ADVISORY NEIGHBORHOOD COMMISSION 3C
GOVERNMENT OF THE DISTRICT OF COLUMBIA
CATHEDRAL HEIGHTS • CLEVELAND PARK • MASSACHUSETTS AVE. HEIGHTS
MCLEAN GARDENS • WOODLEY PARK

Single Member District Commissioners
01-Allen Hahn; 02-Kurt Vorndran; 03-Sally MacDonald
04-Vacant; 05-John Welsh; 06-Trudy Reeves
07-Sheila Hogan; 08-Nancy Nord; 09-Nancy MacWood

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November 23, 2004

Mr. Geoffrey Griffis
Chair, D.C. Board of Zoning Adjustment
441 4th Street, N.W.
Washington, D.C. 20002

Re: BZA Application No. 17211, National Broadcasting Corporation
4001 Nebraska Avenue, N.W.

Dear Chairman Griffis and Members of the Board,

Attached are the Findings of Fact and Conclusions of Law submitted by the Advisory Neighborhood Commission 3C, a party in the above referenced case.

Thank you for the opportunity to submit this document and for giving the views of the ANC 3C great weight.

Sincerely,

Nancy J. MacWood
Chair, ANC 3C

Cc: Edward Donohue
Karen Thomas
Amy McVeigh
Councilmember Phil Mendelson

BZA
Case No. 17211
Exhibit No. 39

Board of Zoning Adjustment
District of Columbia
CASE NO. 17211
EXHIBIT NO. 39

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FINDINGS OF FACT, BZA APPLICATION NO. 17211

Subject Property and Surrounding Area

1. The subject property is located at 4001 Nebraska Avenue, N.W. (Square 1722, Lot 1) and is owned by the National Broadcasting Corporation (NBC).

2. The subject property is zoned R-1-B.

3. The subject 7-acre property is developed with a three-story office and broadcast building, two antenna towers, and a parking lot for approximately 222 vehicles.

4. National Presbyterian Church headquarters and its elementary school are located to the north in an R-1-B zone; Glover-Archbold Park, owned by the National Park Service is located to the east, as is the McLean Gardens housing development, which is zoned R-5-A; U.S. Department of Homeland Security offices are located to the south in an R-5-A zone; residential housing is located to the west in an R-1-B zone.

Previous BZA Orders

5. Board of Zoning Adjustment granted a use variance to NBC to locate a broadcast studio office building with 459 foot antenna tower and parking lot in 1955.

6. In 1981, BZA granted a special exception (BZA Order 13554) to NBC for a 25-year master plan, which included a three-phase expansion of existing facilities and the construction of a new 659 foot antenna tower to replace the 459 foot tower. A 659 foot tower was built in 1988, but the old tower was not demolished.

7. In 1992, NBC applied for and received a special exception pursuant to Section 211 for the 459 foot tower after the Zoning Administrator ruled that this tower had to be demolished in compliance with the 1981 BZA Order and the exhibits in the record of that hearing.

8. An appeal was filed in D.C. Court of Appeals in 1995 by ANC 3C Commissioner Phil Mendelson. The Court remanded the case to the BZA.

9. On January 21, 2004, the Board issued Order No. 15708-A, which granted the special exception for the 459 foot tower based on the 12-year old record. This Order expires on December 1, 2004.

Office of Planning

10. Office of Planning (OP) submitted a report and testified regarding the current special exception application. Based on the continuous use of the 459 foot antenna tower, OP determined that the Applicant, NBC, had complied with the provisions of 11 DCMR Section 211. OP also stated that the tower was integral to the studio's (WRC-TV) operation. But NBC testified that they lease space to other antenna users on the 459 foot tower, reserving space for only one NBC antenna, which could be moved to the larger tower.

11. In response to questions, OP testified that they had no knowledge of the unused antenna tower capacity in the District of Columbia or in adjacent jurisdictions. OP also stated that they had no information about the ability of the tower tenants to relocate.

12. In their written report, OP concluded that none of the facts upon which the Board based its January 21, 2004 Order (BZA Order 15708-A) had changed and therefore, the special exception should be granted again. However, the Order acknowledged in a footnote that there have been technological changes since the 1992 hearing, but the Board had to rely on that record to render a decision. The Order also listed NBC antennae uses on the 459 foot tower in 1992; NBC testified in the current case that it no longer uses the tower for those broadcast and reporting uses. There is only one NBC antenna on the 459 foot tower and that antenna could be moved to the larger tower according to NBC testimony.

District of Columbia Councilmember Phil Mendelson

13. Councilmember Mendelson, who represented Advisory Neighborhood Commission 3C in the 1992 BZA special exception proceeding, testified that the 459 foot tower was completely visible from all directions. He offered as an exhibit a photograph that showed two clearly visible NBC towers, which he stated was the view from McLean Gardens. He suggested that the photographs in the Applicant's submission were taken from the few locations that obscured the smaller tower from view.

14. He also testified that NBC had not demonstrated that it had a broadcast need for the 459 foot tower and that NBC was using the tower for its financial benefit by leasing space on the tower.

15. Councilmember Mendelson further urged the Board to exercise "prudent avoidance" in deciding whether to allow the tower to continue to operate, as is recommended in the District of Columbia Comprehensive Plan, Section 411 (Environmental Protection Element) and 1403.13(e) (Ward 3 Plan).

Advisory Neighborhood Commission 3C

16. ANC 3C submitted a unanimously approved resolution that did not support the special exception application.

17. ANC 3C, which borders the Applicant's property, based its position on the objectionable visible impact of two towers and on the absence of NBC demonstrating any need for its use of the 459 foot tower.

18. The ANC also submitted a response to the Applicant's contention that Section 211 includes the need of tenants. In brief, the ANC argued that if Section 211 assumed consideration of tenants needs, the section would have included provision for tenants to be parties and testify regarding their individual need to locate on the Applicant's tower. Absent that testimony, the Board has no record to base a decision on tenant's need and can only rely on the Applicant's need.

CONCLUSIONS OF LAW

Applicable Law – Special Exception

11 DCMR Section 211 establishes the conditions that an applicant must meet for the BZA to grant a special exception, pursuant to Section 3104, for the use of a broadcast antenna tower in an R-1 zone. As the Applicant in this case, NBC must meet each of the conditions and if it fails to comply with even one condition, the special exception cannot be granted. The hearing record contains testimony that NBC does not comply with at least three of the provisions under Section 211.

Section 211.3 – ***The antenna shall be mounted in a location that minimizes to the greatest practical degree its visibility from neighboring property and from adjacent public space, or that is appropriately screened by landscaping or other techniques so as to soften or minimize the visibility of the antenna***

The areas surrounding the NBC tower are notable for open spaces and both single family and multiple-family housing, both of which present a low, horizontal profile. The vast skyline is broken by the existence of the two NBC towers. While the elimination of the smaller 459 foot tower would not restore an unbroken skyline it would remove the industrial effect that two towers bring to the residential area and by doing so would minimize the visual impact. Common sense leads to the conclusion that two of something that large has more of a visual impact than one of something. The effort to minimize the visual impact of the tower by painting it grey has not been successful. Additionally, there is no landscape screening to soften the views of a 459 foot tower in the midst of parkland and 40 to 60 foot high residential housing. The tower is readily visible from public right of ways. Thus, the location of the tower at this site does not comply with Section 211.3.

Section 211.5 – ***The proposed height of the tower shall not exceed that which is reasonably necessary to render satisfactory service to all parts of its service area.***

Based on briefs submitted by the parties, the Board finds that Section 211 addresses the need of the Applicant, and not the needs of its tenants. The only testimony the Board received regarding need was from the Applicant, as none of the tenants testified. So even if the Board determined that it could consider a tenant's need to locate on the 459 foot tower, there is no record of any tenant's need to locate on the Applicant's tower to the exclusion of other towers. Thus, considering only the need of the Applicant, the Board notes that NBC stated that they could relocate the single NBC-related antenna to the existing larger tower. NBC did not testify that service to its service area would be impacted by the transfer of that single antenna. Under Section 211.5 the Applicant has the burden of demonstrating that it needs a specific height tower to render reasonable service to its service area. The Applicant has made it clear that they do not rely on the 459 foot tower and thus, the Applicant has not met the burden of Section 211.5.

The Office of Planning stated in its submission that the two towers could not be consolidated without building a larger tower in order to render satisfactory service to the area and therefore, there is a demonstrated need for the 459 foot tower. First, the Board finds that there is no provision in Section 211 requiring that a tower must continue to operate as long as it has rental tenants. NBC testified that it did not need the tower for its use and it has no zoning-related obligation to provide space to other users; NBC is renting space in order to benefit financially from a tower that it does not need. Second, there was no creditable testimony that the tenants on the 459 foot tower could not relocate and there was also no testimony that these tenants could not relocate on the taller NBC tower. In fact, Office of Planning testified that they had no knowledge about the potential for relocation on any tower. Thus, OP seems to have based its conclusion on assumptions that are not supported by the record.

In addition, the test for compliance with Section 211.5 is not whether tenants have need for a tower but whether the Applicant needs the tower to broadcast to its service area. Furthermore, the proposed argument that NBC did the community a favor by building the approved 659 foot tower with a smaller base than had been approved and therefore, the Board should evaluate the 459 foot tower as if it were part of the original proposed wider-based tower is creative, but not supported by the facts. NBC did build a 659 foot tower, which was the approved height. Section 211 addresses height and not width or mass. Why NBC chose to construct the tower with a smaller base than had been approved and to build it at ground level rather than on the proposed parking garage is irrelevant to the current special exception case. What is pertinent is that the approval for a master building plan and a new larger tower was conditioned on the removal of the smaller tower, now the subject of this special exception application. It is unreasonable to conclude that the tower earmarked for replacement and demolition and thus, not considered when the taller tower was approved, should now be considered as a component of the taller tower. The two towers are completely distinct. NBC has created a distraction by arguing that their decision to build a smaller base means that they should be allowed to continue to use the other tower because if they had chosen to build the approved tower it might be more visible than the current 459 foot and 659 foot towers. The Board is not persuaded by this circular argument. NBC made a choice and the Board can consider only the tower that is the subject of this special exception application and whether NBC needs that tower for its service delivery.

Section 211.6 – *No transmission equipment shall be located in a Residence District, unless location in the district is necessary for technically satisfactory and reasonably economical transmission.*

The Applicant has not shown that it needs the 459 foot tower for its transmissions. It uses the taller tower for these transmissions and based on the record it can relocate the one antenna that is currently on the 459 foot tower. When the subject tower was granted a special exception in 2004 based on the 1992 record there was ample testimony that NBC was using the smaller tower for its own transmissions. That is not the case currently.

There was also no testimony to support the Office of Planning's assumption that the tower tenants would have to build additional towers if they could no longer locate on the NBC tower. The Board cannot base its decision on speculation when there is not a shred of testimony regarding the available unused tower capacity in the District and surrounding jurisdictions and none regarding the potential for the tenants to relocate on the taller NBC tower or another tower that would meet their transmission needs. Testimony from the NBC engineer that studies of the optimal relocation placement of specific antenna could be costly is a business-related expense and there was no creditable testimony that these costs would be unreasonable. Furthermore, Section

211 does not provide flexibility for the Board to approve a special exception based on a tenant's need rather than the Applicant's need.

Section 211.10 – *The applicant shall have the burden of demonstrating the need for the proposed height, and that full compliance with the matter-of-right standards would be unduly restrictive, prohibitively costly, or unreasonable.*

The Office of Planning stated that they believe the Applicant demonstrated need for the 459 foot tower when it was initially approved in 1955 and again in 2004 when it was granted a special exception to use the tower. However, the tower was approved in 1955 based on zoning regulations that reflected the state of broadcast technology at that time. Use by NBC was not at issue in 1955. In 1992, NBC testified that they were using the 459 foot tower and they listed the specific antenna and the NBC news reporting and broadcast service that each provided and the 2004 decision by the Board reflected the 1992 record. The facts have changed. The Board must look at the current demonstrated, or undemonstrated, need pursuant to Section 211.10. NBC has not shown that matter-of-right standards would not meet their needs because they have no needs that are not being satisfied by the larger tower. Therefore, the Board finds that NBC has not complied with this section.

Conclusion

The Board finds that the Applicant, NBC, has not met the burden of complying with Sections 211.3, 211.5, 211.6, and 211.10. The visibility of the 459 foot tower is obtrusive and unwarranted and there is no demonstrated need for a tower of that height to reasonably render broadcast service to the NBC service area. There is public policy as outlined in the Comprehensive Plan that towers should not be located in residential districts and that policy is consistent with a decision to deny the special exception application when it does not meet the provisions of Section 211. Furthermore, the zoning provision, Section 201.6, which allows co-location of antenna on existing towers does not imply or state that towers should continue to be used for that purpose alone. First, the special exception process must approve the erection or continuation of use of a tower based on the Applicant's need and other conditions, and then, and only then, can the tower be used, if there is space, for co-location.