

Francetown Zoning Board
Proposed Minutes
July 9, 2009

Members Present: Silas Little (Chair), Richard Barbalato, Sue Jonas, Lois Levitt and Charles Pyle

Mr. Little opens the meeting at 7:33 p.m. by stating that the purpose of tonight's public hearing is to consider the applications by SBA Network Services

**Continuation of Public Hearing: SBA Network Services and AT&T Wireless Services
Application for Variances and Special Exception from June 4, 2009**

Zoning Board has received letters from the Francetown Conservation Commission and Abigail Arnold. Arnold letter has been provided to Mr. Springer. Copies of letters provided to Board members tonight. Mr. Little discloses that Mr. Springer had telephoned him early in the week to state he had received the Arnold letter. Mr. Little reads both letters into the record (see copies of letters attached).

Following the reading of the letters Mr. Little introduces Mr. Springer, representing the applicants, who, it turn, introduces Russ Putnam (Project Manager), Dan Hamm (Engineer) and Shannon McManus (Assist. Project Manager)

Mr. Springer follows up on a request from the last meeting for information from the Fire Chief, who was going to write a letter to the Board. According to Mr. Springer, the Fire Chief had no problem with the proposal; no letter has been received by the Board.

Per Mr. Springer the special exception application for the wetlands crossing will be withdrawn because they have an alternative. He provides a handout showing a wooden bridge (wooden/timber mat) that will span with wetlands – about 8'. Mr. Little asks if they are proposing to build a ramp on either side of the bridge for a vehicle and Mr. Springer replies that some fill on either side, which is not shown on plans. Mr. Little questions whether there is a buffer zone to wetlands area that cannot also be disturbed. Mr. Pyle questions why the bridge eliminates the need for a special exception. Mr. Springer replies that it is not impacting the wetlands as stated by Audra Klumb, wetlands scientist, at the last Conservation Commission (hereafter ConCom) meeting. Mr. Pyle notes that under Francetown Zoning Ordinances uses permitted in the Wetlands Conservation District by special exception include roads, driveways and utility easements. Though this appears to be an extension of the road and a better method to cross the wetlands, it still needs a special exception. Mr. Springer states that access already exists. Wetlands scientist, Audra Klumb, is not in attendance to explain. Mr. Little states that Ms. Klumb is confusing state and local regulations. State law does not deal with buffers. Mr. Springer notes that wetlands crossing already existed, but Mr. Little replies that the road is being improved. Mr. Springer determines that he will leave application for special exception "on the table". Mr. Little would like more information about how you will come off the bridge, the need for fill and the affect on buffer area.

Mr. Springer submits memo to Board dated July, 9, 2009 (see attached), addressing access issues. Mr. Springer notes the chain of title grants a right of way to pass and to repass by foot or

by vehicle. He shows a plan from 1972 with a right of way from East Road to top of Crotched Mountain and adds that under NH Law (*Arcidi* case cited in memorandum) they have the right to improve the road. Mr. Little notes that road created by JHP is in violation of Planning Board decision in 1990 that there was not to be a road. Mr. Springer states that road by JHP does not affect SBA's request. Mr. Little replies that they are using the "fruits of the poisoned tree". Mr. Springer states that since 1959 his client has had a right to build a road. Mr. Little notes that road is subject to site plan approval. Discussion followed over road issue and access to SBA property. Mr. Little states that he believes the issue of the right of way and its legal status needs to be cleared up before the Board can consider the application for variance. Mr. Pyle adds that Planning Board decision of 1998 states that heavy equipment will not be used in the installation of generator. Mr. Springer notes that it was only for that use and does not bar it now. Discussion followed on 2002 easement and possible violation of Planning Board decision. Mr. Springer states that if 2002 easement is thrown "out the door"; they still have easement for right of way. Mr. Little replies that they will need to establish that they can meet the requirement of the planning board as part of their site plan. Mr. Pyle states that question is not original right of access, but that the 2002 easement became the current road, which is not the original access. Mr. Springer states that the ZBA cannot "hang" on SBA what JHP did or did not do to road. Mr. Pyle questions whether the Board has the right to approve something without knowing status of the road. Road over town land is needed to access the wetlands crossing on town land. "We are making a decision on something that may not be legal." Selectmen Hardwick stated that no reference to a vote could be found. Mr. Springer has not had a chance to review the Selectmen's minutes. Mr. Springer states that they have the right to access their property whether the 2002 easement was legally granted. If they do not have the right to a 15' right of way they have the right to a 12' has originally granted. They have not engineered a plan for 12' at this time. Mr. Springer asks that if the access is an issue the Board should take a vote now. Mr. Little asks for the Board's opinion. Board unanimously agrees to hear the whole case and decide later.

Mr. Springer returns to memo. First issue is the right to use easement by vehicle. Mr. Springer cites *Arcidi Case* referred to in memorandum. Mr. Springer and Mr. Little discuss the merits and application of the *Arcidi Case* to the easement issue. Mr. Springer notes that they have revised the plans to address concerns. Feels that the issue of the ledge is of minimum impact and "disagrees with the characterization of the Arnold Letter". Other reasons for proposal to create road on ledge (steep slope issue) is the status of stairs. Concern over public safety and liability, if some falls. Mr. Springer notes that we live in a "litigious society".

Mr. Springer notes issue in Ms. Arnold's letter of access and traffic. Question contradiction of access for public with limiting use of road. Mr. Little notes distinction of vehicle versus foot access. Mr. Springer states that they would be willing to gate or bar the road if ZBA or other Board required.

Mr. Springer refers to plans for erosion control measures (Sheets ES1 & 2)

Mr. Springer introduces Mr. Hamm, principal and engineer with the Hudson Design Group. He notes area of ledge they will be removed by blasting, the road grade and that the area affected will be about 300 sq ft. They will bring in some larger boulders and crushed stone. Mr. Little asks for reference of station numbers on plans. Total ledge and other materials to be removed will be approximately 1,385 sq. ft. Proposed width is 12' to 15'. Area cut will be used for fill and more will be brought up. Mr. Little notes that along the profile the grades have not been identified. Mr. Hamm replies that the grade is approximately 27%, but Mr. Little notes that

grade varies. Mr., Hamm replies that from station 1+50 to 3+00 (about 150') the grade will be 27%. Bridge will be at about station 1+25. Width of area of cut will be about 15'. Mr. Little asks about additional fill on side and asks Mr. Hamm to confirm total fill being used. Mr. Little asks if any fill needed for parking and turn around area. Mr. Hamm responds "not too much."

Mr. Little asks if a crane is needed to set mats. Mr. Hamm states that a back hoe can set mats.

Mr. Pyle asks for slope of parking area. Mr. Hamm states that it is fairly flat. They will put crushed stone down. Small turn around area.

Mr. Pyle questions slope and notes that few cases in his time on Board have involved slopes of 25% or more. Current proposal is on a slope of 67%. Asks Mr. Springer for insight on why this proposal should be approved. Mr. Springer replies that they have addressed the issue of run off and a safe access. Mr. Pyle asks Mr. Springer about issue of variance and why the variance proposal for steep slopes is in the public interest for Francess town. Clearly contrary to Francess town Zoning Ordinance. He asks why is it in the public interest to have a slope greater than 25%? Mr. Little replies that it is not consistent with the intent of the ordinance to limit this type of activity. Mr. Springer states that ordinances concern is over issues of erosion, run off, drainage and safety. Mr. Springer believes that request is in the spirit of the ordinance as they have addressed erosion and run off. A gate will address the issue of safety. Only limited number of people will have access to gate, including the Town's safety personnel.

Mr. Pyle reads from section 2-A.3 concerning the four uses permitted on slopes of greater than 25%. He notes that a variance request can be and has been made for a use not permitted by the ordinance. The ZBA has not granted a variance in the past for a use on slopes greater than 25%. He asks "what is the special nature" of this case. Mr. Springer replies that the four uses are permitted and anything else requires a variance. Mr. Springer notes that this is a limited area with limited use. He also adds that there is the overlay of the federal telecommunications act. Mr. Springer notes that NH Supreme Court has recently stated that the ZBA can consider the overlay of the TCA. Mr. Pyle notes that the Board is not considering whether they can or cannot have a tower.

Mr. Little asks why in the interest of public interest and substantial justice the improvement could not be done by helicopter as has been done in other areas. Mr. Springer believes that helicopter is not feasible, and also expensive and difficult to bring in materials with. His understanding is that in the past a staging area could not be located. Mr. Little asks about the need to go forward for a vehicle at the site. Asks for specifics about need for road. Safety issue with stairs.

Mr. Little asks for any further questions from the Board. Mr. Pyle again questions the slope issue and the granting of a variance on slopes over 25%. Mr. Springer notes limited area, totally on their property and the ability to limit access by public vehicles. Mr. Little asks if it makes a difference that under the zoning ordinance they own the property? Mr. Springer responds that it is a factor.

Mr. Little asks Mr. Springer if anything else to add. Mr. Springer notes that they have already discussed RF and other issues in prior meeting. Mr. Little summarizes that they are requesting relief for four issues: Variance for slope, Variance for setbacks due to height of proposed tower.

Special exception for wetlands crossing, Variance to increase non conforming use by more than 20 %

Mr. Little first asks if anyone wishes to speak in favor of the proposal, followed by anyone opposed. No one speaks in favor.

Polly Freeze, ConCon member, asks how many trips per month will be necessary. One or two trips per month per carrier; seven carriers in total

Betsy Hardwick, ConCom Chairman and Selectmen, mentions the issue of the easement and whether there had been a public decision. No record can be found at this time. She and the Selectmen are investigated. Minutes do not reflect vote on the easement. Mr. Little asks if the ZBA can receive a copy of the minutes. Mr. Springer suggests that the process may have begun in 2001; Ms. Hardwick will review those records also.

Ms. Hardwick also notes that the minutes of the 1998 Planning Board decision differ from the final decision. Minutes state that no heavy equipment should be used period, final decision states "during construction". Copy of minutes provided to ZBA for its records.

Sarah Pyle asks what the nature of the visits each month. Mr. Springer replies generally maintenance, but also sometimes for equipment.

Abigail Arnold notes that Mr. Springer has stated fencing blocks off parts of the summit and proposed expansion will block off more public access. She asks what is being proposed to allow public access. Mr. Springer replies that he has been told there are about six trails. He is not sure which trails will be affected and would try to accommodate them. Mr. Springer further stated that he is unsure about the public's right to access the site, any such use is permissive and not "adverse possession". Betsy Hardwick notes that the Town has the same rights to travel by foot and vehicle over the land in question. Further discussion on easement and wooden stairs.

Dennis Calcutt, Francetown Land Trust, asks, if the removal of a portion of the summit is part of the hearing before the ZBA. Mr. Little explains that the Board will indirectly take it into account in the application for a variance to construct the road on steep slopes.

Polly Freeze asks if this or any Board will take into consideration the feelings of the public. "Once done; it's done." "Mountain is important to an off lot of people." Mr. Little responds that the criteria that the Board considers include: substantial justice, public interest and spirit of the ordinance. Mrs. Freeze states that the "proposal is outrageous."

Jennifer Vadney states that she and her husband often hiked in the area. She cannot support any of the four proposals.

Ben Haubrich asks if a balloon test had been considered as in other tower proposals. Mr. Little says it had not been. There are already two towers in the area.

Kim Dalley opposes the four applications. As a life-long resident of the Town she notes that she has enjoyed the mountain for many years.

Betsy Hardwick speaking for herself and not as Board member states that Zoning Ordinance encourages co-location. While she has mixed feelings on the proposal she would rather see one tower than several new ones around Town.

Ron Baptists notes that he has been at many hearings and could not remember one with so many requests. Robin Haubrich agrees and asks why a helicopter had not been considered.

Mr. Little asks if Mr. Springer wishes to respond to any of the public comments.

Mr. Little notes that no decision will be reached tonight and asks if the Board wishes to close off public comments. Mr. Pyle states that he would like to keep the public meeting portion open for new comments, but would not want to “reinvent the wheel” at the next meeting. Board unanimously approves keeping the public meeting open.

Mr. Springer states they have done their best to present a plan that they believe works.

Mr. Pyle asks about the helicopter issue, why it is not being considered. Slope and wetlands issues are the most difficult and helicopter would alleviate those problems. Mr. Springer responds that he believes they have addressed the issue. Brief discussion on helicopters, towers and replacement equipment needed for tower area follows. Applicant notes that heavy cable would need to be brought in. SBA has owned the site since 2001 and has not replaced cable.

Motion to continue meeting by Lois Leavitt, second by Silas Little; all in favor.

Hearing continued to August 13, 2009, starting at 7:30 p.m.

Mr. Little notes that he received a second incomplete application from a Mr. Farrel regarding a structure on Abbot Lane with possible wetland setbacks issues. He has sent the application back to Mr. Farrel and informed him that he needs to provide more information and a complete application to the Board.

Mr. Little also notes that he has received a letter from Mr. Anderson of Anderson and Kreiger, regarding the proposed cell tower on Pettee land. He has asked the Board to continue the case from August 13 to September 10. They are pursuing a site on Dennison Pond Road and may withdraw the request for a tower on the New Boston Road property. Board agrees to continuance.

SBA/Pettee Hearing continued to September 10, 2009 at 7:30 p.m.

Mr. Pyle states that he may have to recuse himself if the original tower case continues due to a conflict. Mr. Lindgren advises the Board that on July 21 the Planning Board will be having a conceptual consultation with Mr. Anderson about the new proposal.

Meeting adjourned at 9:48 p.m.