

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission



ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 04-08D/02-45
Z.C. Case No. 04-08D/02-45
Cellco Partnership d/b/a Verizon Wireless
(Modification of Consequence of PUD @ Lot 805 in Square 5868S)
July 30, 2018

Pursuant to notice, at its July 30, 2018 public meeting, the Zoning Commission for the District of Columbia (the “Commission”) considered the application (the “Application”) of Cellco Partnership d/b/a Verizon Wireless (the “Applicant”) for:

1. A Modification of Consequence to the plans approved for a planned unit development (a “PUD”) approved by Z.C. Order Nos. 02-45 and 04-08, as modified by Z.C. Order Nos. 04-08A/02-45, 04-08B/02-45, and 04-08C/02-45; and
2. A special exception to permit a monopole pursuant to Subtitle C § 1313.3 of the Zoning Regulations (Title 11 of the District of Columbia Municipal Regulations to which all subsequent citations refer unless otherwise specified).

The Application would authorize a temporary Cell on Wheels (“COW”) monopole for two years on Lot 805 in Square 5868S (the “Property”). The Commission reviewed the Application pursuant to the Commission’s Rules of Practice and Procedures, which are codified in Subtitle Z. For the reasons stated below, the Commission **APPROVES** the Application.

FINDINGS OF FACT

Background

1. Pursuant to the Z.C. Order No. 02-45, the Commission approved a first-stage PUD, together with a related map amendment from unzoned to the SP-1 zone (MU-1 zone under the Zoning Regulations of 2016), in order to develop a new mental health facility on the Property.
2. Pursuant to Z.C. Order No. 04-08, the Commission approved a second-stage PUD for the Property (together with Z.C. Order No. 02-45, the “Approved PUD”).
3. Pursuant to Z.C. Order Nos. 04-08A/02-45A, 04-08B/02-45, and 04-08C/02-45, the Commission approved minor modifications to adjust the boundaries of the Approved PUD.

Parties

4. The only party to Z.C Case Nos. 02-45 and 04-08, other than the Applicant, was Advisory Neighborhood Commission (“ANC”) 8C, the “affected” ANC pursuant to Subtitle Z § 101.8. At the time of filing the Application, ANC 8E is also an “affected ANC” because it abuts the Property, and so is also a party to this case.

The Application

5. On May 2, 2018, the Applicant served the Application on ANCs 8C and 8E, the Office of Planning (“OP”), and the District Department of Transportation (“DDOT”), as attested by the Certificate of Service submitted with the Application. (Exhibit [“Ex.”] 1.)
6. The Application stated that the proposed COW would allow the Applicant to maintain antenna coverage for the Property, which is currently provided by 12 cell antennas located on a water tank scheduled to be removed in the summer of 2018. The Application stated that the existing St. Elizabeths tower cannot support additional equipment because it currently exceeds its structural capacity and that the Applicant was unable to locate any other existing structures that were suitable for collocation. (Ex. 2.)
7. The Application asserted that the proposed COW’s temporary status will be the least intrusive means to provide coverage given the Property’s location and existing development. The COW is proposed to be located on the perimeter of the St. Elizabeths’ campus and set back more than 300 feet from all property lines except that shared with the St. Elizabeths cemetery to the northeast, which is only 37.4 feet away. The Application asserted that the proposed COW’s 150-foot height is the minimum needed to achieve the desired coverage, but that the COW will be largely shielded from view by the existing structures on the site. The Application stated that the existing tree line is approximately 60 feet high and the Application does not propose to remove any trees. (Ex. 2.)
8. The Application was revised to note that the COW would not be able to comply with the 50-foot minimum required setback from the nearest property line pursuant to Subtitle C § 1313.9 and would only provide a 37.4-foot setback. The property line at issue is the southwestern boundary of a cemetery that is owned by the District and contains no inhabited buildings. The Application noted that compliance with the setback requirements would necessitate moving the COW closer to the St. Elizabeths hospital buildings and asserted that the proposed location would be preferable in order to minimize impacts on the hospital. (Ex. 6, 7.)
9. The Application included the written and graphic documentation and responses required pursuant to the requirements of Subtitle C §§ 1312 and 1313, including:
 - Maps showing the coverage area that is currently served by the antennas on the water tower, the reduced coverage area with the water tower removed, and the coverage area with the proposed monopole;
 - Information on the monopole’s appearance and maintenance plan;

- A statement that the Applicant would obtain the required mayoral permission as part of the permitting process; and
- A statement that the Applicant would comply with all applicable FCC requirements. (Ex. 2.)

Responses to the Application

OP

10. OP submitted a June 1, 2018, report (the “OP Report”), as required by Subtitle C § 1313.10, recommending approval of the Application for a period of two years as consistent with the design and programmatic intents of the Approved PUD. (Ex. 8.) The OP Report noted that while the Application requested special exception relief not originally granted by the Approved PUD. OP recommended that the Application be considered as a modification of consequence because the “special exception is straightforward and presents no factual issues that require a public hearing to resolve.”
11. The OP Report analyzed the Application against the special exception criteria of Subtitle C §§ 1312 and 1313 and concluded that the Applicant had met its burden of proof. On the matter of the reduced setback, the OP Report concurred with the Applicant that the COW’s proposed location would not result in any adverse impacts to the neighboring cemetery property and would also minimize impacts to the St. Elizabeths hospital buildings. The OP Report noted that the COW would otherwise be properly setback from all other property lines and neighboring residential zones.

ANC 8C

12. ANC 8C did not submit a report or any correspondence to the record, but the Applicant submitted a letter to the record indicating that it had met with the ANC to discuss the installation of the COW and that the ANC had voted to support the required modifications. At the July 30, 2018 public meeting of the Commission, the Office of Zoning stated that the chair of the ANC had confirmed that the ANC had voted to support of the Application but had been unable to file a report prior to the meeting. (Ex. 10; July 30, 2018 Public Meeting Transcript at 14.)

ANC 8E

13. ANC 8E did not submit a report or response to the Application.

CONCLUSIONS OF LAW

1. Subtitle Z § 703.1 authorizes the Commission, in the interest of efficiency, to make modifications of consequence to final orders and plans without a public hearing.
2. Subtitle Z § 703.3 defines a modification of consequence as “a modification to a contested case order or the approved plans that is neither a minor modification nor a modification of significance.”

3. Subtitle Z § 703.4 includes “a proposed change to a condition in the final order” and “a redesign or relocation of architectural elements” as examples of modifications of consequence.
4. The Commission concludes that the Applicant satisfied the requirement of Subtitle Z § 703.13 to serve the Application on all parties to the original proceeding, in this case ANC 8C. The Applicant also served ANC 8E, which is considered an “affected ANC” pursuant to Subtitle Z § 101.8.
5. The Commission concludes that the Application qualifies as a modification of consequence within the meaning of Subtitle Z §§ 703.3 and 703.4, as a request to modify a final condition and redesign of the architectural elements approved by the Original Order, and therefore can be granted without a public hearing pursuant to Subtitle Z § 703.17(c)(2). The Commission concurs with the conclusions of OP that the requested special exception relief can be considered as a modification of consequence because it does not present any factual issues that would require a public hearing to resolve, especially as it is for a temporary use that will maintain existing service.
6. Subtitle X § 303.13 provides that:

As part of any PUD, the applicant may request approval of any relief for which special exception approval is required. The Zoning Commission shall apply the special exception standards applicable to that relief, unless the applicant requests flexibility from those standards. Any such flexibility shall be considered the type of development flexibility against which the Zoning Commission shall weigh the benefits of the PUD.

7. As the Application did not request any flexibility from the special exception standards, the Application does not affect the PUD’s development flexibility.
8. Section 8 of the Zoning Act of 1938 (D.C. Official Code § 6-641.07(g)(2) (2018 Repl.); see also Subtitle X § 901.2) authorizes the Commission to grant special exceptions, as provided in the Zoning Regulations, where, in the judgement of the Commission, the special exception:
 - (a) *Will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Map;*
 - (b) *Will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Map; and*
 - (c) *Complies with the special conditions specified in the Zoning Regulations.*
9. For the relief requested by the Application, the “specific conditions” are those of Subtitle C §§ 1312 and 1313.

10. Relief granted by the Commission through a special exception is presumed appropriate, reasonable, and compatible with other uses in the same zoning classification, provided the specific regulatory requirements for the relief requested are met. In reviewing an application for special exception relief, the Board's discretion is limited to determining whether the proposed exception satisfies the requirements of the regulations and "if the applicant meets its burden, the Board ordinarily must grant the application." (*First Washington Baptist Church v. D.C. Bd. of Zoning Adjustment*, 423 A.2d 695, 701 (D.C. 1981) (quoting *Stewart v. D.C. Bd. of Zoning Adjustment*, 305 A.2d 516, 518 (D.C. 1973)).)
11. The Commission concludes that the Application has met the special exception criteria of Subtitle C §§ 1312 and 1313 by demonstrating that the proposed COW:
 - Will be the least intrusive means to maintain the current coverage;
 - Is the lowest height feasible to maintain that coverage;
 - Will not remove any trees;
 - Is temporary; and
 - Will comply with the applicable laws and regulations of the District and the FCC.
12. The Commission concludes that although the COW does not meet the setback requirements of Subtitle C § 1313.6, the proposed location of COW will not result in any adverse impacts to the neighboring cemetery property and will minimize impacts to the St. Elizabeths hospital buildings. The Commission notes that pursuant to Subtitle C § 1313.6, it can grant a special exception not meeting the other special exception requirements of Subtitle C § 1313 if the application demonstrates that "the proposed location will generate the least adverse impacts." (Subtitle C § 1313.6(d).) The Commission notes that the OP Report supported this substandard setback as reducing the potential adverse impacts of the COW on other properties that are more heavily used and concludes therefore that the proposed location generates the least adverse impacts because it allows the COW to be setback much further from all other lot lines.
13. The Commission also concludes that the Application has met the general special exception criteria of Subtitle X § 901.2 because:
 - (a) The COW monopole use is in harmony with the Zoning Regulations and Map because it is a permitted use in the MU-1 zone if it meets the specific special exception criteria, as the Application does;
 - (b) The COW monopole is temporary and is located to limit adverse impacts on neighboring properties; and
 - (c) The COW monopole has met the specific requirements of Subtitle C §§ 1312 and 1313, as asserted in the Application and as confirmed by the OP Report.
14. The Commission concludes that the requirement of Subtitle Z § 703.17(c)(2) to provide a timeframe for responses by all parties to the original proceeding had been met because ANC 8C, the only party other than the Applicant to the Approved PUD, did not file a

response to the Application within the time frame set by the Commission, and therefore, the Commission could consider the merits of the Application at its July 30, 2018 public meeting.

15. The Commission finds that the modification proposed by the Application is consistent with the Approved PUD because the COW will allow the Applicant to continue to provide antenna coverage for the Property during the construction of the Approved PUD and the COW's impact on the Approved PUD will only be for the two-year period of the special exception

“Great Weight” to the Recommendations of OP

16. The Commission must give “great weight” to the recommendation of OP pursuant to § 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990 (D.C. Law 8-163; D.C. Official Code § 6-623.04 (2018 Repl.)) and Subtitle Z § 405.8. (*Metropole Condo. Ass’n v. D.C. Bd. of Zoning Adjustment*, 141 A.3d 1079, 1087 (D.C. 2016).)
17. The Commission found OP’s lack of objection to the Application being considered as a modification of consequence and recommendation that the Commission approve the Application persuasive and concurred in that judgment.

“Great Weight” to the Written Report of the ANC

18. The Commission must give “great weight” to the issues and concerns of the affected ANC expressed in a written report of an affected ANC that was approved by the full ANC at a properly noticed meeting that was open to the public pursuant to § 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d)(2012 Repl.)) and Subtitle Z § 406.2. To satisfy this great weight requirement, District agencies must articulate with particularity and precision the reasons why an affected ANC does or does not offer persuasive advice under the circumstances. The District of Columbia Court of Appeals has interpreted the phrase “issues and concerns” to “encompass only legally relevant issues and concerns.” (*Wheeler v. District of Columbia Board of Zoning Adjustment*, 395 A.2d 85, 91 n.10 (1978).)
19. The Commission notes that as neither ANC submitted a written report, there are no issues or concerns to which the Commission can give great weight.

DECISION


In consideration of the case record and the Findings of Fact and Conclusions of Law herein, the Commission concludes that the Applicant has satisfied its burden of proof and therefore **APPROVES** the Application’s request for a Modification of Consequence to:


- Modify the approved plans and conditions of the PUD approved in Z.C. Order Nos. 02-45 and 04-08, as modified by Z.C. Order Nos. 04-08A/02-45, 04-08B/02-45, and 04-08C/02-45; and
- Add special exception relief pursuant to Subtitle C §§ 1312 and 1313.

The approved Application allows placement of a 150-foot-tall Cell on Wheels on the Property for a two-year period from the effective date of this Order. All provisions of Z.C. Order Nos. 02-45, 04-08, 04-08A/02-45, 04-08B/02-45, and 04-08C/02-45 remain unchanged and in effect.

VOTE (July 30, 2018): **5-0-0** (Anthony J. Hood, Robert E. Miller, Peter A. Shapiro, Peter G. May, and Michael G. Turnbull to **APPROVE**).

In accordance with the provisions of Subtitle Z § 604.9, this Order No. 04-08D/02-45 shall become final and effective upon publication in the *D.C. Register*; that is, on May 8, 2020.


ANTHONY J. HOOD
CHAIRMAN
ZONING COMMISSION


SARA A. BARDIN
DIRECTOR
OFFICE OF ZONING

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 *ET SEQ.* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.