

## APPEAL

Petitions for Variance & Special Hearing  
39 Glenbrook Drive  
E/S of Glenbrook Drive, 569 feet north of Blenheim Road  
10th Election District 3rd Councilmanic District  
Legal Owners: Benjamin A. & Kayren P. Governale

Case No.: 06-180-ASPH

Petitions for Variance & Special Hearing (September 23, 2005)

Zoning Description of Property

Notice of Zoning Hearing( October 13,2005)

Certification of Publication (November 1, 2005- The Jeffersonian)

Certificate of Posting (October 25, 2005) by John J. Dill

Entry of Appearance by People's Counsel (October 5, 2005)

Petitioner(s) Sign-In Sheet- One Sheet

Protestant(s) Sign-In Sheet- None

Citizen(s) Sign-In Sheet- One Sheet

Zoning Advisory Committee Comments

Petitioners' Exhibits

1. Site Plan for Governale Property( 39 Glenbrook Drive)

2A. Photo from front

28. Photo from rear

3. W3LL - Amateur Radio License

4. 47 CFR 97.113- Prohibited Transmissions

5A. Building PermitB 551665

58. Diagram

6. Eleven letters of support from neighbors

7. View Map- Neighbors who have written letters

B. BCZR, Sec.426.5( D) Height Determination Standard

Protestants' Exhibits:

1A-1J - Photographs

2. Letter of opposition from Matt Inskeep

Miscellaneous Not Marked as Exhibit

1. 11/12/05 letter from John Lynch re: tower problems

2. 11/15/05 fax from PDM to Zoning Commissioner's Office  
re: Case No. 05-5573 notes pertaining to towers

3. Copy of Sec.426A, BCZR

4. Copy of Page 1050, Definitions, Webster's Third New International Dictionary

5. Copy of Resolution No. 55-96

6. Copy of Resolution No. 27-97

7. Copy of Legislative Project 96-06p pertaining to Wireless Communication Facilities

8. 11/24/97 letter to Hon. Joseph Bartenfelder from Pat Keller, Planning re: Wireless

Telecommunication Facilities, Council Resolutions 55-96 & 27-97 w/ attachments

9. Copy of County Council Bill No. 30-98

10. Copy of 4-page document re: Bill No. 30-98

11. Copy of 3-page document re :Bill No. 121-01

12. Copy of 1-page document re :Bill No..9 -02

13. Copy of 1-page document re :Bill No. 17-02

Zoning Commissioner' Order 12/2/05 Granted- Variance from Sec. 426.A.E, BCZR Dismissed  
as Moot

IN RE: PETITIONS FOR SPECIAL  
HEARING &

VARIANCE - WS Glenbrook Drive,  
569' N of the c/l Blenheim Road  
(39 Glenbrook Drive)  
10m Election District  
3'd Council District  
Benjamin A. Governale, et ux  
Petitioners

\* BEFORE THE  
\* ZONING COMMISSIONER  
\* OF BALTIMORE COUNTY  
\* Case No. 06-180-SPHA

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Zoning Commissioner for consideration of petitions for Special Hearing and Variance filed by the owners of the subject property, Benjamin A. Governale, and his wife, Kayren P. Governale. The Petitioners request a special hearing, pursuant to Section 500.7 of the Baltimore County Zoning Regulations (B.C.Z.R.), seeking an interpretation of Section 426.A.E of the B.C.Z.R. and approval of: 1) the configuration, height and location of the existing radio operator antenna, 2) giving full consideration and pre-emptive weight and authority to the Federal Communication Commission (FCC) statutes, rules, regulations, policies and interpretations applicable to the radio operator antenna, its height and location on the subject property. In the alternative, variance relief is requested from Section 426.A.E of the B.C.Z.R. to permit the existing radio operator antenna, in its present configuration and location and at its present height: 1) with an existing height as is determined by the Zoning Commissioner's interpretation of Section 426.A.E as applied to the antenna; or, 2) with a height of 99 feet, each in lieu of 65 feet, which is the horizontal distance from the closest point of the array from the nearest property line above grade level. The subject property and requested relief are more particularly described on the site plan submitted which was accepted into evidence and marked as Petitioner's Exhibit 1.

Appearing at the requisite public hearing in support of the request were Benjamin and Kayren Governale, property owners, Bruce Doak, the Surveyor who prepared the site plan for this property, and Howard L. Alderman, Jr., Esquire, attorney for the Petitioners. Also appearing were a number of amateur radio operators from the locale, namely H. Arthur Brown, Martin J. Green, Jr., Jack C. Hammett, Jr., John V. Evans, Stanley S. Siuta, James M. Green, and Theodore M. Provenza. Appearing as Protestants in the matter were Anne-Marie Hudak, Jason Hardebeck and Jeffrey L. Peek, Esquire, nearby residents of the area.

Testimony and evidence offered revealed that the subject property is an irregular shaped parcel located on the west side of Glenbrook Drive, north of Blenheim Road in Phoenix, not far from the Jacksonville community in northern Baltimore County. The property contains a gross area of 2.20 acres, more or less, zoned R.C.6, and is improved with a two story single family dwelling, known as 39 Glenbrook Drive, and a 99-foot tall radio operator tower antenna that is the subject of the instant request. The Petitioners also own an adjacent unimproved parcel to the rear of the subject property. That parcel is identified on the site plan as parcel ... contains approximately 1.652 acres in area also zoned R.C.6.

The instant Petitions were filed in response to a complaint registered with the Code

Enforcement Division of the Department of Permits and Development Management relative to the "horizontal reach" of the antenna that are located on the tower. Essentially, relief is requested seeking a determination that the subject antenna meets the requirements of Section 426.A.E of the B.C.Z.R. relative to its distance to the property line. A resolution of the violation (Case No. 05-5573) is pending the outcome of the special hearing/variance relief. Mr. Governale testified relative to his experience as an amateur radio operator, his work history, and the efforts he and his wife put into finding the subject property in furtherance of his hobby. After receiving a Bachelor of Science Degree in electronic engineering, Mr. Governale served in the United States Coast Guard, rising in rank from Radioman to Commander. His entire career continued in the radio transmitting and electronic circuitry field, spending some 32 years with the Black & Decker Corporation, and additional years with Bendix Radio until retirement. Mr. Governale is a member of three amateur radio organizations, and testified to his involvement with the National Weather Service reporting stations and rescue of small boats that use the emergency frequency Band No. 14312 for distress calls. Mr. Governale testified that he and his wife, using topographical maps, searched for property that would be positioned for optimal transmitting and receiving radio transmitted communications without interference from other sources. The Glenbrook Road property, which was purchased in 1975, proved to be high in elevation with gentle slopes and the R.C. zone permitted operator towers as a matter of right. Mr. Governale applied for and obtained the requisite building permit to construct a radio operator antenna tower and continued to renew the permit for years. Throughout this period of time, the Petitioner maintained his amateur radio license, including the amateur extra feature (see Petitioner's Exhibit 3), which allows him to operate on any band. Upon his retirement, Mr. Governale constructed the subject 99-foot tall tower, without guy wires (see Petitioner's Exhibit 5). As shown on the site plan, the subject 99-foot tall, three-legged, freestanding, lattice-type metal tower is located in the rear, central portion of the property, 254 feet from the nearest adjacent dwelling.

In this regard, Mr. Bruce Doak testified relative to the setback requirements of Section 426.A.E of the B.C.Z.R. As illustrated on the "tower detail" depicted on Petitioner's Exhibit 1, three radio antennae sit atop the tower structure, extending its total height to 99 feet. Each antenna has a separate or different function. The top two antennae (144 Mhz at 95 feet and 432 MHz at 99 feet) extend horizontally 8½ feet from the tower. These two antennae broadcast on VHF and UHF antenna bands, referred to as "line of sight" bands, meaning the signal is attenuated, or reduced, by any obstruction in its path, such as trees or structures. The third antenna is a 91-foot high, 7 MHz antenna with an array that extends outward a distance of 34 feet. It is this antenna that is the source of controversy before me. This high frequency shortwave radio band transmits to the ionosphere and bounces back to earth as opposed to the "line of sight" antenna located above it. This 7 MHz antenna is designed to operate at a height of 140 feet, however, due to the topographical characteristics of the Petitioner's property, operates marginally at 91 feet. If the regulations are interpreted to require that this antenna array be lowered to a height of 65 feet, its capability would be severely limited, according to Mr Governale, as signals would no longer interact with the atmosphere and return to earth. Given this backdrop, the "height" of the radio operator antenna and its "appearance" are the key issues in this case. Messrs. Doak and Governale both relate the height of an antenna and its proximity to the nearest property line to safety considerations. Mr. Peek, Mr. Hardabeck and Ms. Hudak (Protestants) relate the height to its appearance from their respective properties.

BCZR Section 426A.E cannot be read in a vacuum. There are three (3) provisions of section 426A dealing with measurements. Those provisions are:

BCZR Section 426A.C: The "supporting structure for a radio operator antenna may not be located within 20 feet of any property line." (Emphasis added.)

BCZR section 426A.D: A "radio operator antenna may not extend closer than the front building line to any street on which the lot fronts." (Emphasis added.)

BCZR Section 426A.E: A "radio operator antenna may not be higher than the lesser of 100 feet or the horizontal distance to the nearest property line above grade level." (Emphasis added.)

Thus, these provisions deal, in reverse order, with the height of the antenna- the extension of the antenna and the distance that the supporting structure is located from any property line. Protestants and, apparently, certain personnel in the Code Enforcement Division of the Department of Permits and Development Management utilize the extension of an antenna in determining its height. They suggest that if, as in the instant case, the horizontal distance from any portion of an antenna to the nearest property line is 65 feet, the maximum height permitted is 65 feet. Thus, Protestants consider the "extension" of an antenna in a horizontal plane as the determining factor in its "height".

To apply BCZR Section 426A as suggested by the Protestants would mean that the frequency in use controls the height of the antenna. A whip antenna -- that is an antenna with no "extension" whatsoever for 'non-directional' VHF frequencies -- mounted at the top of a supporting structure could extend to 100 feet in height above the ground, provided that it was a minimum of 100 feet from all property lines. Conversely, that same analysis for the Governale 7 MHz antenna for VHF/short wave frequencies which, as indicated above, 'extends, outward 34 feet from the supporting structure, would result in a limitation in "height" to 65 feet -- a height that, based on Mr. Governale's undisputed testimony renders communications at these frequencies completely inadequate. Thus, the application of Section 426A suggested by the Protestants would mandate maximum heights for different frequencies, an intent that is neither expressly nor implicitly implied in the law.

The relationship between antenna height and property lines as discussed by the Petitioner complies with the overriding standard of the protection of the health, safety and general welfare of the community outlined throughout the BCZR. The monopole antenna located 99 feet from the property line discussed above is limited to 99 feet in height and will not fall on adjoining property possibly jeopardizing the health and/or safety of neighbors. For a homeowner installation, this provision makes sense and no advanced expertise is necessary to locate a radio operator antenna in a fashion to protect the public safety. Applying the *Peek et al* "extension" analysis to the Governale antenna would result in the 7MHz antenna lowered to 65 vertical feet from the ground. Mr. Governale applied his "high school" geometry and the Pythagorean Theorem with respect to the horizontal extension of the antenna at their present height. Applying that geometric principle to each of the three antenna, Mr. Governale's undisputed testimony was that if the supporting structure were to literally snap at its base and fall to any side, the supporting structure and all antenna would fall on the Governale property and not that of adjoining neighbors. Thus, with respect to the issue of determining height and the welfare and safety of the community, the horizontal "extension" is without meaning.

Prior to the enactment of County Council Bill No. 30-1998, antenna associated with resident amateur radio operations were permitted as of right, provided that if it was a "rigid-

structure" antenna, it could be no higher than 100 feet or the horizontal distance to the nearest property line, whichever was less, above the grade level. BCZR Section 1A01.2B.7.g [RC-2], 1A02.2B.31 [RC-3], 1A03.3B.14 [RC-4], and 1A04.2B.21 tRC-51. This "rigid-structure" antenna height language restricted radio operator antenna in two ways. The first was a maximum height of 100 feet. The second was that no matter what the actual height of the antenna was, it could not be closer to the nearest property line than its height. If such a rigid structure were to fall, it would fail within the property boundaries.

At the request of the County Council, the Baltimore County Planning Board issued a Final Report, dated November 20, 1997, to the County Council, in response to two Council resolutions regarding potential updates to the BCZR. In that report, the planning Board made recommendations for both wireless telecommunication antenna and amateur radio antenna. The County Council, in Bill No. 30-1998 adopted the recommendations of the planning Board into BCZR sections 426 and 426A [the Board had recommended this as section 427]. The specific recommendation of the planning Board with respect to amateur radio antenna was to enact a new section of the BCZR and "provide references to it in all zones where amateur radio antennas are permitted, deleting duplicative text in each zone; this does not change the substance of the current regulations." *Final Report of the Baltimore County Planning Board - Proposed Amendments to the Baltimore County Zoning Regulations Regarding wireless Telecommunications Facilities*; adopted November 20, 1997; p.8. (Emphasis added.) Thus, the Legislative history of what is now BCZR Section 426A is clear that there was no intent to modify, substantively the prior "rigid antenna" regulations.

It is the height of the antenna that is of prime import in this case. Nowhere in the "BCZR is the term "height" defined. Section 101 of the BCZR - Definitions provides that any "word or term not defined in this section shall have the ordinarily accepted definition as set forth in the most recent edition of Webster's Third New International Dictionary of the English Language, Unabridged." In reviewing the "Webster's" definition of height, a variety of definitional phrases are set forth, including but not limited to "the highest part of something material"; "the distance extending from the bottom to the top of something standing upright"; and the "extent of elevation above a level". Clearly, height is not measured horizontally but vertically from the ground upward.

An additional legal factor in this analysis is the interrelationship of and potential preemption by the applicable provisions of federal law and regulation. State and local regulation of an amateur station antenna structure must not preclude amateur service communications. Rather, such regulation must reasonably accommodate such communications and must constitute the minimum practicable regulation to accomplish the state or local authority's legitimate purpose. 47 C.F.R., Section 97.15 The reasonable accommodation of the radio operator by the County is further described in the September, 1985 *Memorandum Opinion and Order in private Radio Bureau (PRB-1)*, issued by the FCC.

More recently, in its consideration of a Petition for Rulemaking the FCC denied the Petition, holding that its findings articulated in PRB-1 afforded local governments and zoning authorities ample guidance in regulating amateur radio operators and antennas used by those operators. The FCC found that "PRB-1's guidelines brings to a local zoning board's awareness that the very least regulation necessary for the welfare of the community must be the aim of it's regulations so that such regulations will not impinge on the needs of amateur operators to

engage in amateur communications." *In the Matter of Modification and Clarification of Policies and Procedures Governing Siting and Maintenance of Amateur Radio Antennas and Support, Structures, and Amendment of Section 97.15 of the Commission's Rules Governing the Amateur Radio Service*, Case No. RM-8763, Para. II.9 (Emphasis added.)

In consideration of the Governale evidence and testimony, it is undisputed that the County's legitimate purpose of protection of health, safety and general welfare- - ensuring that a toppled antenna will remain within the boundaries of the Governale property- - will be achieved whether the 7MHz antenna is 65 or 91 vertical feet above the ground. It is also clear from Petitioner's Exhibit 1 that the extension of the 7MHz antenna at either height doesn't bring it closer to Glenbrook Drive than the front building line of the subject property.

Aesthetics are not a factor that the County Council sought to include in BCZR Section 426A. According to each Protestant their testimony and objections were based solely on aesthetic consideration without regard to regulation for safety considerations. Mr. Peek testified that he believes that if the 7 MHz antenna were lowered to 65 vertical feet from the ground it might be shielded from his view by the trees planted by Mr. and Mrs. Governale. The supporting structure for the VHF antenna and the VHF antenna themselves would still be visible from the Peek property. Moreover, if for some reason Mr. & Mrs. Governale decided to remove the trees that they planted, the 7MHz antenna if shielded would again be visible from the Peek property, even if that antenna was located no more than 65 vertical feet from the ground. The position of the Protestants, none of whom are directly adjoining owners, apparently is that the 7MHz antenna required for effective communication by Mr. Governale must be aesthetically more consistent with the views from their respective properties. Clearly, this is a physical impossibility and a result not contemplated by the BCZR, the FCC, or the Courts. See *Evans v. Shore Communications, Inc., et al*, 112 Md. App. 284 (1996) and *AT&T Wireless Services v. Mayor and City Council of Baltimore*, 123 Md. App. 681 (1998) where the Court held that alleged adverse aesthetic effects of an antenna tower did not justify denial of a permit.

Applying a "plain language" reading to the height issue presented, if asked how tall a building was would anyone ask "How wide is the building?" This plain language approach together with the definition of height incorporated in to the BCZR and the legislative history of Section 426A persuade me to enter a finding that the height of a radio operator antenna is Measured from the ground/base of the supporting structure to the antenna located furthest away in a vertical plane.

Accordingly, upon due consideration of all of the testimony and evidence presented. I am persuaded to grant the special hearing relief requested, allowing the radio operator antenna as presently configured and at its present height and location, to remain on the subject property. However, at such time as the tower and antennae cease to be used for telecommunication purposes, the Petitioners shall have one year from the date thereof to remove the structure(s). Pursuant to the advertisement, posting of the property, and public hearing on these petitions held, and for the reasons set forth above, the Petition for Special Hearing shall be granted, and the Petition for Variance dismissed as moot.

THEREFORE, IT IS ORDERED by the Zoning Commissioner for Baltimore County This 2nd day of December 2005 that the configuration height and location of the existing radio operator antenna meets the requirements of Section 426.A.E of the B.C.Z.R. and the Federal Communication Commission (FCC) statutes, rules, regulations, policies and

Interpretations applicable to the radio operator antenna, its height and location on the property, as shown on Petitioner's Exhibit 1, and as such, the Petition for Special Hearing, be and is hereby GRANTED; and,

IT IS FURTHER ORDERED that the Petition for Variance seeking relief from Section 426.A.E of the B.C.Z.R. to permit the existing radio operator antenna, in its present Configuration and location and at its present height; 1) with an existing height as is determined by the Zoning Commissioner's interpretation of Section 426.A.E as applied to the antenna; or, 2) with a height of 99 feet, each in lieu of 65 feet, which is the horizontal distance from the closest point of the array from the nearest property line above grade level, be and is hereby DISMISSED AS MOOT.

IT IS FURTHER ORDERED that any appeal of this decision must be entered within thirty (30) days of the date hereof.

WJW:bjs

(Signature)  
WILLIAM J. WISSMAN, III  
Zoning Commissioner

for Baltimore County