

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO. Z-08-09 : HEARING DATE: July 31, 2008
: :
APPLICATION OF: :
T-Mobile Northeast :
: DATE OF MAILING OF OPINION
: AND DECISION: September 12, 2008
PROPERTY: :
Parcel No. 43-00-03694-00-7 :
Egypt Road, Audubon, PA 19407 :

**OPINION, DECISION AND ORDER OF THE
LOWER PROVIDENCE TOWNSHIP ZONING HEARING BOARD**

The applicant, T-Mobile Northeast (hereinafter referred to as the "Applicant"), filed an application requesting a variance under Section 143-250(B)(3) for a use variance, a variance under Section 143-250(E)(2) for a dimensional height variance for a proposed 120 foot monopole, a variance under Section 143-250(c)(3) for a dimensional variance for six foot high antennas, and under Section 143-250(E)(14) for an interpretation stating the construction of the proposed telecommunications facility is not a land development. The application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board on July 31, 2008 at the Lower Providence Township Building. All members of the Zoning Hearing Board were present as well as the Solicitor, the Director of Community Development/Zoning Officer, and the Court Reporter.

FINDINGS OF FACT

1. The Applicant is T-Mobile Northeast, LLC.
2. The Applicant is the lessee of the relevant portion of the subject property, pursuant to a lease with the owner of record, Lower Providence Gun Club, which lease was marked as Exhibit A-2.

3. The property is Parcel No. 43-00-03694-00-7, located at Egypt Road, Audubon, PA 19407.

4. The applicable zoning is R-2, Residential District.

5. The lot size of the subject parcel is approximately 48 acres.

6. The Applicant was represented by Chris Schubert, Esquire, 717 Constitution Drive, 2nd floor, Suite 201, Exton, PA 19341, and Michael Murray, Jr., Esquire, of Riley Riper Hollin & Colagreco.

7. The application was previously advertised for a public hearing on June 26, 2008, but there was a discrepancy between the Township and the County regarding the address for the subject property, and the application was then re-advertised for the July 31, 2008 public hearing with the correct identifying information. The Applicant, through its attorney, agreed in writing to the continuation of the previously scheduled hearing on the application until the July 31, 2008 hearing. The letter from the Applicant's attorney confirming this agreement was marked as Exhibit B-1.

8. At the hearing, the Applicant amended its application to withdraw the request for a variance under Section 143-250(c)(3) for a dimensional variance for six foot high antennas, because the antennas for the proposed facility would only be 56 inches high.

9. The leased area of the property will be 50 feet by 60 feet. The existing driveway will be used.

10. As set forth on Exhibit A-7, the site plan, the proposal is for a 10 feet by 20 feet concrete pad to be placed within a fenced area of 20 feet by 30 feet, with equipment cabinets located on the pad. A monopole 120 feet in height with antennas is to be located inside the fenced area.

11. As testified to by Mr. Bryan Grebis, a design engineer with T-Mobile, per FCC mandate T-Mobile must operate within their frequency band and provide reliable wireless telephone coverage to subscribers, which is defined as being able to make receive or continue a call at least 98% of the time. T-Mobile is currently operating below the mandated coverage in the proposed area. Exhibit A-5 shows where coverage gaps exist in the area.

12. An analysis of dropped emergency calls last year shows that 200 of 5,000 emergency calls were dropped, which does not meet the standard for reliable coverage.

13. The proposed 120 foot tall tower will help provide coverage in the area, including on Route 422. If the pole is reduced to 100 feet tall, it will greatly reduce coverage, in part because of the topography in this area.

14. Pursuant to testimony by Mr. Grebis, there is not another acceptable location to fill the coverage gap.

15. The proposed tower is designed to permit co-location, or tower access to other wireless callers.

16. Pursuant to Mr. Grebis's expert opinion based on review of the technical design of the proposed tower, he testified that the tower would not generate noise, odor or light. In addition, there will be no emissions harmful to humans or wildlife; the emissions will be well below what is allowed by the FCC.

17. The proposed tower would be serviced one time per month, for a period of 45-90 minutes. It will be remotely monitored around the clock.

18. Pursuant to testimony by Mr. Dennis White, Wireless Site Development, Mont Clare, sites within the zones that permitted the communications tower by special exception were

reviewed but no site was available that provided the necessary coverage and met all of the setback requirements.

19. The proposed site at the Rod & Gun Club provides a willing landowner, site access so it can be developed, and a tree line that buffers three-quarters of the tower and the entire base. The tower will be placed off of the Egypt Road driveway toward the center of the site.

20. The proposed wireless telecommunications tower, antennas and equipment would comply with the conditions in the ordinance, including providing co-location, no signs or lights on the tower, and T-Mobile will agree to dismantle the tower if it is not in use for more than 12 months.

21. T-Mobile will agree to supply a location on the tower for the County and/or Township for emergency coverage, free of charge, as a condition for approval.

22. Pursuant to testimony of structural engineer Mr. Jeffrey Thoms, P.E., Betzwood Associates, P.C., the tower location is 754 feet from the northeast property line and 584 feet from the southwest property line. The tower site is on one of the higher elevations of the property to minimize tower height. The location is hidden from view because of existing greenery so no additional landscaping is proposed. The only area of disturbance is a 200 square foot concrete pad.

23. The tower is designed in accordance with the latest revision of applicable standards. The rungs for climbing the tower begin 20 feet above ground level so equipment is needed to reach the rungs. A galvanized finish is proposed for the tower, which provides the best durability and is not a shiny metal finish. Monopoles with a galvanized finish typically fade and begin to blend in with the sky.

24. The tower will not interfere with the radio frequency of the fire station located within one mile from the site; a different frequency will be used.

25. There are several types of failure modes for the tower, including one in which the pole sections would collapse upon themselves instead of falling over, according to structural engineer Thoms.

26. A letter from George E. [Ed] Welborn, 261 Pinetown Road, Audubon, PA to Mr. Michael Siegel, Director of Community Development for the Township, opposing the request as to the tower, was submitted as resident exhibit 2.

27. There were no residents who appeared and testified against the project.

DISCUSSION/CONCLUSIONS OF LAW

1. The Applicant has standing to appear before the Board.

2. Denial of the requested variances for the property will impose an unnecessary hardship upon the Applicant, including by preventing it from complying with FCC mandates regarding reliable coverage.

3. The hardship is not self imposed, and is due in part to the unique topographical features of the property, where the proposed site is the only available site in the area that will provide reliable coverage and the tower height is necessary to provide coverage due to the topography of the property, including its elevation.

4. The authorization of the variances is necessary to enable the reasonable use of the property.

5. The grant of the requested variances will not alter the essential character of the neighborhood or the zoning district in which it is located, will not substantially impair the

appropriate use of adjacent properties and will not be detrimental to the public welfare. In addition, the requested variances represent the minimum variances that will afford relief.

6. The Board is without jurisdiction to grant a waiver or exemption from the land development requirements of the Township's Subdivision and Land Development Ordinance.

The Applicant seeks a use variance under Section 143-250(B)(3) as to the wireless telecommunications tower, antennas and equipment as a permitted use and a dimensional variance under Section 143-250(E)(2) as to the height of the tower. The Applicant withdrew its request for a dimensional variance as to the height of the proposed antennas.

Differing standards apply to use and dimensional variances. Generally, a variance requires the Applicant to show that unnecessary hardship will result if a variance is denied and that the proposed use will not be contrary to public interest. Hertzberg v. Zoning Bd. Of Pittsburgh, 554 Pa. 249, 257, 721 A.2d 43, 47 (1998) (citing Allegheny West Civic Council, Inc. v. Zoning Bd. Of Adjustment of the City of Pittsburgh, 547 Pa. 163, 167, 689 A.2d 225, 227 (1997)).

The Supreme Court in Hertzberg held that the Zoning Hearing Board must, at the beginning of its analysis of an appeal from the terms of the Zoning Ordinance, determine whether the requested relief is for a use variance or a dimensional variance. Id. at 263-64, 721 A.2d at 50. The quantum of proof required to establish unnecessary hardship is lesser when a dimensional variance, as opposed to a use variance, is sought. Id. at 258-59, 721 A.2d at 47-48. In addition, to justify the grant of a dimensional variance courts may consider multiple factors, "including the economic detriment to the applicant if the variance was denied, the financial hardship created by any work necessary to bring the building into strict compliance with the

zoning requirements and the characteristics of the surrounding neighborhood.” Id. at 263-64, 721 A.2d at 50.

It is only the stringency of the standard in proving an unnecessary hardship that varies, depending on whether a use or dimensional variance is sought. Great Valley School District v. Zoning Hearing Board of East Whiteland Township, 863 A.2d 74, 83 (Pa. Commw. 2004), appeal denied, 583 Pa. 675, 876 A.2d 398 (2005) (citing Zappala Group, Inc. v. Zoning Hearing Board of the Town of McCandless, 810 A.2d 708, 710-11 (Pa. Commw. 2002), appeal denied, 573 Pa. 718, 828 A.2d 351 (2003)); The Friendship Preservation Group, Inc. v. Zoning Hearing Board of Adjustment of the City of Pittsburgh, 808 A.2d 327 (Pa. Commw. 2002); Cardamone v. Whitpain Township Zoning Hearing Board, 771 A.2d 103 (Pa. Commw. 2001).

Despite the trend to apply a relaxed standard to dimensional variances, Pennsylvania case law is clear in its approach to the issuing of variances and demands that the reasons for granting a variance must be substantial, serious, and compelling. POA Company v. Findlay Township Zoning Hearing Board, 551 Pa. 689, 713 A.2d 70 (1998); Evans v. Zoning Hearing Board of the Borough of Spring City, 732 A.2d 686 (Pa. Commw. 1999); Soteneanos, Inc. v. Zoning Board of Adjustment of the City of Pittsburgh, 711 A.2d 549 (Pa. Commw. 1998). Moreover, variances from zoning codes should be granted sparingly and only under exceptional circumstances; a variance should not be granted simply because such a grant would permit the owner to obtain greater profit from or use of the property. Commonwealth v. Zoning Hearing Board of Susquehanna, 677 A.2d 853 (Pa. Commw. 1996).

In order to grant a variance, the Board must make the findings set forth in § 910.2 of the Municipalities Planning Code, 53 P.S. § 10912.2, where relevant. See Hertzberg, 554 Pa. at 256-57. 721 A.2d at 46-47. The law established by the Pennsylvania courts further establishes these

standards, stated in full herein. See Alpine Inc. v. Abington Township Zoning Hearing Board, 654 A.2d 186 (Pa. Commw. 1995); Appeal of Lester M. Prang, Inc., 169 Pa. Commw. 626, 647 A.2d 279 (1994). The findings that the Board must make, where relevant, in granting a variance as set forth in the Municipalities Planning Code are as follows:

(1) That there are unique circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property and that the unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located.

(2) That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property.

(3) That such unnecessary hardship has not been created by the applicant.

(4) That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare.

(5) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

The Applicant has demonstrated, and the Board finds and concludes, that the Applicant will suffer unnecessary hardship if the variances are not granted; that the unnecessary hardship is due to the unique physical circumstances or conditions relating to the property, and that the authorization of a variance is therefore necessary to enable the reasonable use of the property;

that the unnecessary hardship was not created by the Applicant; that the requested variances will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare; and that the requested variances are the minimum that will afford relief and will represent the least modification possible of the applicable zoning code provisions.

The Applicant has demonstrated unnecessary hardship. Per FCC mandate T-Mobile must operate within their frequency band and provide reliable coverage to subscribers. T-Mobile is currently operating below the mandated coverage in the proposed area, including performance regarding dropped emergency calls which does not meet the standard for reliable coverage. The proposed 120 foot tall tower will help provide wireless telecommunications coverage in the area, including on Route 422; if the pole were limited to 100 feet tall it would greatly reduce coverage, in part because of the topography in this area. Pursuant to expert testimony there is not another acceptable location to fill the coverage gap. Within the zones that permitted the communications tower by special exception no site was available that provided the necessary coverage and met all of the setback requirements.

Also, the hardship arises from the unique topography of the property, including the elevation. Without the variances requested the Applicant will not be able to make reasonable use of the property. The requested variances represent the minimum relief necessary. The area on the property where the tower will be located is one of the highest elevations on the property to minimize tower height. In addition, the area of the communications tower, antennas and equipment use on the property is limited to a 200 square foot concrete pad.

The granting of the requested variances will not alter the essential character of the neighborhood or the zoning district in which it is located, will not substantially impair the appropriate use of adjacent properties and will not be detrimental to the public welfare. The proposed tower would not generate noise, odor or light. In addition, there will be no emissions harmful to humans or wildlife; the emissions will be well below what is allowed by the FCC. Also, a tree line will buffer three-quarters of the tower and the entire base, and the galvanized monopole will fade and begin to blend in with the sky.

The Applicant also requested an interpretation of Section 143-250 to the effect that the construction of the proposed telecommunications facility is not a land development. The Board lacks jurisdiction or authority to grant a waiver or exception to the land development requirements set forth in the Township's Subdivision and Land Development Ordinance.

DECISION

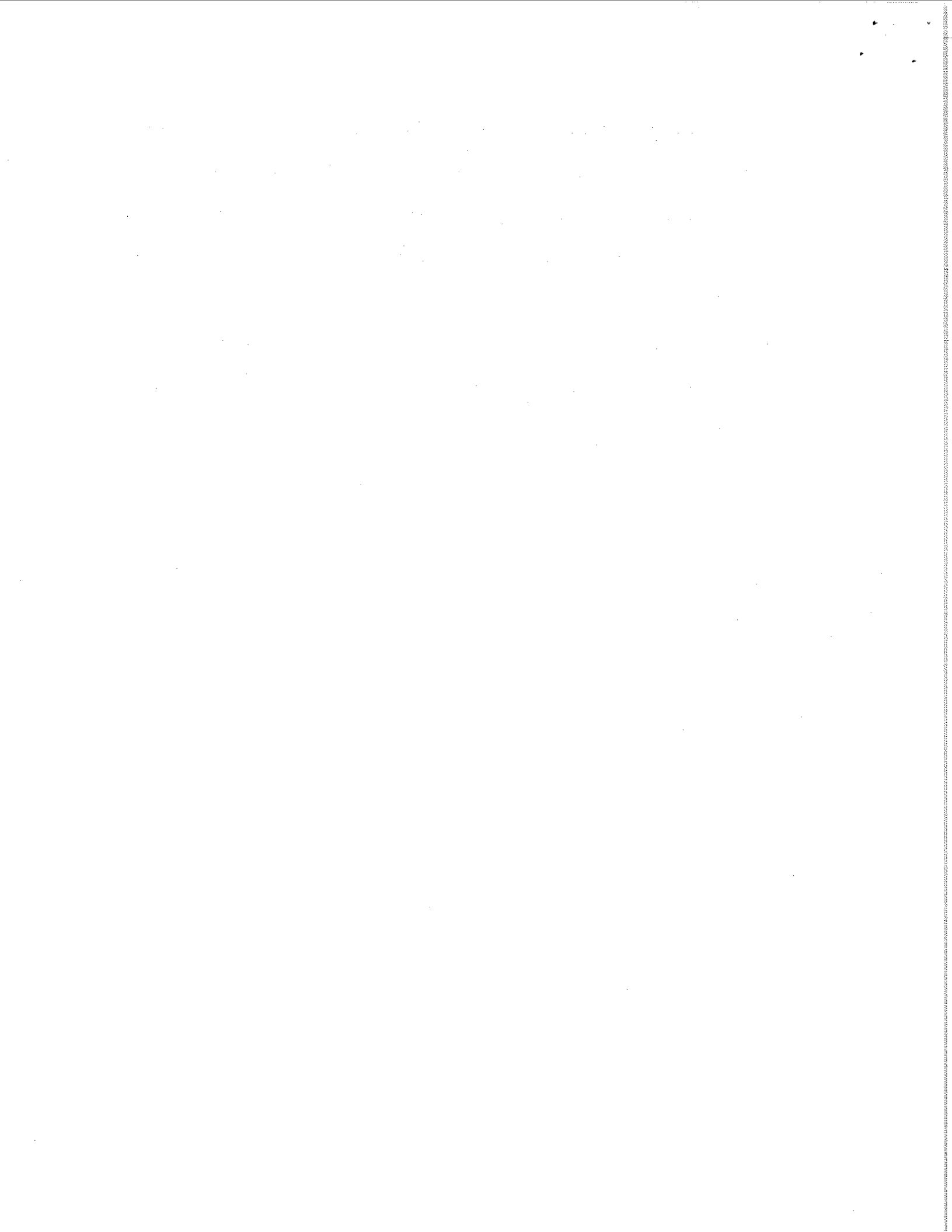
The following is the decision of the Lower Providence Township Zoning Hearing Board by a vote of 5-0:

1. The variance from Section 143-250(B)(3) to permit the erection and operation of a telecommunications tower, antennas and equipment consistent with the testimony and exhibits presented by the Applicant at the hearing and consistent with the other applicable conditions and requirements of the Township's Ordinances including the Zoning Ordinance, and subject to the conditions that the Applicant offer co-location on the tower to the County and the Township for free and that the Applicant obtain land development approval or a waiver from the Township, with the Township making determinations regarding aesthetics during the land development process, is granted.

2. The variance from Section 143-250(E)(2) to permit the height of the monopole tower to be 120 feet, subject to the conditions that the Applicant offer co-location on the tower to the County and the Township for free and that the Applicant obtain land development approval or a waiver from the Township, with the Township making determinations regarding aesthetics during the land development process, is granted.

3. The request for an interpretation under Section 143-250(E)(14) that the construction of the proposed telecommunications facility is not a land development is denied.

Dated: September 12, 2008



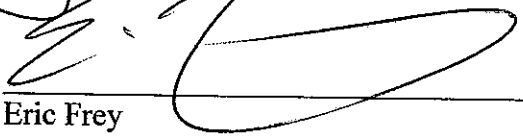
ORDER

The foregoing Findings, Discussion and Decision are hereby approved and ordered.


LOWER PROVIDENCE TOWNSHIP
ZONING HEARING BOARD



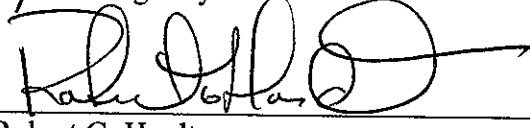
Janice Kearney



Eric Frey



James Dougherty



Robert G. Hardt



William Donovan

NOTE TO APPLICANT

There is a thirty (30) day period after the date of a decision for an aggrieved person to file an appeal in the Court of Common Pleas of Montgomery County to contest an approval or denial by the Zoning Hearing Board. If the Applicant has been granted Zoning Hearing Board approval, the Applicant may take action on said approval during the thirty (30) day appeal period; however, the Applicant will do so at his or her own risk. If the Applicant received Zoning Hearing Board approval, the Applicant must secure all applicable permits from Lower Providence Township within one (1) year of the date of the approval or the decision granting approval.

