

REQUEST FOR BOARD ACTION

HENDERSON COUNTY

BOARD OF COMMISSIONERS

MEETING DATE: 20 April 2005

SUBJECT: Adoption of Order on Variance Request of
Pegasus Tower Company, L.L.C.

ATTACHMENT(S): Draft order

SUMMARY OF REQUEST:

On 4 April 2005, after a quasi-judicial hearing the Board of Commissioners voted unanimously to deny the request of Pegasus Tower Company, L.L.C., for a variance from the requirements of the Henderson County Communications Tower Ordinance. The variance sought was to be relieved of the requirement of obtaining an easement from the owners of the property surrounding the proposed tower within a distance from the tower base equal to the height of the tower.

Attached is a proposed order which, if approved by the Board of Commissioners, makes findings fact and conclusions from the hearing, and denies the variance request.

COUNTY MANAGER RECOMMENDATION/BOARD ACTION REQUESTED:

The County manager supports this proposal.

STATE OF NORTH CAROLINA

COUNTY OF HENDERSON

In the Matter of the Application of HAROLD TIMMONS,
Agent for PEGASUS TOWER COMPANY, L.L.C.,
Applicant

to the

File Number: CTV-05-01

HENDERSON COUNTY BOARD OF COMMISSIONERS,
Permit Authority

ORDER DENYING APPLICATION FOR VARIANCE

The HENDERSON COUNTY BOARD OF COMMISSIONERS held a quasi-judicial public hearing on 4 April 2005 to consider an application for a Variance submitted by Harold Timmons, Agent for Pegasus Tower Company, L.L.C., Applicant, and made the following persons parties to the proceeding:

- Harold Timmons, agent for Pegasus Tower Company, L.L.C., Applicant
- Karen Smith, Henderson County Planning Director
- Natalie J. Berry, Henderson County Zoning Administrator
- Charles Lewis, adjacent property owner
- William Wilkes, adjacent property owner
- Paul Stoney, adjacent property owner
- Joan Husni, adjacent property owner
- Martha Johnson, adjacent property owner
- Mary Mowery, adjacent property owner

The Board of Commissioners heard all of the evidence and arguments presented at the hearing, and now makes the following findings of facts, and draws the following conclusions.

FINDINGS OF FACT

1. The Applicant, Pegasus Tower Company, L.L.C., seeks a variance from the requirements of the Henderson County Communications Tower Ordinance, Chapter 81 of the Henderson County Code. The provisions for a variance of this ordinance are found in §81-10 of the Henderson County Code. §81-10A provides as follows:

Where, because of severe topographical or other conditions peculiar to the site, strict adherence to the provisions of this chapter would cause an unnecessary hardship, the Board of Commissioners may authorize a variance, if such variance can be made without compromising the intent of this chapter. Notwithstanding the foregoing, no variance may be issued allowing the modification of any height restriction or limitation contained in this chapter. Anyone desiring a variance from the terms of this chapter shall make application, in writing, justifying the request. The Ordinance Administrator shall prepare an item requesting that the Board of Commissioners set a quasi-judicial public hearing on the application for variance and shall forward the item to the County Manager by the agenda deadline for the first regularly scheduled meeting of the Board of Commissioners after the application has

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been submitted. The Board of Commissioners shall schedule the public hearing for a regular evening meeting on a date which allows sufficient time for notice of the hearing to be mailed to owners of adjacent property and to be published in the newspaper, as outlined in §81-6C. Notice of a quasi-judicial public hearing on an application for a proposed tower shall comply with the provisions of N.C.G.S. 153A-323 and 153A-343, as amended. (See §81-6C.) The Board of Commissioners shall consider the public health, safety and welfare when ruling on applications for variance. Any grant of a variance pursuant to this §81-10 must be based upon specific findings of the fact made by the Board that support the following conclusions:

- (1) There are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of this chapter.
- (2) The variance applied for is in harmony with the general purpose and intent of this chapter and preserves its spirit.
- (3) In the granting of the variance, the public safety and welfare have been assured and substantial justice has been done.

2. The Applicant seeks to place a Category 4, Level II communications tower (as that term is defined in Chapter 81 of the Henderson County Code) on Henderson County parcel PIN 00-9595-44-8747-55 (“the subject property”), located on Judds Peak Road, near Saluda, in Henderson County.

3. The Applicant’s application for a variance from Chapter 81 of the Henderson County Code seeks to avoid a portion of the requirements for a permit for a Category 4, Level II communications tower as such requirements are stated in §81-6B, namely, the requirement of §81-6B.(2)(a)[10] (“Easement Acquisition Documents”), which reads, in part, as follows:

Where any adjacent property to the tower site falls within the distance of the tower height measured from the tower base, the applicant shall submit with the application a statement of intent to grant an easement to the applicant. If such application is subsequently approved, the permit will be conditioned on the easement documents being recorded in the Henderson County Register of Deeds Office. The applicant must submit copies of the recorded easements to the Ordinance Administrator.

4. One or more of the owners of property directly adjacent to the subject property falling within the distance from the tower as noted in §81-6B.(2)(a)[10] have refused to execute either a document stating their intent to grant the easement as required by §81-6B.(2)(a)[10] or a grant of such an easement.

5. Karen Smith is the Planning Director for Henderson County, and Natalie J. Berry is the Zoning Administrator and Communications Tower Ordinance Administrator for Henderson County, both having an address of 101 East Allen Street, Hendersonville, NC 28792. As agents for Henderson County, Ms. Smith and Ms. Berry have standing to participate in the proceeding and were made parties.

6. Harold Timmons is the Zoning Coordinator for the Applicant, which has its home office in Cedar Bluff, Virginia. As an agent for the Applicant, Mr. Timmons has standing to participate in the proceeding and was properly made a party.

7. Charles Lewis is an adjacent or nearby property owner to the subject property. As such, Mr. Lewis has standing to participate in this proceeding, and was made a party to it.

8. William Wilkes is the owner of the subject property. As such, Mr. Wilkes has standing to participate in this proceeding, and was made a party to it.

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9. Paul Stoney is an adjacent or nearby property owner to the subject property. As such, Mr. Stoney has standing to participate in this proceeding, and was made a party to it.

10. Joan Husni is an adjacent or nearby property owner to the subject property. As such, Ms. Husni has standing to participate in this proceeding, and was made a party to it.

11. Martha Johnson is an adjacent or nearby property owner to the subject property. As such, Ms. Johnson has standing to participate in this proceeding, and was made a party to it.

12. Mary Mowery is an adjacent or nearby property owner to the subject property. As such, Ms. Mowery has standing to participate in the proceeding and was made a party to it.

13. All parties and witnesses were sworn in at the proceeding.

14. The Applicant presented no evidence regarding how “severe topographical or other conditions peculiar to the site” which in any way contribute to the failure by the Applicant to obtain a statement of intent to grant an easement from one or more owners of the property adjacent to the subject property falling within the distance from the proposed tower site stated in §81-6B.(2)(a)[10].

15. The Applicant presented no evidence regarding how the Applicant would suffer an “unnecessary hardship”, or any hardship different from any every Applicant for a permit under Chapter 81 of the Henderson County Code as a result of being forced to comply with the easement provision cited above.

CONCLUSIONS

1. All parties were properly before the Board of Commissioners in the Proceeding.

2. The Applicant seeks a variance from the provisions of Chapter 81 of the Henderson County Code, pursuant to Code §81-10.

3. The Applicant has failed to present any evidence on issues which must be proven in order under §81-10 in order for this Board to be able to grant the variance the Applicant seeks.

4. The variance sought by the Applicant cannot be granted by this Board on the evidence presented, and should therefore be denied.

IT IS THEREFORE ORDERED that the Application for a Variance, Henderson County file CTV-05-01, is hereby denied. A motion to that effect was made and unanimously agreed to by the Board of Commissioners of Henderson County.

This the _____ day of _____, 2005.

HENDERSON COUNTY BOARD OF COMMISSIONERS

By: _____
WILLIAM L. MOYER, Chairman

Attest:

Elizabeth W. Corn, Clerk to the Board of Commissioners