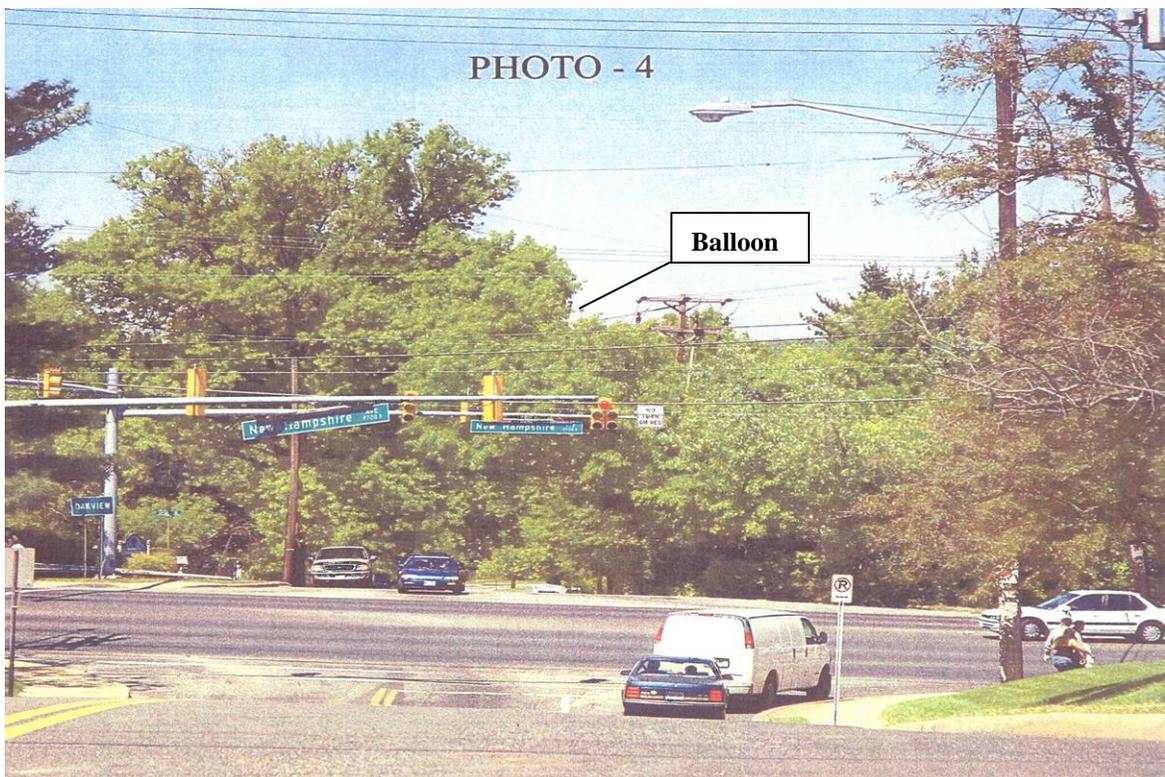
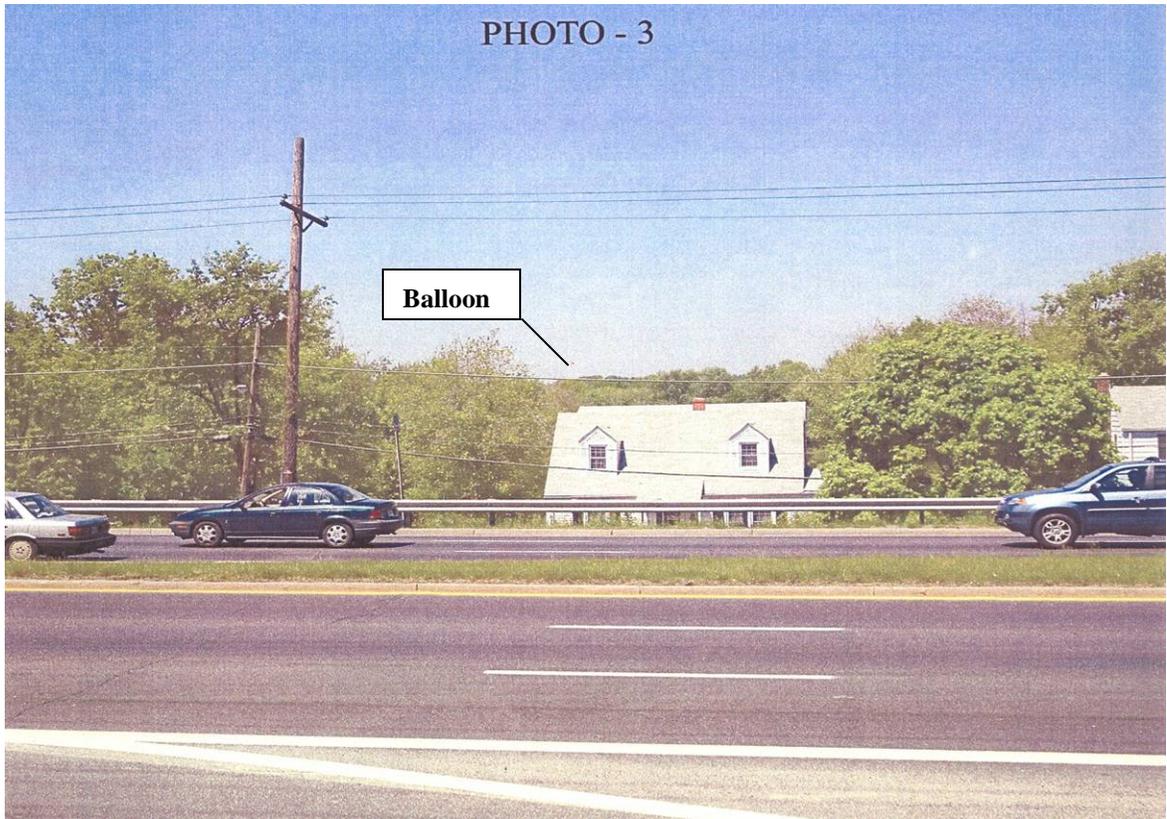
Taken from .31 miles (about 1,640 feet)



PHOTO - 5

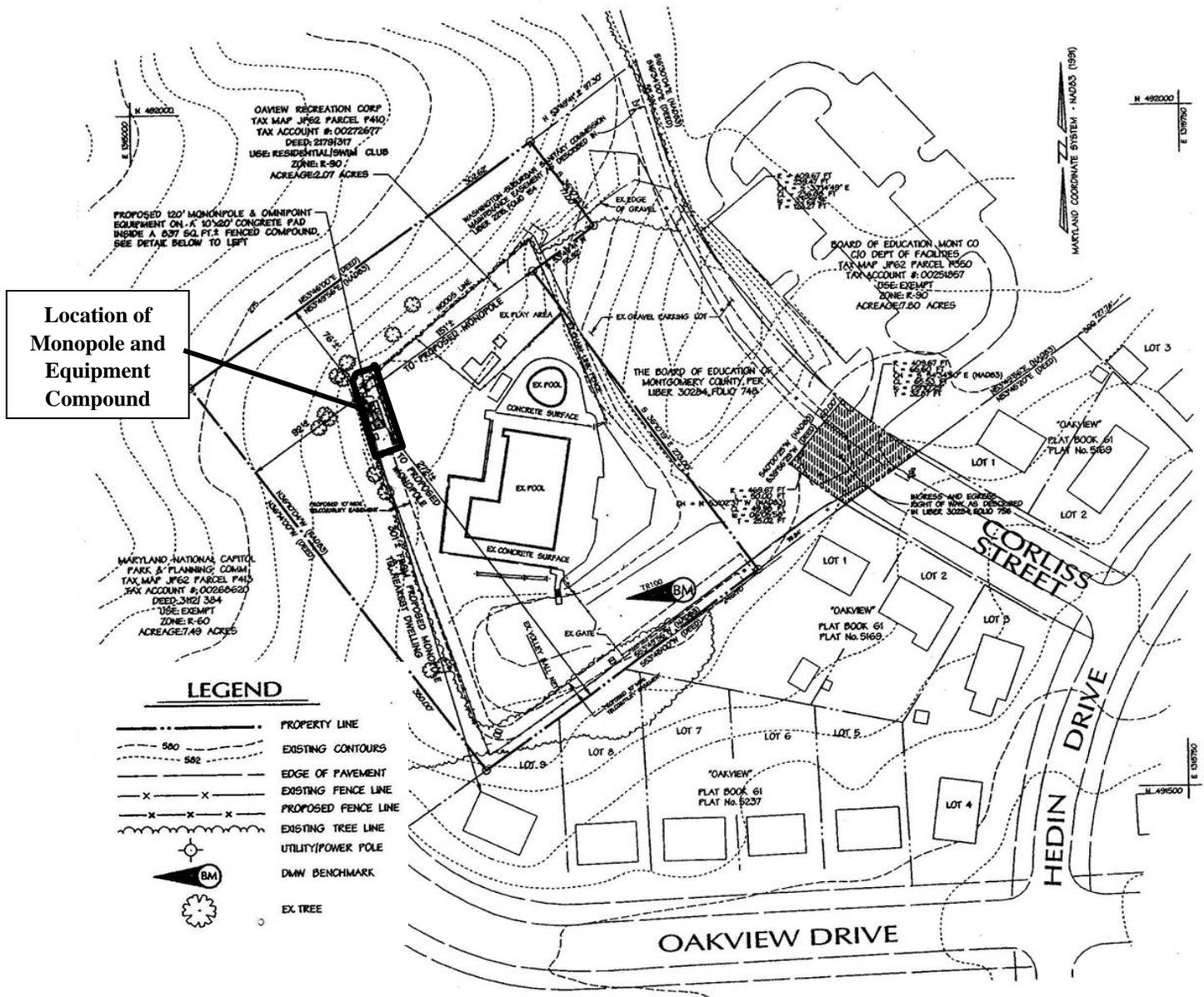


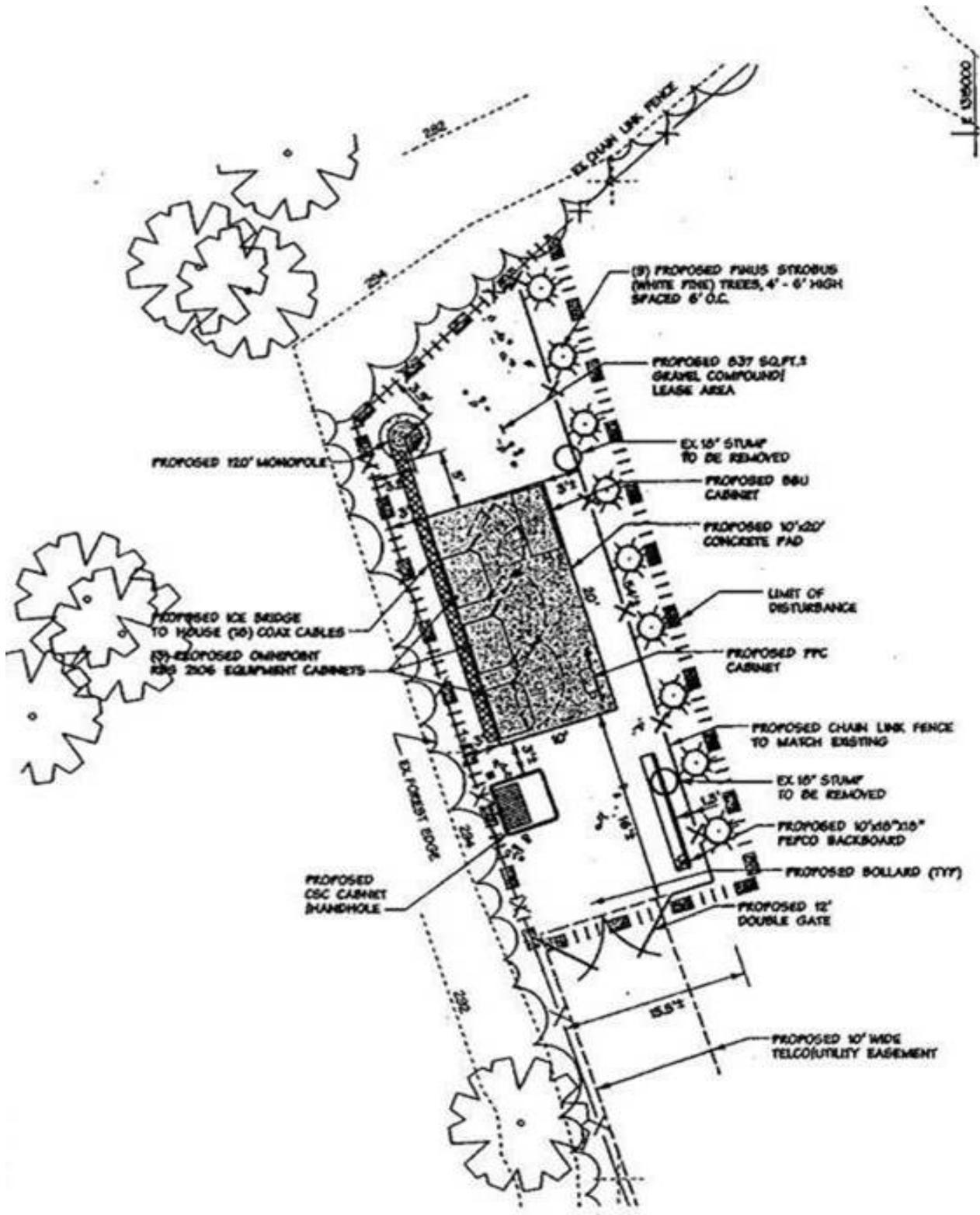
The following two photos (3 and 4) were taken from .70 miles (3,700 feet) and .72 miles (3,800 feet), respectively. There is no simulated monopole because none would be visible from that distance.



As is apparent from the above photographs, the proposed facility will be substantially visible only to those who are practically on the grounds of the subject site or right next to it. The parkland to the north and west will obscure views of the monopole from those vantage points, and the institutional use to the east, makes visibility of the monopole from that location unimportant. The monopole will be located well back in the northwestern corner of the site, which will put it over 300 feet from the nearest dwelling. The Hearing Examiner therefore concludes that the proposed monopole will not be a visual nuisance to the neighborhood.

The revised Site Plan (Exhibit 19) shows the location of the proposed structures, their details and the notes describing the project. The site layout is shown below, followed by details and notes:





COMPOUND DETAIL

SCALE: 1" = 10'



PROPOSED OMBIPONT
DEADPOLE ANTENNAS
CLUSTER MOUNTED TO
PROPOSED MONOPOLE

PROPOSED 120'
MONOPOLE

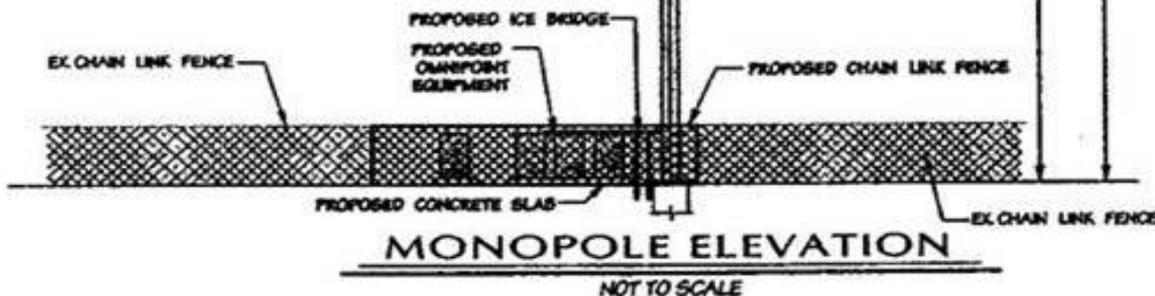
120' TO ANTENNA RAD CENTER AND TOP OF PROPOSED MONOPOLE

123'± TO TOP OF PROPOSED ANTENNAS

MONOPOLE SETBACKS

1:1 PER MONTGOMERY COUNTY ZONING CODE

SETBACK	REQUIRED	PROVIDED
FRONT	120'	272'
SIDE	120'	151'
SIDE	120'	92'
REAR	120'	76'



ADDITIONAL NOTES:

1. THE APPLICANTS SHALL PROVIDE A CERTIFIED ARBORIST OR LICENSED TREE PROFESSIONAL TO PERFORM ROOT PRUNING AND TREE TRIMMING WITHIN THE FOREST. THE ARBORIST MUST BE AT THE PRE-CONSTRUCTION MEETING AND PRESENT DURING CONSTRUCTION.
2. THE APPLICANTS SHALL CONTACT AN MNCPPC INSPECTOR FOR PRE-CONSTRUCTION INSPECTION OF TREE PROTECTION MEASURES AND AUTHORIZATION TO BEGIN TREE CLEARING.
3. THE MONOPOLE SHALL BE REMOVED AT THE COST OF THE OWNER OF THE TELECOMMUNICATION FACILITY WHEN THE TELECOMMUNICATION FACILITY IS NO LONGER IN USE BY A TELECOMMUNICATION CARRIER FOR MORE THAN 12 MONTHS.
4. THE APPLICANTS SHALL OBTAIN A WAIVER FROM THE SETBACK REQUIREMENTS FOR THE NORTH AND WEST SIDES OF THE PROPERTY.
5. THE APPLICANTS SHALL OBTAIN APPROVAL OF A MODIFICATION OF THE EXISTING SPECIAL EXCEPTION (CBA-379) TO REFLECT THE PROPOSED TELECOMMUNICATION FACILITY.

SITE NOTES

1. CURRENT OWNER AND STREET ADDRESS: OAKVIEW RECREATION CORP
PO BOX 3213
SILVER SPRING, MD 20918
2. CONTRACT LESSEE/APPLICANT: OMNIPONT COMMUNICATIONS
CAP OPERATIONS, LLC
12050 BALTIMORE AVENUE
BELTSVILLE, MD 20705
(240) 264-8600
3. SITE AREA: 2.07 AC.
4. EXISTING USE: RESIDENTIAL
5. SITE ADDRESS: 1101 CORLISS STREET
SILVER SPRING, MD 20903
6. SITE DATA: TAX MAP JP62 PARCEL P410
DEED: 2179/317
TAX ACCOUNT #: 00272677
ELECTION DISTRICT: 05
ZONE: R-90
ADC MAP 37 GRID G-5
7. MONOPOLE LOCATION
LATITUDE: N 39°01'01.37" (NAD83) N 39°01'00.97" (NAD27)
LONGITUDE: W 76°59'24.16" (NAD83) W 76°59'25.26" (NAD27)
GROUND ELEVATION: 294.46' AMSL (NAVD 88)
PROPOSED STRUCTURE AND ANTENNA HEIGHT: 123'± AGL
TOTAL PROPOSED ANTENNA ELEVATION: 417.46' AMSL (NAVD 88)
8. THIS PROPOSAL IS FOR AN UNMANNED TELECOMMUNICATIONS FACILITY CONSISTING OF INSTALLING A PROPOSED 120' MONOPOLE/LIGHT POLE WITH THREE (3) ANTENNAS, AND THE PLACEMENT OF (3) GROUND BASED EQUIPMENT CABINETS ON A 10' x 20' CONCRETE PAD NEXT TO THE MONOPOLE INSIDE A PROPOSED 837 SF.± FENCED GRAVEL COMPOUND. THE PROPOSED MONOPOLE SHALL BE DESIGNED TO ACCOMMODATE NO LESS THAN THREE CARRIERS.
9. THE TOPOGRAPHIC INFORMATION SHOWN HEREON, IN THE AREA OF THE PROPOSED COMPOUND, IS THE RESULT OF A DMW FIELD SURVEY PERFORMED ON 03/24/05. ALL OTHER TOPOGRAPHY WAS PROVIDED BY MONTGOMERY COUNTY GIS. THE PROPERTY INFORMATION AND LOCATION HAVE BEEN COMPILED FROM DEEDS, PLATS AND OTHER SOURCES DEEMED RELIABLE. HOWEVER, THIS PLAN IS NOT THE RESULT OF A DMW BOUNDARY SURVEY AND, THEREFORE, IS SUBJECT TO CHANGE. THIS PLAN WAS PREPARED WITHOUT THE BENEFIT OF A TITLE REPORT. THIS PLAN MAY BE SUBJECT TO EASEMENTS AND RESTRICTIONS THAT MAY BE RECORDED OR UNRECORDED AND MAY NOT BE SHOWN HEREON. BOUNDARY INFORMATION SHOWN HEREON IS BASED UPON THE FOLLOWING DEED LIBER 2179 FOLIO 317 AND RECORDED AMONG THE LAND RECORDS OF MONTGOMERY COUNTY, MARYLAND, OVERLAID ON PROPERTY EVIDENCE FOUND IN THE FIELD AND ROTATED TO THE MARYLAND COORDINATE SYSTEM NAD83(1991) AS SHOWN.
10. THERE ARE NO NEW SIGNS PROPOSED FOR THIS FACILITY UNLESS REQUIRED BY THE FEDERAL COMMUNICATIONS COMMISSION, THE FEDERAL AVIATION ADMINISTRATION, OR MONTGOMERY COUNTY. (SEE NOTE 19)
11. NO ANTENNA LIGHTS OR STROBOSCOPIC LIGHTS ARE PROPOSED FOR THIS FACILITY, UNLESS REQUIRED BY THE FEDERAL AVIATION ADMINISTRATION.
12. THIS SITE IS NOT LOCATED WITHIN A 100 YEAR FLOOD PLAIN AS PER THE NATIONAL FLOOD INSURANCE PROGRAM, FLOOD INSURANCE RATE MAP COMMUNITY PANEL NUMBER 240049-0200-C REVISED AUGUST 5, 1991.
13. NO WATER OR SANITARY UTILITIES ARE REQUIRED FOR THE PROPOSED FACILITY.
14. EXISTING UTILITY LOCATION INFORMATION SHOWN ON THESE PLANS IS FOR THE CONTRACTORS CONVENIENCE ONLY. WHILE THE INFORMATION SHOWN HAS BEEN GATHERED FROM SURVEYS AND SOURCES DEEMED TO BE RELIABLE, THE CORRECTNESS OR COMPLETENESS OF THE INFORMATION SHOWN IS NOT WARRANTED OR GUARANTEED. THE CONTRACTOR SHALL VERIFY ALL INFORMATION TO HIS OWN SATISFACTION.
15. THE CONTRACTOR IS TO NOTIFY MISS UTILITY (800)-257-7777 A MINIMUM OF 3 WORKING DAYS PRIOR TO ANY CONSTRUCTION OR EXCAVATION. THE CONTRACTOR IS TO ALSO NOTIFY A PRIVATE UTILITY CONTRACTOR FOR ALL ON-SITE UTILITY LOCATIONS.
16. COMMUNICATION TOWER SHALL BE GREY OR A SIMILAR COLOR THAT MINIMIZES VISIBILITY, UNLESS A DIFFERENT COLOR IS REQUIRED BY THE FCC OR FAA.
17. GROUND DISTURBANCE NOT TO EXCEED 1000 SQUARE FEET ±.
18. THE MONOPOLE WILL BE IDENTIFIED BY A SIGN NO LARGER THAN 2 SQUARE FEET AND FIXED TO THE SUPPORT STRUCTURE OR EQUIPMENT SHELTER. THE SIGN SHALL IDENTIFY THE OWNER AND MAINTENANCE SERVICE PROVIDER OF THE SUPPORT STRUCTURE OR ANY ATTACHED ANTENNAS AND PROVIDE THE TELEPHONE NUMBER OF A PERSON TO CONTACT REGARDING THE STRUCTURE. THE SIGN WILL BE UPDATED AND THE BOARD OF APPEALS NOTIFIED WITHIN 10 DAYS OF ANY CHANGE IN OWNERSHIP.
19. THERE WILL NOT BE ANY OUTDOOR STORAGE OF EQUIPMENT OR OTHER ITEMS, ACCEPT AS PROVIDED BY THESE PLANS AND APPROVED BY THE COUNTY.
20. THE OWNER OF THE TELECOMMUNICATIONS FACILITY SHALL MAINTAIN THE TELECOMMUNICATIONS FACILITY IN A SAFE CONDITION.
21. TREE SAVE NOTES:
1. TOTAL AREA OF SITE: 2.07 ACRES
2. TOTAL FORESTED AREA: 0.83 ACRES
3. FORESTED AREA TO BE DISTURBED: 1 TREE TO BE TRIMMED
OR REMOVED (AS NECESSARY)

The antennas will transmit radio frequency signals twenty-four hours a day for the T - Mobile network, which holds a license from the Federal Communications Commission (“FCC”) to provide personal communication service (“PCS”) throughout the greater Baltimore-Washington, DC metropolitan areas, including Montgomery County. Exhibit 20. No lighting or sound will be associated with this activity.⁷ The only staffing will be regular monthly service calls, and responses to emergencies. Exhibit 20, p. 3. The only sign will be the 2 square foot warning sign called for by regulations. Exhibit 19, Site Note # 18.

Petitioners’ revised site plan (Exhibit 19) reflects the fact that a portion of the subject property has been sold to the Montgomery County Board of Education, reducing the site’s size from 2.89 acres to 2.07 acres. The proposed setback distances for the monopole remain the same on all sides except for the east side which has been reduced from 271 feet to 151 feet. The proposed distance of 151 feet on the east side still meets the required one-to-one (height-to-distance) setback requirements for the facility, since the proposed monopole will be 120 feet tall. Therefore, the sale of the eastern portion of property does not materially affect the substance of the application. A reduction of those setback requirements for the north and west sides was sought in the original application, and continues to be part of the application, as permitted by Zoning Ordinance §59-2.58(a)(1)(d). This issue will be discussed in the section-by-section analysis in Part IV.C. of this report.

On September 14, 2005, the proposed facility was reviewed and recommended for approval by the County Telecommunication Transmission Facility Coordinating Group (TTFCG), subject to Petitioners obtaining a special exception and what it incorrectly referred to as a “variance” from the setback requirements discussed in footnote 5, on page 3 of this report. Exhibit 9. As mentioned there, the reduction of those setback requirements is not a “variance” request. Technical Staff initially made the same error in its report, but corrected it later in an e-mail to the Hearing Examiner (Exhibit 16).

⁷ Two floodlights will be provided on the scene in case emergency, night-time repairs are needed. Tr. 12.

C. Need for the Proposed Facility

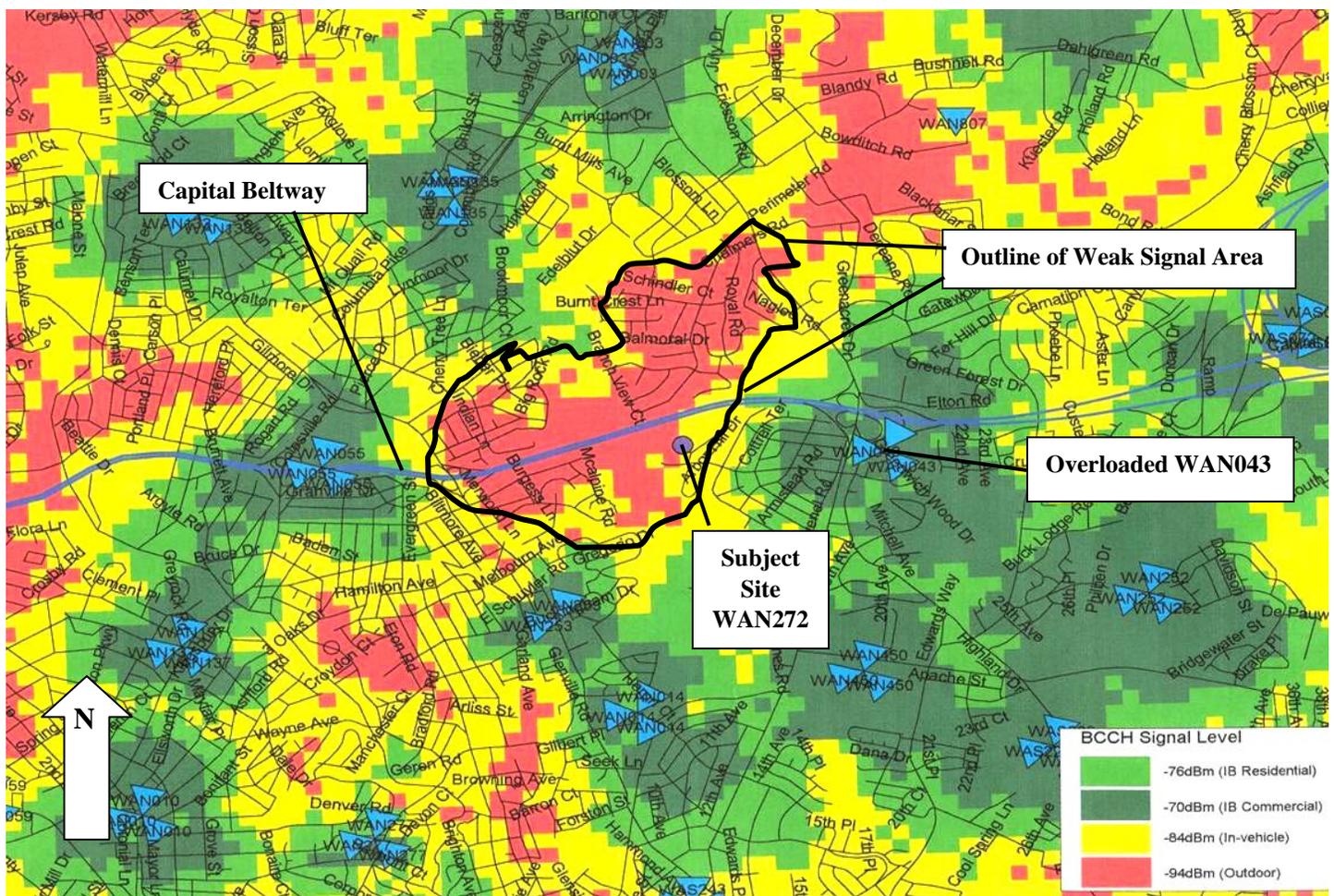
Even though this petition has been recommended by both the Telecommunications Transmission Facility Coordination Group and the Planning Board, the Board of Appeals “must make a separate, independent finding as to need and location of the facility.” Zoning Ordinance §59-G-2.58 (a)(12).

Petitioners presented evidence at the hearing as to both the need and the proper location of the proposed telecommunications facility. That testimony came from Mikel Budde, Zoning Manager for Omni Point, T-Mobile and an expert in siting telecommunications facilities (Tr. 9-23), and from Douglas Brown, an expert in Radio Frequency (RF) Engineering. Tr. 24-45.

Mr. Budde explained that the proposed facility will fill a critical need for T-Mobile in the area surrounding the subject site, where both significant coverage and capacity problems exist. Seamless coverage is necessary for public convenience and service. Additionally, availability of wireless communications benefits the public safety and welfare by facilitating an individual's communications with police and fire rescue operations in times of emergencies. In evaluating its need for service in the area and completing an examination of possible site locations, T-Mobile selected the subject site as an appropriate location for its facility. By locating its facility at the rear of the property bordering the park land the Petitioners minimized any possible impact to the community. Tr. 17-19.

Douglas Brown testified as an expert in Radio Frequency (RF) Engineering. Tr. 23-45. He introduced Exhibit 24, which summarized the need for coverage. He identified maps and charts showing customer complaints, dropped calls, current signal coverage and anticipated signal coverage once the proposed facility is operational (Exhibits 24, 25 and 26). He noted that there is a significant signal coverage gap on the Capital Beltway (I-495) in the area of the subject site and that, on average, 372 calls are dropped daily (*i.e.*, disconnected from service in mid-call) in the entire area that would

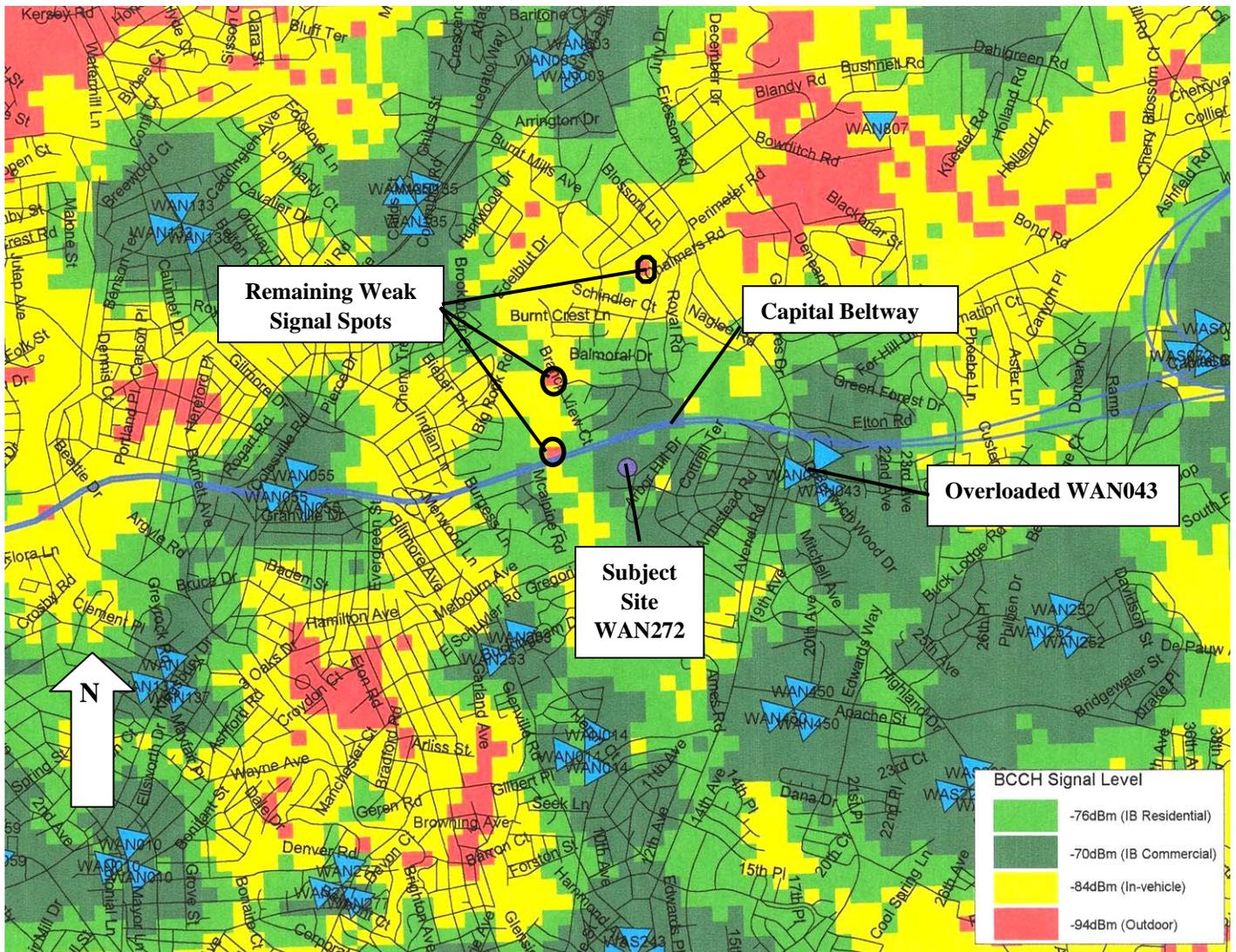
be covered by the proposed facility, which he called “WAN272.” The levels of current coverage are depicted on Exhibit 25(a), shown below. On the actual exhibits, red areas indicate minimal signal; yellow areas indicate reasonable coverage if you are in an automobile; light green areas indicate good residential coverage; and dark green areas shows there's good commercial in-building coverage.⁸ Unfortunately, we live in a achromatic universe when it comes to reports, so the Hearing Examiner has outlined the main area lacking sufficient signal strength (*i.e.*, the “red” area) to be remedied.



The new facility would provide missing coverage on the Capital Beltway and eliminate most of the dropped calls in the overall area. It would also supplement the service that is currently being

⁸ The dark green indicates the strongest signal because it's harder to penetrate a commercial building. Signal strength is measured in decibels. The signal is strongest as the number approaches zero.

provided by an overloaded facility (WAN043) to the east of the subject site. Mr. Brown estimated that WAN043 would exceed its capacity by the middle of 2007, if not supplemented by the proposed facility. Thus, in Mr. Brown’s opinion, the proposed facility would fulfill three needs of cell phone service in the area. The following map (Exhibit 25(b)) shows anticipated coverage once the proposed facility is operational:



As can be seen from Exhibit 25(b), the new installation eliminates almost the entire red (*i.e.*, uncovered) area to the west and northwest of the subject site. In Mr. Brown’s opinion, it is necessary to have the proposed facility, and to locate it at the subject site, in order to eliminate the

coverage gap, avoid the dropped calls and supplement the nearby telecommunications facility to the east (WAN043) that is about to exhaust its capacity. There is no evidence in the record to contradict the testimony of Messrs. Budde and Brown, and the Hearing Examiner credits that testimony as being accurate and persuasive. Based on that testimony and on the recommendation of the Telecommunications Transmission Facility Coordination Group and the Technical Staff, the Hearing Examiner finds that there is a need for proposed telecommunications facility and that it is appropriately located.

D. Impact of the Proposed Facility on the Neighborhood

The visual impact of the proposed telecommunications facility was discussed in Part II. B of this report, and the Hearing Examiner determined that the proposed monopole will not be a visual nuisance to the neighborhood.

Petitioners' siting expert, Mikel Budde testified that the facility will not have any lights on the monopole and will not cause any objectionable noise, vibration, fumes, odor, dust, or glare. Any needed utilities are already on site. The only sign on the facility will be limited to two square feet. There will be no special requirements for other public facilities or services, and there will be no traffic increase associated with its operation. In fact, the new equipment will facilitate the response times of emergency response teams, and will facilitate communication for commuters and people in the area. In Mr. Budde's opinion, the proposed communications facility is necessary for public convenience and service. It is also his opinion that the facility will not endanger the health or safety of workers or residents in the community.

Although Technical Staff recommends that an arborist be employed to make sure that trees near the proposed equipment compound are not impacted, Staff shares Mr. Budde's opinion that there will be no non-inherent adverse effects from the proposed installation. Exhibit 15, pp. 6-7.

As stated by Technical Staff:

The location of the proposed facility . . . relative to the surrounding neighborhood is such that it is sufficiently separated and screened from the nearest residential properties to the south and the future school property to the east with the combination of distance, the existing swimming pool facility, and existing and proposed trees on the subject property. The facility would be located in the rear portion of the property adjoining the Northwest Stream Valley Park and closer to the Capital Beltway. . . .

The proposed monopole will be slightly above the height of the existing tree line, however, the antennas will be flush mounted to the monopole and painted to minimize visibility. The applicants have provided photos simulations of the proposed monopole at various distances from the facility within the neighborhood. The size, scale and scope of the subject use are not likely to result in any noise related problems, traffic disruption, light intrusion or any other environmental impact. There are no non-inherent adverse effects sufficient to justify a denial of the requested special exception.

One other area of concern should be mentioned – the health effects of the radio waves generated by telecommunications facilities. The FCC regulates radio frequency exposure issues on a Federal level, and local officials are prohibited from deciding, based on health concerns, that a facility is inappropriate, as long as it complies with FCC regulations. Section 704(B) of the Telecommunications Act of 1996, 47 USC §332(c)(7)(B)(iv), provides, *inter alia*, that

No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] Commission's regulations concerning such emissions.

Both Mr. Brown and Mr. Budde testified this facility will comply with FCC set standard for RF emissions. In addition, Petitioners submitted a report from a professional engineer, Jules Cohen, indicating that RF exposure from the facility will be, at worst, no more than .011 percent of the FCC set standard for maximum permitted exposure (MPE). Exhibit 10, p.3.

The Hearing examiner finds, based on the uncontroverted evidence, that the proposed use will have no adverse effects on the surrounding community.

E. The Master Plan

Petitioners' property is subject to the *2000 East Silver Spring Master Plan*. The property is zoned R-90 for single-family detached housing, and Zoning Code §59-C-1.31(b) permits telecommunications facilities by special exception in the R-90 Zone.

The Master Plan does not appear to address telecommunications facilities of this type, and Technical Staff, in their discussion of the Master Plan (Exhibit 15), quoted Community Planning staff, which offered the following comments about the Master Plan

I have reviewed this application with regard to the *December 2000 Approved and Adopted East Silver Spring Master Plan*. This Plan seeks to preserve the residential character of the existing neighborhoods, e.g., by discouraging neighborhood cut through traffic and enhancing community facilities. We see nothing in the Special Exception application that is inconsistent with this goal. The application proposes to locate the telecommunications tower in the rear of the site, adjoining Northwest Stream Valley Park. This would place the facility as close as possible to the Capital Beltway and maximize the distance to the nearest single-family homes. Although this strategy may necessitate a variance, we find the proposed location to be consistent with the goal of protecting the existing residential neighborhoods. . . . [W]e see no master plan or community compatibility issues with regard to the subject application.

The Hearing Examiner concludes that because the Master Plan supports the R-90 Zone, and that zone permits the subject use by special exception, it is fair to say that the planned use is not inconsistent with the goals and objectives of the *East Silver Spring Master Plan*.

III. SUMMARY OF HEARING

At the hearing, Petitioners moved to amend the petition (Exhibit 18), pursuant to Zoning Ordinance §59-A-4.24, to accurately reflect the correct section of the Code (Section 59-G-2.58) currently applicable to telecommunications facilities.⁹ Petitioners submitted a revised Statement reflecting the proper reference to Section 59-G-2.58 and describing how the application meets the requirements of that section of the Zoning Ordinance. Exhibit 20. In addition, the Petitioners

⁹ Under a zoning text amendment (ZTA 05-10, Ordinance No. 15-54, effective December 26, 2005), the regulations applicable to telecommunications facilities are now located in Section 59-G-2.58, instead of Section 59-G-2.43.

submitted a revised site plan (Exhibit 19) to reflect the fact that a portion of the subject property has been sold to the Montgomery County Board of Education (MCBE), reducing the site's size from 2.89 acres to 2.07 acres. Tr. 4-7. Testimony was then heard from Mr. Mikel Budde, Zoning Manager for Petitioner Omni T-Mobile, and from Mr. Douglas Brown, a radio frequency engineer. The record was held open until July 7, 2006, so that notice of Petitioners' motion to amend the petition could be published, and the public given an opportunity for comment.

Mikel Budde (Tr. 9-23):

Mikel Budde testified as Zoning Manager for Omni Point, T-Mobile, and as an expert in siting telecommunications facilities. He described the proposed facility, including the 120 foot tall monopole and the supporting equipment, which consists of a 15x54 foot compound area housing a 10x20 foot concrete pad on which T-Mobile's three equipment cabinets will be mounted. There will be three panel antennas mounted to the top of the monopole.

The proposed panel antennas measure approximately 54 inches long, 12 inches wide, and 4 inches deep. The equipment cabinets measure approximately 60 inches in height, 51 inches in width, and 37 inches in depth. Coaxial cables will run from the equipment cabinets to the monopole and antennas.

He stated that the proposed antennas would be flush mounted and placed against a background of trees to mitigate the visual impact on the surrounding area. The facility will be screened by proposed landscaping of nine white pines to the east and existing vegetation to the north and the west. According to Mr. Budde, there will be no impact to the existing parking, landscaping, or other features of the existing structure and property. There will be no signage or illumination other than as required by a state or federal or county agency.

Mr. Budde further testified that, as a rule of thumb, the Federal Aviation Administration requires lighting on anything that is taller than 199 feet. A contractor then does a preliminary

screening based on the proximity of the pole to nearby airports, and they determine whether formal notification to the FAA or lighting will be required. In this case there will be no lighting. In other words, there won't be a strobe light at the top or anywhere else on the pole. At the base, within the compound, will be floodlights for emergency nighttime equipment service, but nothing taller than six feet off the ground.

Mr. Budde indicated that there will be no significant impact on traffic. The facility will be in continuous operations 24 hours a day, but the use is low intensity and only requires site personnel for emergency repairs and regularly scheduled maintenance, approximately one or two times a month. The facility will not be detrimental to the use of surrounding properties. It will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the property. The facility will not require any water or sewer service. Electric and telephone service is already at the site. There will no special requirements for other public facilities or services. There would be no signage, other than the required warning sign. There will be no outdoor storage of equipment, and Petitioners are willing to remove the facility once it is no longer needed for a period of 12 months. The facility will be maintained in a safe condition, and this facility will not adversely affect the health, safety, security, morals, or, general welfare of the residents or workers in the area. Petitioners will meet the FCC standards for radio frequency (RF) emissions. In Mr. Budde's opinion, the fact that the area is developed and subdivided, means there's little possibility of additional future special exceptions in the area.

The facility will be placed at the rear of the swimming pool property located at 1101 Corliss Street, Silver Spring. The property is zoned R-90. Telecommunications facilities are permitted by special exception in the R-90 zone. The properties along the site are mainly institutional. There's M-NCPPC property to the north and west and an elementary school to the east.

According to Mr. Budde, the land transfer to the MCBE took place in July of 2005, but

Omnipoint was unaware that it been finalized as a sale at the time this application was filed. The setbacks, following the land transfer, are 76 feet to the north, 92 feet to the west, 272 feet to the south, and 151 feet to the east. In Section 59-G-2.58 in (a)(1)(d), it says the Board of Appeals may reduce the setback requirements to not less than the building setback of the applicable zone, if the applicant requests a reduction, and the evidence indicates that a support structure can be located on the property in a less visibly obtrusive location after considering the height of the structure, topography, existing vegetation, adjoining and nearby residential properties, if any, and the visibility of the street. Petitioners felt that placing the facility in the northwest corner of the site, against the tree line, removed it as far as possible from the residences and removed it as far as possible from the street. Therefore, they placed the pole structure as close to the tall trees as they could. That placement would require a reduction of the 120 foot setback requirements for the north and west setbacks, which are proposed at 76 to the north and 92 to the west. The presently proposed location would be the least visible and affect the community the least. The structure would still meet the requirement of being at least 300 feet from the nearest residence.

In Mr. Budde's opinion, the proposed site is consistent with both the Montgomery County Regulations regarding the setting of wireless antennas, and the East Silver Spring Master Plan, although the Master Plan does not mention telecommunications facilities. The facility will offer co-location opportunities for other carriers once constructed, and the Montgomery County Tower Coordination Group was established to promote such co-location opportunities. That body recommended approval of the application, as did the Planning Board.

Mr. Budde identified the photos contained in Exhibits 7(a) through (g). Applicants set up a balloon at the location proposed for a monopole and elevated it to the intended 120 foot height of the structure. They then took a series of photos from the adjacent neighborhood in the direction of the proposed location of the monopole (the top photos). Applicants then added a simulation of the

monopole to each of the photos (the bottom photos).

According to Mr. Budde, T-Mobile currently experiences a gap in coverage and lack of capacity in the area surrounding the proposed site. In order to fulfill its service requirements, T-Mobile needs to locate a new telecommunications facility in the proposed area. Seamless coverage areas for wireless communications are necessary for public convenience and service. Additionally, availability of wireless communications benefits the public safety and welfare by helping to alleviate road congestion and by facilitating an individual's communications with police and fire rescue operations in times of emergencies.

Douglas Brown (Tr. 23-45):

Douglas Brown testified as an expert in Radio Frequency (RF) Engineering. He identified maps and charts showing customer complaints, dropped calls, current signal coverage and anticipated signal coverage once the proposed facility is operational (Exhibits 24, 25 and 26). He noted that there is a significant signal coverage gap on the Capital Beltway (I-495) in the area of the subject site and that, on average, 372 calls are dropped daily (*i.e.*, disconnected from service in mid-call) in the entire area that would be covered by the proposed facility, which he called "WAN272." The new facility is located so that it will provide missing coverage on the Capital Beltway and eliminate most of the dropped calls in the overall area. It would also supplement the service that is currently being provided by another overloaded facility (WAN043) to the east of the subject site. Mr. Brown estimated that WAN043 would exceed its capacity by the middle of 2007, if not supplemented by the proposed facility. Thus, in Mr. Brown's opinion, the proposed facility would fulfill three needs of cell phone service in the area.

Mr. Brown also testified this facility will comply with FCC set standard for RF emissions.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioners have the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioners will have satisfied all the requirements to obtain the special exception, if they comply with the recommended conditions (Exhibit 15).

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Code §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioners comply with the conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.21. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a telecommunications facility. Characteristics of the proposed telecommunications facility that are consistent with the “necessarily associated” characteristics of telecommunications facilities will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with telecommunications facilities, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff lists the following inherent and non-inherent characteristics of telecommunications facilities (Exhibit 15, p. 6):

The inherent, generic physical and operational characteristics associated with the subject unmanned wireless communication facility are the antennas, monopole, equipment platform, and equipment cabinets. The non-inherent effects include the location of the buildings the location of the equipment platform and equipment cabinets, the height of the monopole, lighting, potential noise generation from the mechanical equipments and landscaping.

The Hearing Examiner agrees with Technical Staff’s listing of the inherent characteristics of telecommunications facilities. The inherent effects of a typical monopole telecommunications facility would generally have only a visual impact on the neighborhood, since it would be noiseless, unmanned and require only occasional servicing. That is the case here, except that even the visual impact is small in this instance because the telecommunications facility will be set back far from the nearest dwelling and will be adequately buffered. There are no unusual characteristics of the site.

For all the reasons discussed in Part II.D, above, and considering size, scale, scope, light, noise, traffic and environment, the Hearing Examiner concludes, as did the Technical Staff, that there are no non-inherent adverse effects from the proposed use which would require denial of the petition.

B. General Conditions

The general standards for a special exception are found in Zoning Code §59-G-1.21(a). The Technical Staff report, the approval of the Telecommunication Transmission Facility Coordinating Group, the exhibits in this case and the testimony at the hearing provide ample evidence that the general standards would be satisfied in this case.

Sec. 59-G-1.21. General conditions.

§5-G-1.21(a) -*A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) Is a permissible special exception in the zone.

Conclusion: A telecommunications facility is a permissible special exception in the R-90 Zone, pursuant to Code § 59-C-1.31.

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.58 for a telecommunications facility as outlined in Part C, below.

(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: Petitioners' property is subject to the *2000 East Silver Spring Master Plan*. The property is zoned R-90 for single-family detached housing, and Zoning Code §59-C-1.31(b) permits telecommunications facilities by special exception in the R-90 Zone. The Master Plan does not appear to address telecommunications facilities of this type, and Technical Staff concluded that the proposed special exception was not inconsistent with the Master Plan. The Hearing Examiner concludes that because the Master Plan supports the R-90 Zone, and that zone permits the subject use by special exception, it is fair to say that the planned use is not inconsistent with the goals and objectives of the *East Silver Spring Master Plan*.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: The proposed installation will be in harmony with the character of the neighborhood because it will be barely visible from the adjacent community due to the large setbacks and landscape buffers. There will also be no significant impact on traffic or parking. The proposed use is a low intensity use, only requiring on-site personnel for emergency repairs and regularly scheduled maintenance visits once or twice a month. As stated by Technical Staff, "the proposed facility will be located, constructed, and operated in such a manner that it will not interfere with the orderly use, development and improvement of surrounding property. The antennas and support structure will be painted in a manner as to reduce the visual impact and create a harmonious appearance with its surroundings. . . . The proposed facility would not result in a negative aesthetic impact on the surrounding neighborhood. . . ." Based on these facts and the other evidence of record, the Hearing Examiner

concludes, as did Technical Staff, that the proposed use will be in harmony with the general character of the neighborhood.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Technical Staff found the telecommunications facility will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood. The Hearing Examiner agrees for all the reasons stated immediately above. In fact, the easy availability of telecommunications should enhance the value of the nearby properties. Therefore, the Hearing Examiner finds that the telecommunications facility will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The facility will not be illuminated at night except in emergencies. Petitioners' telecommunications facility siting expert testified that the special exception would cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site. Technical Staff agreed. Thus, the undisputed evidence supports the conclusion that the telecommunications facility will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity, and the Hearing Examiner so finds.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: The proposed special exception use will not change the intensity of special exception uses in any substantial way. The Hearing Examiner finds that the proposed special exception will not increase the number, scope, or intensity of special exception uses in a way that will affect the area adversely.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site. Moreover, the federal Telecommunications Act of 1996, 47 USC §332(c)(7)(B)(iv), provides that:

No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] Commission's regulations concerning such emissions.

Exhibit 10, the report of a professional engineer, Jules Cohen, indicates that the proposed facility will operate well within the FCC maximum standard. Both expert witnesses at the hearing testified in a similar manner. The Hearing Examiner therefore concludes that the proposed telecommunications facility will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: The evidence supports the conclusion that the proposed special exception would be adequately served by the specified public services and facilities, to the extent they are needed for this type of use. Department of Permitting Services requirements for stormwater quality and quantity control must be fulfilled prior to issuance of sediment and erosion control permits

- (i) *If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review, as required in the applicable Annual Growth Policy.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision. Therefore, the public facilities review must include analysis of the Local Area Transportation Review (“LATR”).¹⁰ The Transportation Planning Staff did do such a review, and concluded that because the proposed telecommunications facility use would require only one or two service trips per month, there would be no peak-hour trips, and the impact on traffic would be negligible. Therefore, an LATR traffic study is not required,

¹⁰ The Policy Area Transportation Review (PATR) was abolished as of July 1, 2004, pursuant to the FY 2003-5 Annual Growth Policy (AGP) – Policy Element.

and the Technical Staff concluded, as does the Hearing Examiner, that the instant petition meets the LATR.

- (ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.*

Conclusion: Based on the evidence of record, especially the Technical Staff's conclusion that the proposed use "will not have an adverse effect on the transportation network," the Hearing Examiner so finds.

C. Specific Standards

The testimony and the exhibits of record, especially the Technical Staff Report (Exhibit 15) and the conclusion of the Telecommunication Transmission Facility Coordinating Group (Exhibit 8), provide sufficient evidence that the specific standards required by Section 59-G-2.58 are satisfied in this case, as described below.

Sec. 59-G-2.58. Telecommunication facility

(a) Any telecommunication facility must satisfy the following standards:

- (1) A support structure must be set back from the property line as follows:*
- a. In agricultural and residential zones, a distance of one foot from the property line for every foot of height of the support structure.*
 - b. In commercial and industrial zones, a distance of one-half foot from property line for every foot of height of the support structure from a property line separating the subject site from commercial or industrial zoned properties, and one foot for every foot of height of the support structure from residential or agricultural zoned properties.*
 - c. The setback from a property line is measured from the base of the support structure to the perimeter property line.*
 - d. The Board of Appeals may reduce the setback requirement to not less than the building setback of the applicable zone if the applicant requests a reduction and evidence indicates that a support structure can be located on the property in a less visually obtrusive location after considering the height of the structure, topography, existing vegetation, adjoining and*

nearby residential properties, if any, and visibility from the street.

Conclusion: The proposed facility will have a 120 foot tall monopole tower. The facility is set back 151 feet and 272 feet, respectively, from the east and the south property lines, as measured from the base of the monopole structure, in accordance with subsections (a)(1)a. and c.¹¹ Thus, it provides setbacks consistent with the statutory requirements from the adjoining residential uses to the south, and from the school site to the east. However, the facility is set back 92 feet from the western property line and 76 feet from the northern property line, falling short of the requirement. Both the northern and western property lines adjoin the Brookview Park that is owned by M-NCPPC. These setbacks are smaller because Petitioners propose to place the facility in the rear corner of the subject property, in order to keep it away from the residential properties and thus to minimize potential visual impact. The Petitioners are requesting a reduction of the setback requirements for the west and north sides of the property, for the reasons specified in subsection (a)(1)d – doing so allows them to locate the tower in a less visually obtrusive location, considering the height of the structure, topography, existing vegetation, adjoining and nearby residential properties, if any, and visibility from the street.

The Hearing Examiner recommends granting the requested reduction in the northern and western setbacks because the reduction is necessary to minimize visibility of the monopole from the nearby residential neighborhood to the southeast. As demonstrated by the photographs and simulations reproduced on pages 7 through 12 of this report, the proposed location yields very little visual impact on the nearby residences, given the proposed height of the structure, topography and existing

¹¹ Subsection (a)(1)b is inapplicable because it applies only to commercial and industrial zones.

vegetation. As required by this subsection, the proposed setbacks would still be much greater than those required for a main building in the R-90 Zone (30 feet to the front, 8 feet to the side, 25 feet for the sum of both sides and 25 feet in the rear).¹² The smallest of the proposed setbacks for this project is 76 feet to the northern property line.

- (2) *A support structure must be set back from any off-site dwelling as follows:*
- a. *In agricultural and residential zones, a distance of 300 feet.*
 - b. *In all other zones, one foot for every foot in height.*
 - c. *The setback is measured from the base of the support structure to the base of the nearest off-site dwelling.*
 - d. *The Board of Appeals may reduce the setback requirement in the agricultural an[sic] residential zones to a distance of one foot from an off-site residential building for every foot of height of the support structure if the applicant requests a reduction and evidence indicates that a support structure can be located in a less visually obtrusive location after considering the height of the structure, topography, existing vegetation, adjoining and nearby residential properties, and visibility from the street.*

Conclusion: The subject site is in a residential zone, so the 300 foot setback requirement applies.

The proposal is in compliance with this requirement. The Petitioners' site plan shows that the proposed facility is located 301 feet from the nearest off-site dwelling.

- (3) *The support structure and antenna must not exceed 155 feet in height, unless it can be demonstrated that additional height up to 199 feet is needed for service, collocation, or public safety communication purposes. At the completion of construction, before the support structure may be used to transmit*

¹² The Board should note that subsection (a)(1)d does not tell us whether the referenced "building setback of the applicable zone" refers to the main building setback or the accessory building setback specified for the zone. The proposed facility is not a building, but it is a structure. The Code defines accessory buildings, but not accessory structures. Even if we assume that the proposed facility is an accessory structure, the intent of subsection (a)(1)d, in specifying the "building setback" appears to have been to impose, on any telecommunications structure, accessory or not, a minimum setback equivalent to the main building setback for the zone, and to give the Board flexibility above that minimal amount in reducing the applicable telecommunications setbacks from one or two sides to allow precisely the kind of positioning intended here to reduce visibility. That is what the Hearing Examiner concluded; however, if the Board takes the view that the applicable zoning setback is the accessory structure setback, then the site plan provides inadequate setbacks to the north and the west. Setbacks for accessory structures require 5 feet to the side and the rear plus one foot for every foot of height above 15 feet. Since the tower will be 120 feet tall, it exceeds 15 feet by 105 feet, thereby requiring side and rear setbacks of 110 feet (5 + 105). The setbacks currently provided are 92 feet to the west and 76 feet to the north. Moving the proposed location of the facility to comply with these larger setbacks would require a reduction in the 300 foot setback from the nearest dwelling specified in subsection (a)(2)a, and would increase visibility of the proposed tower in the residential community to the southeast.

any signal, and before the final inspection, pursuant to the building permit, the applicant must certify to the Department of Permitting Services that the height and location of the support structure is in conformance with the height and location of the support structure, as authorized in the building permit.

Conclusion: The proposal conforms to this requirement. The support structure and antenna will be 120 feet in height, and the proposal therefore meets the requirement of being under 155 feet. A condition has been proposed in Part V of this report to insure compliance with the certification requirement.

(4) The support structure must be sited to minimize its visual impact. The Board may require the support structure to be less visually obtrusive by use of screening, coloring, stealth design, or other visual mitigation options, after considering the height of the structure, topography, existing vegetation and environmental features, and adjoining and nearby residential properties. The support structure and any related equipment buildings or cabinets must be surrounded by landscaping or other screening options that provide a screen of at least 6 feet in height.

Conclusion: Technical Staff approved the efforts made by Petitioners to minimize the visual impact of the proposed installation upon the surrounding areas. As already mentioned, the proposed facility would be located in the rear corner of the subject site so as to reduce any potential visual impact upon the closest residential community. In addition, the property has substantial natural screening provided by the existing woods on two sides. The equipment compound will be similarly screened by the existing vegetation and by nine (9) White Pine trees proposed as landscaping by the Petitioners. The antennas will be flush mounted to the proposed monopole and will be painted to match in color, again reducing the visibility of the facility. The aforementioned photos and simulations demonstrate that the proposed tower will not have an undue visual impact upon the community.

(5) The property owner must be an applicant for the special exception for each support structure. A modification of a telecommunications facility special exception is not required for a change to any use within the special

exception area not directly related to the special exception grant. A support structure must be constructed to hold no less than 3 telecommunications carriers. The Board may approve a support structure holding less than 3 telecommunications carriers if: 1) requested by the applicant and a determination is made that collocation at the site is not essential to the public interest; and 2) the Board decides that construction of a lower support structure with fewer telecommunications carriers will promote community compatibility. The equipment compound must have sufficient area to accommodate equipment sheds or cabinets associated with the telecommunications facility for all the carriers.

Conclusion: The property owner, Oakview Recreation Corporation, is a co-petitioner. The facility will be capable of supporting three telecommunications carriers, as indicated in Site Note 8 on the Site Plan (Exhibit 19).

(6) No signs or illumination are permitted on the antennas or support structure unless required by the Federal Communications Commission, the Federal Aviation Administration, or the County.

Conclusion: No signs or illumination are proposed, except the two square foot sign required by subsection (8), below, and floodlights to be used if emergency repairs are required at night.

(7) Every freestanding support structure must be removed at the cost of the owner of the telecommunications facility when the telecommunications facility is no longer in use by any telecommunications carrier for more than 12 months.

Conclusion: Petitioners' site plan calls for removal by Petitioners if the facility is not used for more than 12 months, and a condition to that effect is recommended in Part V of this report.

(8) All support structures must be identified by a sign no larger than 2 square feet affixed to the support structure or any equipment building. The sign must identify the owner and the maintenance service provider of the support structure or any attached antenna and provide the telephone number of a person to contact regarding the structure. The sign must be updated and the Board of Appeals notified within 10 days of any change in ownership.

Conclusion: The required sign will be installed, as indicated in Site Note 18 on the Site Plan (Exhibit 19) .

(9) *Outdoor storage of equipment or other items is prohibited.*

Conclusion: No outdoor storage of equipment is proposed. Equipment will be enclosed as described elsewhere in this report.

(10) *Each owner of the telecommunications facility is responsible for maintaining the telecommunications facility, in a safe condition.*

Conclusion: A condition to this effect is recommended in Part V below. Petitioners plan to service the facility on a monthly basis.

(11) *The applicants for the special exception must file with the Board of Appeals a recommendation from the Transmission Facility Coordinating Group regarding the telecommunications facility. The recommendation must be no more than one year old.*

Conclusion: A recommendation of approval, dated September 14, 2005, was filed herein as Exhibit 9. It is less than one year old.

(12) *Prior to the Board granting any special exception for a telecommunications facility, the proposed facility must be reviewed by the County Transmission Facility Coordinating Group. The Board and Planning Board must make a separate, independent finding as to need and location of the facility.*

Conclusion: As noted, both the Transmission Facility Coordinating Group and the Planning Board recommended approval. The Technical Staff and the Hearing Examiner recommend that the Board make the finding that there is a need for the proposed telecommunications facility and that it will be appropriately located, for all the reasons set forth in Part II.C. of this report.

(b) Any telecommunications facility special exception application for which a public hearing was held before November 18, 2002 must be decided based on the standards in effect when the application was filed.

Conclusion: Not applicable.

(c) Any telecommunications facility constructed as of November 18, 2002 may continue as a conforming use.

Conclusion: Not applicable.

D. Additional Applicable Standards

Section 59-G-1.23. General development standards.

(a) Development Standards. Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.

Conclusion: This petition falls under the exception because Zoning Ordinance §59-G-2.58 specifies the development standards for telecommunications facilities.

(b) Parking requirements. Special exceptions are subject to all relevant requirements of Article 59-E.

Conclusion: Technical Staff did not recommend any additional parking for the proposed telecommunication facility because it will require only one or two service visits per month, and the existing swimming pool has a parking lot on the subject site.

(c) Minimum frontage. In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21:

* * *

(5) Public utility buildings and public utility structures, including radio and T.V. broadcasting stations and telecommunication facilities.

Conclusion: Not applicable, since the proposed facility will be located on an existing special exception site, which must have met its own frontage requirements to be approved.

(d) Forest conservation. If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.

Conclusion: The property is exempt from the forest conservation requirements of Chapter 22A. Exhibit 8. However, Technical Staff has recommended certain protections for the nearby trees, and Staff's proposed conditions have been recommended in Part V of this report. They have also been included as Additional Notes 1 and 2 on the revised site plan. Exhibit 19.

(e) Water quality plan. If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.

Conclusion: Technical Staff noted that Department of Permitting Services requirements for stormwater quality and quantity control must be fulfilled prior to issuance of sediment and erosion control permits. A condition to that effect is recommended in Part V of this report.

(f) Signs. The display of a sign must comply with Article 59-F.

Conclusion: As indicated earlier in this report, the only sign on the facility will be the two square foot sign required by the special exception.

(g) Building compatibility in residential zones. Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.

Conclusion: The proposed monopole will be appropriately sited, scaled, painted and landscaped to avoid impinging on the residential appearance of the neighborhood.

(h) Lighting in residential zones. All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:

- (1) Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*
- (2) Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: As discussed elsewhere in this report, no lighting will be used on a regular basis. Two floodlights are planned for use only in the event of emergency nighttime repairs.

Section 59-G-1.26. Exterior appearance in residential zones.

A structure to be constructed, reconstructed or altered pursuant to a special exception in a residential zone must, whenever practicable, have the exterior appearance of a residential building of the type otherwise permitted and must have suitable landscaping, streetscaping, pedestrian circulation and screening consisting of planting or fencing whenever deemed necessary and to the extent required by the Board, the Hearing Examiner or the District Council. Noise mitigation measures must be provided as necessary.

Conclusion: It is not “practicable” to make a 120 foot tall monopole “have the exterior appearance of a residential building;” however, as mentioned above, it will be will be appropriately sited, scaled, painted and landscaped to avoid impinging on the residential appearance of the neighborhood. Noise mitigation will not be needed.

Based on the testimony and evidence of record, I conclude that the telecommunications facility use proposed by Petitioners, as conditioned below, meets the specific and general requirements for the special exception, and that the Petition should be granted, subject to the conditions set forth in Part V of this report.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2669 for a special exception to construct and operate a telecommunications facility, including a 120 foot tall monopole and related equipment, at 1101 Corliss Street, Silver Spring, Maryland, be GRANTED, with the following conditions:

1. The Petitioners shall be bound by all of the exhibits of record, and by the testimony of their witnesses and the representations of counsel identified in this report.
2. The Petitioners shall obtain approval of a modification of the existing special exception (CBA-379) to reflect the proposed telecommunication facility.
3. The Petitioners shall provide a certified arborist or licensed tree professional to perform root pruning and tree trimming within the adjacent forest. The arborist must be at the pre-construction meeting and present during construction.
4. The Petitioners shall contact an M-NCPPC inspector for pre-construction inspection of tree protection measures and authorization to begin tree clearing.
5. Petitioners must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioners shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.
6. Department of Permitting Services requirements for stormwater quality and quantity control must be fulfilled prior to issuance of sediment and erosion control permits.
7. At the completion of construction, before the support structure may be used to transmit any signal, and before the final inspection pursuant to the building permit, the Petitioners must

certify to the Department of Permitting Services that the height and location of the support structure is in conformance with the height and location of the support structure as authorized in the building permit.

8. The telecommunication facility must display a contact information sign, no larger than two square feet, affixed to the outside of the equipment enclosure. This sign must identify the owner and the maintenance service provider and provide the telephone number of a person to contact regarding the installation. The sign must be updated and the Board of Appeals notified within 10 days of any change in ownership.
9. There will be no antenna lights or stroboscopic lights unless required by the Federal Communications Commission.
10. There will be no outdoor storage of equipment. Equipment will be stored as provided in the Site Plan (Exhibit 19).
11. Each owner of the telecommunications facility is responsible for maintaining the facility in a safe condition.
12. The facility shall be available for co-location of up to three carriers.
13. The telecommunications facility must be removed at the cost of the owner of the telecommunications facility when the facility is no longer in use by any telecommunications carrier for more than 12 months.

Dated: July 25, 2006

Respectfully submitted,

Martin L. Grossman
Hearing Examiner