

**CHARTER TOWNSHIP OF PLYMOUTH
ZONING BOARD OF APPEALS MINUTES
REGULAR MEETING
THURSDAY, SEPTEMBER 4, 2008**

Meeting called to order at 6:30 p.m. by Chairman Levensgood.

MEMBERS PRESENT: Gene Levensgood
Harry Jachym
Ray Sturdy, Jr.
Robert Doroshewitz
Jim Zdanek

MEMBERS ABSENT: None

OTHERS PRESENT: Mark Lewis, Chief Building Official
Alice Geletzke, Recording Secretary
11 members of the public

ITEM NO. 1 - APPROVAL OF MINUTES

1. Regular Meeting – August 7, 2008.

Moved by Mr. Jachym, supported by Mr. Zdanek, to approve the minutes of the regular meeting of August 7, 2008, as presented. Ayes all.

Moved by Mr. Sturdy, supported by Mr. Jachym, to switch Items 1 and 2 under New Business on the agenda, hearing first from Harry & Corrine Kert, 46477 Arboretum CR, Application 1462. Ayes all.

ITEM NO. 2 – NEW BUSINESS

**2. Application No. 1462- Harry & Corrine Kert
46477 Arboretum CR
Plymouth MI 48170**

Location – **46477 Arboretum CR
Plymouth, MI 48170**

Tax I.D. #78-055-04-0003-000

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RE: Zoning Ordinance No. 99, Article XXVIII, Special Provisions; Section 28.31 (a)

<u>Variance No.</u>	<u>Zoning Ordinance Section/Standard</u>	<u>Location</u>	<u>Allowed Locations</u>	<u>Proposed Location</u>	<u>Variance Required</u>
1462	Ordinance 99, Article XXVIII, Sec 28.31 (a)	46477 Arboretum CR	Rear 1/3 of side yard or rear yard	Front yard	Front yard

The applicant is requesting one variance:

- This application is in an R-1-H zoning district. The applicant is requesting a variance to install a generator in the front yard. The ordinance allows for placement in the rear 1/3 of the side yard or rear yard. The applicant is requesting placement in the front yard of the property.

Mr. Kert addressed the Board and answered questions regarding the proposed location of the generator. He indicated this location would be the least visible and cause fewer noise problems. In addition to the materials provided with his initial Application, he presented minutes of a special board meeting of the Arboretum Condominium Association dated August 21, 2008, in which the board members agreed unanimously to this location in the inside corner of the northeast setback of the condo for installation of the generator on this particular site. The minutes also conveyed the approval of the closest neighbor to the installation.

Moved by Mr. Doroshewitz, supported by Mr. Sturdy, to grant approval for front yard installation of a generator as requested in Application 1462, Harry and Corrinne Kert, 46477 Arboretum CR, all criteria of the Zoning Ordinance having been met in the material submitted by the applicant. Ayes all.

Exhibits:

- Application Form
- Applicant's Explanation Statement
- Plan Diagram
- Approval of Condominium Association 8/5/08
- Notation of Concurrence of Immediate Neighbor
- Aerial Photos (2)
- Site Photos (6)
- Tract/Plat Map
- Condominium Association Approval 8/21/08

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**1. Application No. 1461- Metro PCS Michigan Inc
28505 Schoolcraft RD, Bldg 6
Livonia MI 48150**

Location - **5770 Napier
Plymouth, MI 48170**

Tax I.D. #78-043-99-0002-001

RE: Zoning Ordinance No. 99, Article XXVII, Nonconformities & Article XXVIII, Sec 28.11 Wireless Communication Facilities and Services

The applicant is requesting the following variance:

- This application is in an R-1-H zoning district. The applicant is requesting a variance to permit the addition of new cellular communication panel antenna arrays on existing microwave tower and the installation of equipment cabinet inside fenced area on a B nonconforming property.

Mr. Joe Infante appeared on behalf of Metro West PCS and Global Tower Partners (GTP).

Mr. Sturdy referred a note left with the ZBA earlier in the meeting by residents of 16681 Carrin Court and 11865 Chandler Drive to Mr. Infante. The note objected to adding more cellular facilities to the old microwave tower and grounds and listed concerns regarding lower property values and health issues for their children. Mr. Infante was also presented with a copy of a communication the ZBA received from a Mr. Martin Korshak, a resident whose property backs up to the tower, objecting to the proposed installation of additional equipment to the tower and additional equipment to be installed within an expanded fenced area on the tower site.

Mr. Infante explained the wishes of Metro West PCS to add six new panel antenna arrays to the tower and associated tower cabling and new outdoor equipment in an expanded fenced area at the site to cover gaps in their cell phone coverage to their customers. The best location that would work to cover gaps without installing a new conforming cellular facility was to expand facilities on this existing non-conforming tower. The tower, as it stands now, has been in place for over 50 years. In the past there were microwave communication dishes on it. With current technology changes, the cellular communication antennas are smaller and the intention is to put numerous smaller antenna arrays on the tower.

He contended that the Zoning Ordinance considers the tower to be a non-conforming structure only because it is a lattice tower. Because of that, permission is needed to add to the tower. He believed the Zoning Ordinance says that you cannot increase the non-

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conformity, not that you cannot ever change the use. He claimed that the non-conformity now is not the antenna, it is the tower. He argued that by putting more antennas on the tower, it will not change the non-conformity—it is still a tower and that will not be changed. Many of the goals of the Zoning Ordinance, he said, are to make use of what's already in place, to encourage co-location. He stated that the existing tower has a lot more room on it—it's barely being used to capacity and he said that without using this tower, another tower would be necessary.

Mr. Infante said another goal of the Zoning Ordinance seemed to be to make advantageous use of a non-conforming use during its life. He believed that the tower has a long life ahead of it. Metro PCS would like to continue to make advantageous use of that tower by putting additional arrays of antenna on that tower to fulfill its FCC requirements. He indicated that Metro PCS would be in violation of FCC regulations if they didn't fill the gaps in their current service. Mr. Infante noted that a number of other carriers currently have facilities attached to the tower and claimed that a township could not allow one provider to maintain an attachment and deny another provider from going on there.

Chairman Levensgood opened the floor for public comments.

Mr. Dwight Dean, a resident located on Lot 54 of Huntington Park Subdivision; Mr. John Wild who lives across the street from the tower, and Mr. Keith Bennett of Westin Drive voiced their objections to expansion of the tower. They were concerned about the safety of the tower, the continued lack of reasonable maintenance of the tower site, and health issues. Mr. Infante indicated that a recent structural review of the tower had been conducted. Chairman Levensgood noted that the company conducting the review was located in Oregon and did not make any on-site inspection of the tower.

Following the public comments, Mr. Sturdy referred Mr. Infante to Applicant's July 17, 2008 cover letter and exhibits submitted with the current application. Mr. Infante confirmed that Applicants' request in this case was the same as the request the Board had denied after an extended hearing in February, 2007. He acknowledged that, other than changes in letterhead and dates and an update of the building official's rejection in Applicants' Exhibit F, the information submitted in this proceeding is exactly the same as that submitted with the prior request in November, 2006.

Applicants' earlier request was denied by the Board on February 1, 2007. Applicants' appeal of that determination was denied by the Wayne County Circuit Court in Docket No. 07-70873-AV. The Circuit Court upheld the ZBA's determination to reject the application. Applicants' request for leave to appeal to the Michigan Court of Appeals was denied for lack of merit on May 1, 2008 in Docket No. 281145.

The minutes of the Board's February 1, 2007 meeting considering Applicants' prior request and a communication to the Board from Township Attorney Witthoff advising the Board of the Circuit Court and Court of Appeals actions was placed in the record. The minutes of the prior Board hearing describe in detail the nature of Applicants' efforts to attempt to collaterally attack a determination of the Township Planning Commission, in

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violation of Section 27.3.6 of the Zoning Ordinance. The Township's Ordinance provides a procedure for owners of non-conforming structures and uses to obtain permission to expand facilities in certain circumstances and the prior owner of the tower under consideration in this case sought unsuccessfully to obtain such permission from the Commission before bringing their earlier appeal to the ZBA. The Ordinance prohibits review of such Planning Commission determinations by the ZBA so the Applicants' styled their prior appeal as a challenge to the Township building official's denial of a building permit.

Turning to the substance of the current request, Mr. Sturdy indicated that when the microwave tower was constructed in the early 1960's, both the structure and the use were in compliance with current zoning requirements. At that time, there were no residential dwellings in the immediate area and no cause for property value or public safety concerns. During the ensuing 50 year period, rezoning occurred and both the structure and use acquired non-conforming status. Ultimately, the tower owner, AT&T, abandoned its microwave communication practices and property adjacent to the tower site was subdivided and residential homes constructed adjacent to the tower property. Mr. Sturdy distributed a recent aerial photo taken from one of the Applicant's website that showed the current proximity of residential dwellings to the tower (ZBA Exhibit detailing Residence Proximity).

Mr. Sturdy noted that Applicants' Exhibit C contained notes describing the presence of "ice" canopies at several locations below the top of the tower. He noted further that page A-1 of Applicants' Exhibit E shows the location of existing and proposed new "ice bridges" to cover cabling equipment on the ground below the tower. Mr. Infante concurred with Mr. Sturdy that the purpose of these ice canopies and bridges were to protect communications equipment from destruction from falling ice that could form much higher on the tower and fall to the ground during winter thaw conditions. Mr. Sturdy distributed an exhibit consisting of two photographs of the platform at the top of the tower that presented a site for the formation of large ice sheets that could fall or be blown down on adjacent property (ZBA Exhibit displaying Ice Formation Platform).

Applicants' Exhibit H consisted of the same two-page "structural review" of the tower and proposed additional facilities that had been presented at the Board's previous hearing on February 1, 2007. During that hearing it was determined that "a number of serious flaws and deficiencies were readily apparent on the face of the engineering analysis. Chief among these was the recognition that significant substantial modifications had been made to many of the structural elements of the tower on a least seven, if not more, separate occasions (in 1968, 1970 and 1983 when the four additional microwave reflectors were added, and then on each occasion that the various existing panel antenna arrays, cabling and mounting frames were added to the structure) without any review of how these individual modifications may have changed the strength of individual tower elements from those initially considered when the tower was designed." This purported review and approval was given despite the consultant's express recognition on Page Two of its report that "improperly connected equipment can significantly stress individual tower members and consequently reduce the overall load capacity of the entire tower structure."

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Mr. Infante conceded that there had not been any subsequent review of the tower structure since the prior review considered by the Board at the February 1, 2007 hearing. The consultant only used information provided by one of the Applicants and looked at some photos of the tower. It made no visit to or survey of the tower as part of its scope of work—its assumption being that the tower was simply maintained in good physical condition and the new equipment wouldn't weigh much. Mr. Sturdy stated that a central issue, considered by the Board in detail at the prior hearing, was not simply the weight or loading of new elements now being added to the structure, but more importantly, the changes in individual tower member stresses resulting from the extraordinarily high number of modifications made to individual structural members of the tower that had occurred since the tower was initially constructed. These extensive modifications, made on numerous occasions, could inadvertently result in the denigration of the structural integrity of one or more tower members leading ultimately to member failure and possible structural collapse.

Mr. Jachym said he felt that there are two main issues involved—maintenance of the property and structural integrity. He believes from his visit that maintenance has improved somewhat, but he's not convinced that structural integrity of the tower has. He would like to have seen a valid analysis actually made, not a review of photographs or reports that someone has sent to Oregon to have done.

Chairman Levengood said he has issues with how the existing antennas were installed, whether permits were issued and he raised concerns about if and how these earlier installations were inspected for proper installation. He was also concerned that this is the same material presented by Applicants at the last hearing where the appeal was denied and the denial upheld by the courts.

Mr. Sturdy noted that at its prior hearing on this matter, the Board considered the rationale and purpose underlying the Township Zoning Ordinance provisions dealing with non-conforming structures and uses. The Ordinance does not contain a blanket ban on all improvements or expansions of non-conforming structures and uses, but, instead, provides a public procedure for examining such proposals through application to the Township Planning Commission. In November, 2002, a prior owner of the tower sought a change in status to permit facility expansion and a change in use. The information provided at that meeting included a substantial analysis conducted by the Township's planning consultant, McKenna Associates and described their conclusion that a change in non-conforming status was not appropriate and that the tower had a substantial negative effect on the surrounding areas. The minutes of the Planning Commission's November 20, 2002 meeting and the McKenna Associates review of the non-conforming structure and use status of the microwave tower and attachments were added to the record.

Mr. Sturdy noted that site maintenance had long been an issue at this location and continues present an apparent danger to the public. He passed out an exhibit containing photographs of a hazardous situation at the site that shows a wide open equipment panel about 20 feet from the fence containing hazardous electrical equipment and that is easily

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accessible by children from a large hole in the existing fence at the end of a sidewalk. (ZBA Exhibit identifying Attractive Nuisance Hazard). He stated that this condition had been present at the site for at least a week, if not far longer.

Mr. Sturdy said he feels the Township's Zoning Ordinance is a wireless-friendly ordinance and encourages co-location when appropriate. But he noted there are also situations where public safety needs to be considered and provided for. He took exception to Applicants' contention that the only non-conformity in question here is that the structure is a "lattice tower" as opposed to a pole. He pointed out that the tower structure is not inconformity with at least four separate explicit requirements of the Township's Ordinance. In particular, Ordinance Section 28.11 (6) (b) requires tower and pole structures to be located on parcels of land large enough to contain any structural collapse wholly within the subject property. Section 28.11 (7) (b) 2) prohibits the use of lattice structures. Section 28.11 (7) (b) 4) prohibits wireless communications equipment from being higher than 150 feet in height, unless after Planning Commission review it is found appropriate to go up to a maximum of 200 feet. Section 28.11 (7) (b) 5) imposes a minimum horizontal setback requirement of at least 1-1/2 times the height of the structure and at least 1000 ft from any residential property. These are not simply boilerplate provisions of no consequence to the situation at hand. Mr. Sturdy distributed an exhibit identifying the dangers to public safety resulting from Applicants' failure to comply with Sections 28.11(6)(b) and 28.11(7)(b) 5). (ZBA Exhibit depicting Dangers to Public Safety from Non-Compliance with Ordinance).

The Township does have a policy of encouraging co-location of wireless communication facilities. However, that policy must be carried out responsibly. It cannot be permitted to contravene other important Township policies that call for the lawful elimination of non-conformities and blight, and public health and safety cannot be compromised or endangered.

Mr. Sturdy stated that the application before the Board is styled as an appeal from an administrative decision denying a building permit. Under Section 31.9 of the Ordinance, the Board has three options. It may either:

- 1) Affirm the administrative order, requirement, decision or determination,
- 2) Modify the administrative order, requirement, decision or determination where practical difficulties or unnecessary hardship in the way of carrying out the strict letter of the zoning ordinance or spirit of the zoning ordinance shall be observed, public safety secured, or substantial justice done, or
- 3) Reverse the administrative order, requirement, decision, or determination, but only by determining that it was arbitrary or capricious, based on erroneous finding of material fact, or constituted an abuse of discretion or is based on an erroneous interpretation of the zoning ordinance.

Reversal of the chief building official's denial of Applicants' permit request requires a determination by the Board that his action was arbitrary or capricious, was based on an

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erroneous finding of material fact, constituted an abuse of discretion or was based on an erroneous interpretation of the zoning ordinance. Mr. Sturdy believed that Building Official's permit denial was clearly in compliance with the Zoning Board's determination of February 1, 2007, in Application 1434, which found that a prior building permit denial for the same proposed addition of cellular panels and associated equipment was correct. Acting in conformity with the Board's action in Applicants' prior appeal, particularly when that action was upheld by the Wayne County Circuit Court and the Michigan Court of Appeals, cannot be considered arbitrary or capricious. Further, the facts in this case are clearly developed and consistent with the building official's findings and his action in denying Applicants' permit request constituted no abuse of discretion - it was clearly the contrary. Finally, his interpretation of Zoning Ordinance provisions in this matter was not erroneous but, instead was consistent not only with the Board's determination in the prior proceeding, but also with the Township's planning consultants evaluation and assessment conducted in their examination of the prior tower owner's request for non-conforming structure status revision.

With respect to possible modification of the Building Official's action in this matter, the ordinance allows for modification where practical difficulties or unnecessary hardship in the way of carrying out the strict letter of the zoning ordinance or spirit of the zoning ordinance shall be observed, public safety secured, or substantial justice done. No practical difficulties or unnecessary hardship have been shown in this case. Permit denial in this case simply means that one of the Applicants will simply have to install its antenna panels on a new "conforming" cellular tower in order to meet its FCC coverage requirements. The other Applicant will simply have to forgo additional revenue opportunities that could result from the unlawful expansion of a non-conforming structure and use. With respect to the spirit of the zoning ordinance, numerous provisions of the ordinance prohibit the erection, continued use or expansion of lattice towers [i.e. Sections 28.11(2)(b) and 28.11 (7)(b)2)], and clearly the expansion of non-conforming structures and uses, unless expressly authorized by the Planning Commission are prohibited. With respect to public safety, not only has the structural integrity of the 50-year old tower shown to be in question, the site continues to present attractive nuisance hazards at ground level and the structure poses a falling ice danger to residents in the area that the Applicant's own information and diagrams plainly recognize. Substantial justice requires consideration of possible adverse effects on neighboring properties and the evidence before the Board overwhelming supports findings of significant and long-continuing adverse effects.

Given these considerations, Mr. Sturdy stated that he believed there is no alternative in this case but to affirm the determination of the Building Official in this matter and deny Applicants' appeal.

Mr. Doroshewitz strongly disagreed with the Applicants' contention that conversion of microwave facilities to cellular communication facilities is a continuation of an existing use. Mr. Doroshewitz indicated he has two degrees in telecommunications and works in that field and it is clear that the approved use of that tower was for point-to-point long-distance microwave communication, not wireless cellular communication. When AT&T wanted to provide long-distance service between Detroit and Chicago, it was cheaper to

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build towers along that pathway and those towers would communicate on a line of sight with each other where they could pass the microwave signals along. It would be cheaper than trying to pull wire with having to obtain rights-of-way. The original use approved for the tower at issue in this case was microwave communications. That does not make any subsequent uses “conforming”. He doesn’t believe cellular communication is an extension of the existing approved use for microwave transmission because cellular communication processes are completely different from microwave communication.

Moved by Mr. Sturdy and supported by Mr. Doroshewitz, for the reasons explained and based on the findings stated, to deny the appeal of the Applicants in this matter and to affirm the Township Building Official’s denial of a permit to allow the addition of new cellular communication panel antenna arrays and associated equipment at the site of a Class B non-conforming structure located at 5770 Napier Road, as requested in Application 1461, Metro PCS Michigan Inc. Ayes all.

Exhibits:

- Application Form
- Cover Letter and Applicant Exhibits A-J
- Tract/Plat Map
- Martin Korchak Letter to ZBA dated 8/19/08 objecting to tower expansion
- Attorney Whittoff Letter to ZBA dated 6/3/08 advising of Circuit Court affirmation of prior ZBA determination and Court of Appeal denial of Applicants’ petition for leave to appeal
- Minutes of ZBA Regular Meeting of February 1, 2007
- ZBA Exhibit detailing Residence Proximity
- ZBA Exhibit displaying Ice Formation Platform
- Minutes of Township Planning Commission Regular Meeting of November 20, 2002
- McKenna Associates Report dated 11/15/02 assessing proposed non-conforming structure and use status change
- ZBA Exhibit identifying Attractive Nuisance Hazard
- ZBA Exhibit depicting Dangers to Public Safety from Non-Compliance with Ordinance

Moved by Mr. Sturdy, supported by Mr. Jachym, to adjourn the meeting. Ayes all.

Chairman Levensgood adjourned the meeting at 7:55 p.m.

Respectfully submitted,

Raymond O. Sturdy, Jr.

Raymond O. Sturdy, Jr., Secretary
Zoning Board of Appeals

**NOTE: Upon granting a zoning variance, a building permit is required.
If denied, the applicant may appeal to Circuit Court.**

The Charter Township of Plymouth will provide necessary reasonable aids and services, such as signers for the hearing impaired and audio tapes of printed materials being considered at the meeting, to individuals with disabilities at the meeting/hearing upon two weeks notice to the Charter Township of Plymouth. Individuals with disabilities requiring auxiliary aids or services should contact the Charter Township of Plymouth by writing or calling the Human Resource Office, Charter Township of Plymouth, 9955 N. Haggerty Road, Plymouth, Michigan, 48170, (734) 453-3202, TDD users: 1-800-649-3777 (Michigan Relay Service)-