

**WHITLEY COUNTY BOARD OF ZONING APPEALS
STAFF REPORT**

20-W-APP-1 ADMINISTRATIVE APPEAL
Moreland, Inc. (Appellant)
10800 S. 700 East

MAY 26, 2020
AGENDA ITEM: 4

This petition was delayed due to COVID precautions, and statutory time limits were temporarily suspended per the Governor's Executive Orders.

ADMINISTRATIVE APPEALS

Appeals are one of the less common types of cases considered by the Board of Zoning Appeals under the Indiana Code and §10.8 of the Whitley County Zoning Code. Per I.C. 36-7-4-918.1, "A board of zoning appeals shall hear and determine appeals from and review ... any order, requirement, decision, or determination made by an administrative official, hearing officer, or staff member under the zoning ordinance."

The last appeal that this Board heard was in 2017, dealing with the interpretation and application of a zoning code section with relation to a specific site and proposed use. This case differs in that the Board is being requested to review the enforcement of a condition of approval of a specific special exception.

While the grounds for this appeal stem from a particular case, and certain determinations may only affect the subject site, the Board's determination would apply generally to any future approval with similar conditions.

PROCEDURAL BACKGROUND

The Appellant has requested the Board's review of the issuance of Building Permit 20-10235 and Improvement Location Permit 20-W-LP-35 for a telecommunications facility located at 10800 South 700 East. This facility received special exception approval (19-W-SE-10) from the Board on November 26, 2019, subject to the following conditions:

1. The Special Exception is granted as presented and per the site plan.
2. Petitioner shall provide to Planning Staff the Federal Aviation Administration (FAA) letter concerning FAA regulations.

On or about January 29, 2020, legal counsel for the petitioner in the case provided documentation to Staff regarding the above Condition #2. February 6, 2020, Staff provided affirmation to the petitioner that the documentation would be sufficient to satisfy the condition.

On February 25, 2020, a Building Permit and Improvement Location Permit were issued for the construction of the telecommunications facility.

On March 20, 2020, this administrative appeal was filed, challenging the grant of the permits.

Due to the ongoing health emergency, the hearing of this appeal was delayed from April to May.

DOCUMENTATION, RESEARCH, AND STAFF INTERPRETATION

As required by §12.2 of the Zoning Code, the purpose of this section is to provide the Board with documentation of the process and actions taken by Staff related to the appealed action.

In January, legal counsel for the petitioner provided documentation regarding FAA's regulations on tall structures to show compliance with Condition #2. Among this documentation was an FAA document, dated November 25, 2019 for "Determination of No Hazard to Air Navigation for Temporary Structure." This

document permitted the use of a crane 225' in height during the construction of the permanent structure of the telecommunications facility.

Also provided to Staff was information on FAA's policies on notices and permitting. A relevant policy was summarized in their FAQ, and quoted below (emphasis added):

5. The airport manager and/or air traffic control tower manager said it's OK to put my crane up; do I still have to file an FAA Form 7460-1, Notice of Proposed Construction or Alteration?

Obtaining approval from the airport or air traffic control tower manager does not waive your requirement to submit the notice to the FAA if the structure meets the notice criteria of 14 CFR Part 77. You must receive a Determination of No Hazard to Air Navigation from the FAA and meet all conditions identified in the determination prior to raising the crane.

If the crane is being used for new construction, a notice must also be filed for the permanent structure if it meets 14 CFR Part 77. The FAA will not normally issue a determination for a crane that exceeds the notice criteria until notified in writing that the permanent structure either (1) does not require notice, or (2) the permanent structure required notice, has been studied, and a Determination of No Hazard to Air Navigation has been issued. Therefore, when submitting a notice for a crane, please indicate in the Description of Proposal field that the permanent structure does not require notice or the aeronautical study number for the permanent structure.

The petitioner's application to the FAA from October 2019 was also submitted to Staff, clearly indicating that the application stated that the purpose of the temporary structure was to be used to construct a structure and that "the structure does not exceed FAA notice criteria."

Based on this, it was Staff's understanding that the FAA would not issue a determination for a temporary structure without being notified that the permanent structure would not require notice. It was apparent that the original application explicitly stated that the structure was being constructed and that it did not meet notice criteria. It appeared to Staff that since the FAA issued a determination for a temporary structure, the FAA was satisfied that the petitioner had provided the required information for the issuance of the determination.

In addition to the documentation and information provided, Staff investigated the minimum requirements for notice referred to above to better understand the criteria in an attempt to confirm the applicability to the proposed telecommunications facility. Staff reviewed the text of the notice requirements in CFR Title 14 Part 77.9, which determine the need for noticing of FAA of proposed construction:

§77.9 Construction or alteration requiring notice.

If requested by the FAA, or if you propose any of the following types of construction or alteration, you must file notice with the FAA of:

- (a) Any construction or alteration that is more than 200 ft. AGL at its site.
- (b) Any construction or alteration that exceeds an imaginary surface extending outward and upward at any of the following slopes:
 - (1) 100 to 1 for a horizontal distance of 20,000 ft. from the nearest point of the nearest runway of each airport described in paragraph (d) of this section with its longest runway more than 3,200 ft. in actual length, excluding heliports.
 - (2) 50 to 1 for a horizontal distance of 10,000 ft. from the nearest point of the nearest runway of each airport described in paragraph (d) of this section with its longest runway no more than 3,200 ft. in actual length, excluding heliports.
 - (3) 25 to 1 for a horizontal distance of 5,000 ft. from the nearest point of the nearest landing and takeoff area of each heliport described in paragraph (d) of this section.

- (c) Any highway, railroad, or other traverse way for mobile objects, of a height which, if adjusted upward 17 feet for an Interstate Highway that is part of the National System of Military and Interstate Highways where overcrossings are designed for a minimum of 17 feet vertical distance, 15 feet for any other public roadway, 10 feet or the height of the highest mobile object that would normally traverse the road, whichever is greater, for a private road, 23 feet for a railroad, and for a waterway or any other traverse way not previously mentioned, an amount equal to the height of the highest mobile object that would normally traverse it, would exceed a standard of paragraph (a) or (b) of this section.
- (d) Any construction or alteration on any of the following airports and heliports:
 - (1) A public use airport listed in the Airport/Facility Directory, Alaska Supplement, or Pacific Chart Supplement of the U.S. Government Flight Information Publications;
 - (2) A military airport under construction, or an airport under construction that will be available for public use;
 - (3) An airport operated by a Federal agency or the DOD.
 - (4) An airport or heliport with at least one FAA-approved instrument approach procedure.
- (e) You do not need to file notice for construction or alteration of:
 - (1) Any object that will be shielded by existing structures of a permanent and substantial nature or by natural terrain or topographic features of equal or greater height, and will be located in the congested area of a city, town, or settlement where the shielded structure will not adversely affect safety in air navigation;
 - (2) Any air navigation facility, airport visual approach or landing aid, aircraft arresting device, or meteorological device meeting FAA-approved siting criteria or an appropriate military service siting criteria on military airports, the location and height of which are fixed by its functional purpose;
 - (3) Any construction or alteration for which notice is required by any other FAA regulation.
 - (4) Any antenna structure of 20 feet or less in height, except one that would increase the height of another antenna structure.

Applying these criteria to the proposed structure, the structure height of 199' falls below the criteria for (a), and (b) is inapplicable because there is no airport meeting the requirements of (d) in the vicinity. Gerig's Field, which lies on a nearby property, was not found in the FAA Airport/Facility Directory, and appeared to be a private airfield to which the definition in (d) does not apply.

Based on this research, Staff felt comfortable with the information provided by the petitioner to the FAA in the application. Staff acknowledges that they are not aeronautical regulations experts, and so the level of comfort was only enough to find the provided documentation sufficient for the Special Exception criteria. Reliance was made on the FAA's review and permitting process and policies noted above.

It should be noted for the Board's education that Staff also attempted to use the FAA "Notice Criteria Tool," an online aid from the FAA used as a guide to determine if notice would be required for a particular structure at a particular location. After attempting to use the tool for the subject site and other locations, it appeared that nearly any structure entered would exceed a notice criteria no matter the height or location. As such, it was disregarded as either faulty or at least not useful without a much more extensive knowledge of FAA regulations.

In summary, since the FAA had determined the temporary structure was not an air hazard, and their policy was not to issue such a determination if the permanent structure would exceed their criteria, and since it appeared that the telecommunications facility would not exceed the criteria, Staff accepted the submitted FAA determination as sufficient to fulfill the Special Exception condition. The building permit and Improvement Location Permit for the telecommunications facility were subsequently issued.

TIMING OF APPEAL

The Staff's determination of the sufficiency of the submitted documentation was given to the petitioner on February 6, while this appeal was filed on March 20, beyond the 30-day appeals window to challenge an administrative decision. Since the appeal is of the issuance of the permit, which is an administrative action that can be appealed, and which occurred on February 25, it seems that this appeal was filed in time to challenge the permits. However, the timing to appeal the satisfaction of the Special Exception condition seems to have passed, while it is unquestionable that the appeal period for the Special Exception itself expired.

No matter the apparent basis for an appeal, since the refusal to accept a petition or appeal is itself an appealable action under §10.8 of the zoning code, it is rarely prudent for Staff to refuse an administrative appeal, lest that refusal also be appealed.

POINTS OF APPEAL

This administrative appeal has essentially one point of appeal: that of the issuance of Building Permit 20-10235 and Improvement Location Permit 20-W-LP-35 for the telecommunications facility. The Appellant's discussion describes concerns about the condition of approval, and requests that the public hearing be reconvened for the purpose of "amending the conditions of approval and the conditions of the issuance of the building permit."

STAFF INTERPRETATION OF POINTS OF APPEAL

The Board's review must focus and be limited to the specific point of appeal, the contention that the permits in question were issued improperly.

The Appellant's discussion seems to imply that the provided FAA documentation complied with the letter of the condition of approval of the Special Exception, and that "the FAA's interpretation of its own ordinances" does not consider Gerig's Field.

The Appellant then reiterates topics the Board discussed at the public hearing regarding the safety of air traffic to and from Gerig's Field. In doing so, there appears to be no mention of insufficiency of the documentation in complying with the condition of the approval, and resultant issuance of the permits, but there are questions about whether this documentation, and possibly the FAA as an agency, satisfies the intentions of the Board to protect the safety of air traffic to the airfield.

This contention over the appropriateness of the condition of approval to rely on the FAA's regulations of structures near airports, and the explicit request to rehear the case to amend the condition, essentially constitute an appeal of the special exception approval itself, not an appeal of the permit issuance. As such, the 30-day appeal window provided by IC 36-7-4-1605 for an appeal of the special exception would have already expired in December.

The Appellant chose not to appeal the original Special Exception approval within the appropriate appeal period. Despite that, this appeal attempts to make what effectively is an "end run" around the procedures and laws governing appeals by cloaking an appeal of the Special Exception within an appeal of permits.

Again, the Board review of the issuance of the permits must be limited to a review of any alleged fault in the permit issuance process. As outlined here, the appeal appears to allege no such fault with these processes, but instead desires to discuss issues with the Special Exception. As a result, the Board should confirm that the permits were issued according to the Code.

REVIEW CRITERIA

Indiana Code §36-7-4-918.1 and Section 10.8 of the Zoning Code authorize the Board to review appeals of administrative actions, including issuance of permits. In this case, the Board must evaluate whether the issuance of the two permits in question complied with the standards and regulations of the applicable codes.

Per I.C. §36-7-4-919, at the conclusion of the hearing, the Board may reverse, affirm, or modify the order, requirement, decision, or determination appealed from. Here, the Board must find that there is a fault or defect in the permits in order to reverse or modify those permits.

Date report prepared: 5/20/20.

BOARD OF ZONING APPEALS ACTION

Motion:

By:

Second by:

Vote: **Denihan** **Lopez** **Wilkinson** **Wolf** **Wright**

Yes

No

Abstain

STATE OF INDIANA)
) SS
COUNTY OF WHITLEY)

**APPEAL OF ADMINISTRATIVE ACTION OF ZONING ADMINISTRATOR
OF WHITLEY COUNTY, INDIANA**

MORELAND, INC. ("Appellant"), owner of certain real estate located at South 600 East, Roanoke, Indiana, tax parcel nos. 92-10-35-000-401.000-006, 92-10-35-000-302.000-006, and 92-10-35-000-303.000-006 appeals the following administrative decisions and actions of the Whitley County, Indiana Zoning Administrator:

1. The issuance of the Improvement Location Permit 20-W-LP-35 and Building Permit 20-10235 on February 25, 2020.

DISCUSSION

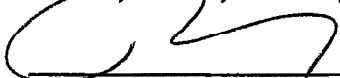
On November 26, 2019, the Whitley County Board of Zoning Appeals ("Board") granted Special Exception 19-W-SE-10 for the construction and operation of a wireless telecommunication facility at the real estate located at approximately 10800 S. 700E in Whitley County, Indiana. A condition of the approval was "Petitioner shall provide to the Planning Staff the Federal Aviation Administration (FAA) letter concerning FAA regulations." Additionally, in the body of the Findings of Fact, it was stated that "[d]uring the public hearing, there were presentations about the possible impact on air safety of the proposed tower on the operations of a private air field (Gerig's Field) located approximately 2,750 feet to the west – northwest of the proposed site. The Board itself and Staff have not performed detailed research into the matters of towers and air fields, but rely on the FAA in its regulations to ensure air safety. Documentation of compliance with FAA regulations is required as a condition prior to the issuance of any development permits." As such, the Board had understood that the FAA regulations would take into consideration the impact of this communications tower on Gerig's Field located on the

Appellant's real estate and relied on such regulations to ensure the safety of flights to and from Gerig's Field.

However, the Aeronautical Study #2018-AGL-17924-0E issued November 25, 2019, by the Federal Aviation Administration did not reference Gerig's Field at all. The only reference in such study was the Fort Wayne Airport, which is almost eight (8) miles west of the site. As such, the Board's reliance on FAA regulations to ensure the safety and protection of Gerig's Field turned out to be unintentionally mistaken. The FAA's interpretation of its own ordinances appears to indicate that Gerig's Field is not the type of air field which requires consideration when constructing a communications tower. As such, the Zoning Administrator's issuance of the building permit and allowance of the construction of the communications tower, may very well have an adverse impact on the safety of incoming flights to Gerig's Field, which runs contrary to the intentions of the Board as expressed at the public hearing. As such, the Appellant would respectfully request that the Board find that the building permit should not be issued and, also, reconvene a public hearing on the issuance of a special exception for the purpose of amending the conditions of approval and the conditions of the issuance of the building permit so that the Applicant must show proof that the construction of the communications tower will not have an adverse effect on Gerig's Field and the flights arriving and departing from such air field.

Respectfully submitted,

BURT, BLEE, DIXON, SUTTON & BLOOM, LLP



Robert C. Kruger, #22738-02
ATTORNEY FOR MORELAND, INC.
200 E. Main Street, Suite 1000
Fort Wayne, IN 46802
(260) 426-1300