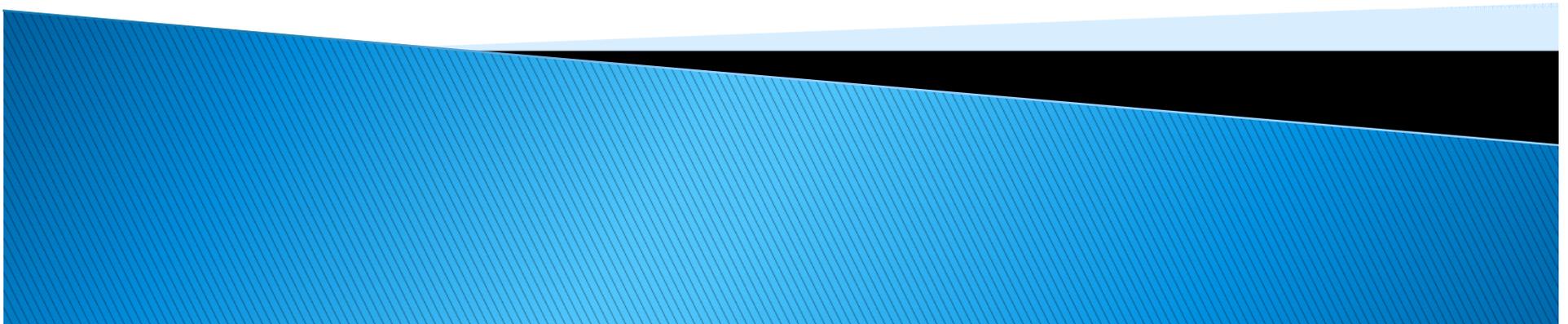


Special Use Permits for Transmission Towers



Special Use Permits Generally

- ▶ Hearings of special use permit applications are required to follow quasi-judicial procedures.
- ▶ The purpose of a quasi-judicial hearing is to gather evidence as to whether or not the application is consistent with the standards set forth in the ordinance.



Ex Parte Communications

- ▶ Ex parte communications are not permitted.
- ▶ Ex parte communications are defined as a communication outside the presence of the other party.
- ▶ All discussion regarding the case should take place at the hearing so that everyone hears what is being said at the same time and has the opportunity to respond or counter testimony immediately.



Hearsay

- ▶ As a general rule, the person asserting a particular fact should be physically present to testify on that matter. Purported statements by those who are not present, letters from those who are concerned but not present, as well as petitions and affidavits from those not in attendance are all hearsay evidence. While hearsay evidence can be presented, a board may well accord it considerably less weight, or no weight at all. Critical factual findings must not be based solely on hearsay evidence.



Opinion Evidence

- ▶ Opinion evidence is generally inadmissible when the witness is unqualified to express an opinion because he/she lacks the necessary experience or factual knowledge to form the proper basis for it.
- ▶ State law specifically prohibits use of opinion testimony by non-expert witnesses on any matter upon which only expert testimony would generally be admissible under the rules of evidence. This would include matters such as how the proposed use would affect the value of neighboring properties, and whether vehicular traffic would pose a danger to public safety.



Standing

The following persons shall have standing to speak in favor of or in opposition to a petition for a transmission tower:

(1) The petitioner/property owner.

(2) The owner of the transmission tower provided the owner has an option or contract to lease or purchase the property that is the subject of the petition.



Standing

(3) Any person who will suffer special damages as a result of the issuance of the special use permit. A property owner/lessee in the area of the subject property has standing; however, said person should be prepared to articulate specific damages that will be sustained due to the issuance of the permit. There is a rebuttable presumption of standing if a property owner/lessee resides within the 500 foot notice area.



Standing

(4) An incorporated or unincorporated association of owners or lessees of the property in the area of the property to which the petition is subject.

(5) An association otherwise organized to protest and foster the interest of the particular neighborhood or local area, provided at least one of the members of the association would have standing as an individual to challenge the petition.

For #4 and #5, the association must be one that was not created in response to the petition.



Examples of Permitted Testimony

A person or entity that has standing may present testimony regarding the following as it relates to a transmission tower petition. Depending upon depth and nature of the testimony, only expert testimony will be allowed. For example, if the concern relates to the structural integrity of the transmission tower, only testimony from an expert with knowledge in the area of tower design will be allowed.

Examples include:



Examples of Permitted Testimony

- (1) Visual impacts/aesthetics (visibility, tree coverage, etc.), if any;
- (2) Design, siting, stability and security concerns, if any; (depending upon the nature of the concern, expert testimony may be required);
- (3) Safety concerns relating to the potential for ice-fall and falling debris, if any;
- (4) Impact of lights, if any;



Examples of Permitted Testimony

- (5) Noise, if any;
- (6) Traffic, if any; (provided the witness is an expert)
- (7) Impact on property values of the property owner presenting testimony. If the impact is on other neighboring property, a real estate appraiser or a mortgage banker that handles residential transactions or some other expert must testify.



TRANSMISSION TOWERS

What Can be Considered? (160A-400.51A)

- ▶ “[L]and use, public safety, and zoning considerations, including aesthetics, landscaping, structural design, setbacks, and fall zones, or State and local building code requirements...”



However... (160A-400.51A continued)

- ▶ “For purposes of this Part, public safety includes, without limitation, federal, State, and local safety regulations but does not include requirements relating to frequency emissions of wireless facilities.”



Derived from Federal Law

(47 U.S.C. §332 (c)(7)(B)(iv))

- ▶ “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 Commission’s regulations concerning such emissions.”



Requirements of Chapter B, Section 6-1.5(F) of the UDO

- ▶ (F) Required FindingsThe Elected Body shall issue a special use permit only when the Elected Body makes an affirmative finding as follows:
 - (1) That the use will not materially endanger the public health or safety if located where proposed and developed according to the application and plan as submitted and approved;
 - (2) That the use meets all required conditions and specifications;



Requirements of Chapter B, Section 6-1.5(D) of the UDO

- (3) That the use will not substantially injure the value of adjoining or abutting property, or that the use is a public necessity; and,
- (4) That the location and character of the use, if developed according to the application and plan submitted and approved, will be in harmony with the area in which it is to be located and in general conformity with *Legacy*.



Harmony

- ▶ The inclusion of a use in the ordinance as a permissible special use within a district establishes a prima facie showing or a rebuttable presumption of harmony with the surrounding area rather than a conclusive finding of harmony.
- ▶ Accordingly, the burden is on the opposition to rebut the presumption of harmony rather than simply objecting to the location of the use in their vicinity.
- ▶ The decision making board is not required to find harmony, if “competent, material, and substantial evidence reveals that the use contemplated is not in fact in ‘harmony with the area in which it is to be located’.”



Harmony

- ▶ What is harmony? In short, think of harmony as the compatibility of a use with the area in which the use is to be located.
- ▶ What type of factors may be discussed so that harmony be proven/challenged?
 - Visual impact/aesthetics (i.e. visibility, tree coverage, lights)
 - Noise, traffic, crime, vandalism
 - Impact upon property values
- ▶ A denial may not be based upon conclusions which are speculative, sentimental, personal, vague, or merely an excuse to prohibit the requested use.



Action May be Taken as Follows: (Section 6-1.5(E) and (F))

- (1) Approve.Approve the application and direct issuance of the special use permit therefor;
- (2) Approve with Conditions.Approve the application with conditions as specified in Section B.6-1.3(A)(1) to assure that the site will be developed in a manner conducive to the public health, safety and welfare, and direct issuance of the special use permit; or,
- (3) Deny.Deny the application. The Elected Body shall enter the reasons for denial in the minutes of the meeting at which the action was taken.



Majority Vote Required

- ▶ No vote greater than a majority vote shall be required for the Elected Body to issue a special use permit. For the purposes of this section, vacant positions on the Elected Body and members who are absent or excused from voting on a special use permit shall not be considered members of the Elected Body for calculation of the requisite majority.

