

Franeestown Zoning Board
Proposed Minutes
October 28, 2009

Members Present: Silas Little (Chair), Abigail Arnold, Sue Jonas, Lois Leavitt and Charles Pyle

Starts at 7:45 p.m.

Mr. Little opens the meeting at 7:30 p.m., introduces himself and the Board member.

Continuation of Public Meeting: SBA Network Services & AT&T Wireless application for Variances (expansion of use greater than 20%, setbacks, slopes), and for a Special Exception (wetlands crossing) by SBA Network Services Case #09-VA-1 – location Map 7, Lot 1

Mr. Little notes that having heard from the applicant, abutters and other interested parties, the Board voted to close the public meeting and continues to tonight to deliberate. Tonight is a public meeting only. Notices were posted at the Town Offices and the Post Office, and announced at last meeting of the ZBA.

Mr. Little asks how the Board wishes to proceed. Mr. Pyle suggests that variances for the setbacks and to expand the use be considered first; then the variance for slopes and the special exception. All agree.

Request for variance for setbacks under Section 7.19.1(c) of the Franeestown Zoning Ordinance.

Board proceeds to discuss the five criteria for granting an area variance -

1) *The proposed use would not diminish the surrounding property values:*

Mr. Little suggest that no evidence of diminution in value. Board agrees.

2) *Granting the variance would not be contrary to the public interest:*

Brief discussion. Mr. Little states in his opinion no evidence that would be contrary, all agree.

3) *Denial of the variance would result in unnecessary hardship to the owner:*

Little suggests that this is an area variance; board agrees.

a) *an area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property*

b) *The benefit sought by the applicant cannot be achieved by some other method reasonably feasible for the applicant to pursuer, other than an area variance*

Mr. Little suggests that the lot is small, no abutting properties that would be affected and no other feasible method. All agree.

4) *Granting the variance would do substantial justice:*

Brief discussion all agree criteria has been met

5) *The use is not contrary to the spirit of the ordinance:*

Brief discussion, not contrary to ordinance; no evidence to the contrary.

Mr. Little states that from the affirmative responses to the criteria it appears that variance has been granted and polls specific Board members. Jonas, Pyle, Leavitt, Barbalato and Little all agree. Variance is granted by a vote of 5-0.

Board discusses conditions. All agree on site plan approval and approval by the Fire Chief for the life safety code. Letter from the Chief has not yet been received. Mr. Pyle reads a notice from a 2004 case approving co-location and a maintenance shed on the same property, regarding the posting of a bond for removal of shed. Mr. Little suggests that we consider the next variance first and then consider conditions when we wrap up the other case. All agree.

Request for variance for setbacks under Sections 7.19 and 3.1.1 of the Franeestown Zoning Ordinance.

Variance is necessary because applicant is proposing to expand a non-conforming use by greater than 20% (23%).

Mr. Pyle, referring to plan, states that he was trying to figure out where the actually proposed increase comes from. Application states increase will be 315 sq ft or 23%, which is perimeter of tower area 17 '9" by 17 '9". But in addition application includes equipment shed and generator for of 43%, including tower, shed and generator. Discussion follows. Mr. Little suggests that the area noted on the plan includes the fenced area and calculates the area for the actual tower to be approximately 200 sq ft. Therefore the result of three sites (tower, shed and generator) would be less than the 315 sq ft on application. All agree. Mr. Pyle notes he raised the issue for the Board to be aware of it; not intending to vote no.

Mr. Little suggests that this is a use variance; all agree. He proceeds with a discussion on the criteria -

Board proceeds to discuss the five criteria for granting a use variance -

1) *The proposed use would not diminish the surrounding property values:*

No evidence of diminution in value, all agree.

2) *Granting the variance would not be contrary to the public interest:*

Brief discussion, all agree use would not be contrary to public interest. There is an existing tower on the site.

3) *Denial of the variance would result in unnecessary hardship to the owner:*

Little suggests that this is an area variance; board agrees.

a) *the zoning restriction as applied to the property interferes with the reasonably use of the property, considering the unique setting of the property in its environment,*

b) *that no fair and substantial relationship exists between the general purpose of the zoning ordinance and the specific restriction on the property,*

c) *and the variance would not injure the public or private rights of others*

Pyle raises the issue of pubic access that might injure the public interest. Mr. Little notes that applicant has stated the issue of access can be addressed.

4) *Granting the variance would do substantial justice:*

Board agrees that it is dealing with an existing facility

5) *The use is not contrary to the spirit of the ordinance:*

Board agrees it is not contrary.

Mr. Little summarizes that that the five criteria have been met.; polls the Board: Jonas, Pyle Leavitt, Barbalato and Little agree.

Discussion on conditions follows for both variance approved so far. First condition is that applicant provide reasonable access around the site. Mr. Pyle suggests that the ConCom because of abutting town forest, the Planning Board as part as site plan review, and the Selectmen be consulted because of deeded public access. Mr. Pyle notes that applicant has stated their agreement, but wants to be sure after ZBA issues its opinion there is some oversight. He also notes that we want to protect the USGS disk. Board reviews plan on location of disks. Mr. Little adds that site plan review is required so not really a condition, but more a reminder.

Next condition discussed is Fire Chief's letter. Mr. Littler asks what would happen if the Chief has a problem and does not issue a letter. Mr. Pyle replies that he has never seen this happen and believes the applicant when he says that Chief has no problem. Mr. Little suggests that language in the conditions note that decision is not final until Board receives letter from Fire Chief. Decision will remain open for every succeeding ZBA meeting until letter has been received; then decision will be final.

Condition for Bond is discussed. Mrs. Jonas asks about co-location and additional antenna. Co-locators would have to come before the Board for approval. She also asks about lighting which would require an additional variance. Bond should be in a form and amount acceptable to the Planning Board.

Mr. Little reviews the conditions:

- 1) Plan for access to be approved by Conservation Commission, Planning Board and Board of Selectmen,
- 2) Maintenance of USGS disks,
- 3) Letter from Fire Chief. Approval is conditional and waiting for receipt of approval letter. plus reminder for site plan review which Mr. Little reviews,
- 4) Bond in amount and form acceptable to the Planning Board and
- 5) Reminder that site plan review by the Planning Board is required.

Discussion on specific tower to be approved. Mr. Little suggests that reference be made in the decision to the specific plan, which indicates height, setbacks, expansion of use, etc. All agree

Mr. Little states that the next part regards access: special exception for wetlands crossing via timber mats installed as bridges (plans ES-1 and P-1) and a variance to construct a road over slopes greater than 25%. Mr. Little suggests special exception first; Mr. Pyle counters that special exception issue may depend on issue of slope.

Request for variance from Sections 2-A.3.3 (steep slopes) of the Francestown Zoning Ordinance.

Board considers request for variance from slope ordinance. Mr. Little refers to Plan P-1 and identifies the areas in question. He suggests that this is a use variance. All agree and discussion of criteria follows.

Board proceeds to discuss the five criteria for granting a use variance -

- 1) *The proposed use would not diminish the surrounding property values:*

All agree that meets criteria.

- 2) *Granting the variance would not be contrary to the public interest:*

Mr. Pyle believes that it is contrary to public interest. Single most important Mountain in town used by public. Mrs. Jonas believes that use stretches the public interest. Mr., Pyle notes that it is the road over 25% slopes that is the issue. Road in ordinance refers to driveway and other uses. Ordinance does state that a "road" cannot have a slope greater than 10%. Mrs. Leavitt adds that all of our zoning leads up to this issue and we would be going against our zoning to allow variance. When zoning was created no one would have believed that road would be allowed over such slopes. Mr. Pyle understands that slope after construction could be minimized. Mr. Little notes that there is going to be minimal use and applicant has proposed gate. Believes that Board must look beyond the road to the actual use and the access to the Tower. He believes that the plan as presented is a very good accommodation. A gate will limit use and posting a bond would mean restoration if site is no longer use and road removed. Mr. Barbalato agrees, but is concerned with any precedent. Mr. Little replies that no precedent as there is already a cell tower site.

- 3) *Denial of the variance would result in unnecessary hardship to the owner:*

Little suggests that this is an area variance; board agrees.

- a) *the zoning restriction as applied to the property interferes with the reasonably use of the property, considering the unique setting of the property in its environment,*
- b) *that no fair and substantial relationship exists between the general purpose of the zoning ordinance and the specific restriction on the property,*
- c) *and the variance would not injure the public or private rights of others*

Mr. Little believes that applicant has met three criteria for hardship. Brief discussion. Mr. Pyle raises the issue of pubic access that might injure the public interest Mr. Little notes that applicant has stated the issue of access can be addressed.

- 4) *Granting the variance would do substantial justice:*

Mr. Pyle states that substantial justice would not be done. If proposed road was built, it would be an injustice to town. Refers to OEP handbook. Also notes no past cases approving use over slopes greater than 25%. Mr. Little notes Board is not bound by other cases; stand alone case. Mr. Little does not believe that there has been an injustice to the town as there is already a cell tower at the site. Mr. Pyle notes that we are not looking at the cell tower, this is for the access that they already have. Mr. Little responds that they want a way to access the site in keeping with the industry.

5) *The use is not contrary to the spirit of the ordinance:*

Mr. Little states that he was looking at the preamble to the ordinance and it meets the criteria. Also compatible with ordinance and Federal Telecommunications Act. Mr. Pyle replies that not saying cannot have tower. Road is necessary for the tower and disingenuous otherwise. Mrs. Leavitt notes that no one other than applicant has petitioned for road. Mr. Little states that this is the Achilles heal of applications. Mrs. Jonas states they have access. Mr. Little disagrees; believe site is ancillary for use of property, but Mrs. Leavitt believes it goes two ways. Mr. Pyle notes it is not the intention of the ordinance to allow for use on slopes greater than 25%. Mr. Little reads the preamble and believes it does. Discussion follows. Mrs. Leavitt notes that area will never be the same.

Mr. Little asks for specific votes on each criterion

1) Diminution of value: all agree meets criteria

2) Contrary to public interest: Mr. Little asks for specific statement that it would be contrary to public interest. He does not believe that proposal is much different than a ski area. Mr. Pyle states he does not believe he has a valid reason and that his comments are more appropriate for intent. Discussion follows. Mr. Little asks for vote on this criterion. Mrs. Jonas passes. Little, Pyle, Barbalato state not contrary and meets criteria. Mrs. Leavitt believes that it is contrary to public interest. 3 in favor, 1 no, Mrs. Jonas abstains.

3) Hardship: Mr. Little believes they have met three tests and refers to ordinance that allows alpine ski trails, etc. Proposal is not much more than that. Mr. Pyle disagrees and states that proposal is not for a ski slope; request is not being made under that part of the ordinance. Mrs. Jonas raises the issue of the flower and Mr. Little was going to leave that for a condition. Applicant should hire a taxonomist to go out and identify species and make recommendations to protect. Mr. Pyle states that he does not have a problem with hardship criteria. All feel that it has been met.

4) Substantial Justice: Mr. Little believes that it does do substantial justice because certain types of uses that are permitted in slopes. Refers to section on ski slope. Mr. Pyle suggests that if that section is to be approved limit should be made for ski trail. Brief discussion on issue of ski slope. Mr. Pyle refers to section of ordinance for slopes of 25% or more. Mr. Pyle suggests that issue is whether there a loss to individual (applicant) that is not outweighed by a gain to public. Mr. Pyle reads from OEP handbook on this criteria and a discussion follows. Mr. Little asks if no, then why.

Time is approximately 9:15 p.m.

Mr. Little reads the criteria for substantial justice: granting the various would do substantial because. He believes that applicant has met criteria based on plans submitted and proposal for gate. Brief discussion follows: four in favor, one against.

5) Spirit of the Ordinance: Mr. Little reads the criteria for spirit of the ordinance: the use is not contrary to the spirit of the ordinance because. He believes that the applicant has met the spirit of the preamble to the ordinance and the ordinance itself. He also sites the alpine ski section of the ordinance (Section 2-A.3.4). The proposed limited use will be similar to an alpine ski hill. Mr. Pyle states that this is not an alpine ski hill. The Board received two letters from the Conservation Commission opposing the plan as well as one from the former Chair of the Planning Board. Mr. Little points out that the latter predates the current application and discusses the old proposal, which Mr. Pyle agrees. Mr. Pyle notes that that the ordinance clearly specifies the limitations on uses on slopes. Spirit is clear that uses on slopes greater than 25% are to be limited. He understands that slope could be improved to meet the ordinance, but the amount of material and equipment would not make the issue better. And the proposed slopes are currently well beyond what the ordinance states are permissible. Again Mr. Little believes that use will be less than what is on a ski hill. Mr. Pyle notes that this is not a ski hill. Brief discussion follows. Mr. Pyle states that the proposal is for road over three slopes greater than 25% and one of 25%. The current slope of one area over 25% is not indicated on the plan and the Board estimates that slope is at least 69%. He feels that the proposal is contrary to the spirit of the ordinance and that the applicant has not presented evidence that it is not contrary. The Board has also received testimony from the ConCom that it is contrary. Mrs. Leavitt adds that the whole road goes against the comprehensive master plan. Mrs. Jonas expresses concern over the ability to restore the area should the road be removed. Mr. Pyle states that he does believe that the applicant could restore the mountain should the road be removed, but that it would never be the same. Mr. Barbalato expresses his view that while he doesn't like the proposal, it may be the best way and agrees that extra material to be brought to reduce slope might make the matter worse. He asks if a residential owner wanted to do the same thing would he be

allowed. Mr. Little replies probably not, but adds that this is a limited commercial use. Mr. Pyle notes that there is no distinction in the ordinance between residential and commercial use. Little notes impact on public services by commercial enterprises.

Mr. Little asks for the Board to vote: three are against the application; two in favor. Application for a variance is denied.

Request for special exception from Section 2-A.2.4 (wetlands crossing) of the Francestown Zoning Ordinance.

Mr. Little briefly reviews the proposal, referring to pages ES-1 and ES-2 of the plans, dated September 28, 2009. Applicant proposes places two wooden bridges or mats across the areas identified as wetlands. He reviews Section 2-A.2.1, the general statement of purpose for the wetlands conservation district. The Board has no issue with this section and all agree that the applicant has met its provisions.

Review of Section 2-A.2.4, specific section of ordinance application has been filed under. Pyle says question before the Board is whether the crossings are necessary given that the Board denied the variance for the road and the unresolved question on access easement to AT&T's property. Pyle believes that having the mats across wetlands would be beneficial and a good idea

Leavitt states that she does not remember the ConCom having a problem with the mats. Pyle notes their concern was more over the issue of the road and that the idea of the mats came out of a ConCom meeting. Board unanimously agrees that the criteria of 2-a.2.4 has been met.

Mr. Little then reviews the provisions of article 7.1 and specifically subsections 7.1.2 (a) through (g). He reviews with the Board each criterion, brief discussion follows, and all agree that provisions of this section have been. Mr. Little summarizes that he believes that the criteria for a special exception under Sections 2-A.2.1, 2-A.2.4 and 7.1 have been met. All agree, special exception is approved by a vote of 5-0.

Mr. Little proposes that the first condition should be that prior to bringing machinery to the site the applicant hire a qualified taxonomist to identify the plants previously identified by the ConCom as possibly endangered or threatened and that they follow the recommendations of that person in preserving any plants so identified. Also this variance is linked to the other two variances for such things as Planning Board's site plan approval. Finally, Mr. Little adds that a condition should be for the placement of a gate at the entrance to their property to limit vehicle use and access. The applicant should discuss with the Fire chief the appropriate key box to place near the gate for emergency access.

Mr. Pyle notes that a condition should be added that the applicants follow the sediment and erosion control plan as presented in the plan (ES-1 and ES-2) and that the plan also be reviewed by ConCom. A bond should also be posted for the removal of mats and restoration of area; amount to be determined by the Planning Board. Mr. Little adds that applicant will still need site plan approval.

All agree to conditions. Special Exception is approved with conditions.

OTHER BUSINESS

Next ZBA hearing is scheduled for November 12. Mr. Pyle asks for confirmation from the Chair and the Board that if the consultant, hired on behalf of the Planning Board and Zoning Board, does not have a report ready by Nov. 12, there will be no hearing on the other AT&T cases. He believes it will not be ready by then and a report has not been submitted as of this date. All agree.

Mr. Little notes that we are still waiting for an application from Mr. Farrell. He notes that application could still be received and noticed for the November 12th meeting. He will let the Board know if there will be a meeting.

On a procedural matter, Mr. Pyle notes that criteria for a variance will be changing as of January 1, 2010 and a new form is needed. Mr. Pyle will prepare a draft for the board's approval; Board agrees. Mr. Little asks that the application include on it a requirement for two sets of gummed labels to be submitted with application.

Little moves that meeting be adjourned, Pyle seconds, all agree.

Meeting adjourned at approximately 9:45 p.m.

Respectfully Submitted,

Charles M. Pyle
Vice Chairman, Francetown ZBA

November 3, 2009