

The Town of North Hampton Zoning Board of Adjustment met on Tuesday, August 30, 2005 at 6:00pm in the Mary Herbert Room at the Town Offices.

Attendance

Present: (1) Ted Turchan; (2) Michele Peckham, Vice Chairperson; (3) John Anthony Simmons, Chairman; (4) Susan Smith; (5) Jennifer Lermer;
Alternates Present: None
Absent: None
Staff Present: (1) Richard Mabey, Building Inspector/Code Enforcement Officer [BI/COE]; (2) Carla Bonney, Recording Secretary

Mr. Simmons, Chair called the meeting to order at 6:10pm.

Preliminary Matters

Recording Secretary Report; Notice of this meeting was posted on August 15, 2005 at the Library, Post Office, Town Clerk's Office and on www.north-hampton-nh.com.

Procedure; Mr. Simmons announced that anybody with questions regarding how the meeting was run should raise their hand to ask. Copies of Rules of Procedure at the front in a green folder.

Swearing of Witnesses; Any member of the audience planning on speaking for/against any matter discussed was asked to stand, raise right hand and swear to tell the truth.

Letter dated 8/25/05 from Sharon Somers, representing Melinda Fuller, 21 New Road North Hampton, NH 03862 confirming continuation of **2005:20** requesting a special exception to Article V, Section 509 to operate a Family Day Care. *Property location: 21 New Road, R-1 zone district, Tax Map #014-095-000.* to September 27, 2005.

Changes to June 28th and July 18th minutes – not on the agenda – Michele Peckham stated she had some changes pending.

Input into replacing Christina – e-mail asking for a representative to help screen and hire. Michele had offered to fill in.

Mr. Simmons moved and Ms. Lermer seconded the motion for Michele Peckham to represent the Zoning Board in the hiring decision of Zoning Coordinator.

Vote was Unanimous (5:0)

Ms. Peckham asked that anybody who might have input get that to her attention.

The ZBA has hired legal council for the Woodland Road cell tower application; Mr. Simmons explained that he thought it prudent to attain the same for the Chapel Road cell tower case at the applicant's expense despite factual differences in the cases. Ms. Peckham suggested Russ Hilliard, the attorney hired for Woodland Road. Mr. Simmons agreed Discussion as to possible conflict of interest. Attorney

Klasnick stated it was certainly within the ZBA's right to obtain legal council at the applicant's expense, – within reasonable cost, and that the applicant would not have any objections. He voiced his concern about billing; defining which case the attorney would be working on, separating documentation, etc. – Mr. Simmons gave him Attorney Hilliard's name and fee info (\$175/hour – no cap – for however long the application should take) and suggested that council for both applicants get together with Attorney Hilliard to coordinate billing and to eliminate duplicate endeavors. He cautioned them on combined billing and client confidentiality.

Mr. Simmons moved and Ms. Smith seconded the motion to hire Russ Hilliard as legal council representing the ZBA for the Chapel Road cell tower application, at the applicant's expense. Fee allocation between Woodland Road and Chapel Road applications to be determined by Attorney Hilliard and Legal Council for both of the applicants.

Vote was Unanimous (5:0)

Break while Mr. Simmons called Attorney Hilliard to tell him and see if he wanted to come down to this session. *(end of Track 1)*

Old Business

2005:19 – Cellco Partnership d/b/a Verizon Wireless, 400 Friberg Parkway, Westborough, MA 01581, requests a Variance (1) from Article IV, Section 415.3 to locate a 120-foot stealth monopine telecommunications tower on Chapel Road; and (2) from Article IV, Section 409.9 for relief from the 100-foot wetland setback. *Property location: Chapel Road, R-2 zone district, Tax Map #005-044-000.* This meeting is a continuation from the July 26, 2005 meeting

6:40pm - Mr. Simmons called the session to order and announced that a board member needed to leave by 8:30pm

Attorney Klasnick stood to say his client would prefer Attorney Hilliard be at every meeting for testimony – including this one – going forward so as not to have to rely on a recording and thus possibly missing critical information. Mr. Simmons agreed to note the applicant's concern, but that given the shortened session added to the fact that Attorney Hilliard was 20 minutes away and already having past material to review in order to get up to speed, they were going to proceed.

Mr. Simmons began by going over new material submitted;

Exhibit 101 – 8/25/05 letter from Charles Gordon, co-chair of the North Hampton Conservation Commission – re Chapel Road Telecommunication Tower. *Dear Mr. Simmons, earlier this year the Commission received a letter from an attorney representing Mr. Michael Megna in opposition to the above captioned application. Among other legal counts to the application, said letter argued that the Cahill Conservation Easement Deed granted to the Town of North Hampton thru the Conservation Commission on the proposed Chapel Road site does not permit such a structure, and, as the members of the Commission understood the letter, that the commission has an affirmative duty under the deed to oppose the erection of telecommunications towers in the area subject to the easements. That condition was confirmed by council for Mr.*

Megna, it appears, at our July meeting. Because of that legal challenge and mindful of the possibility that this matter might result in litigation the Commission decided at that meeting to defer action on the request made on the basis of a presentation by New Hampshire Soils for our approval of the applicant's permanent application to the state wetlands Bureau . . . DES. The Conservation Commission hereby respectfully requests the Zoning Board of Adjustment ask the attorney that was recently retained for a legal opinion on this matter. . . . in so far as such council may be relevant. Intentions and understanding of the Commission when it recommended acceptance of the easement by the Town of North Hampton. . . this is to confirm that the Commission understood and accepted the grantors specific reservation of the right to allow telecommunications tower to be erected on the property.

Mr. Simmons confirmed that Attorney Hilliard would receive a copy of this letter and be asked for his legal opinion. He asked Attorney Klasnick if he wished to comment on the request.

Attorney Klasnick said it was consistent with the letter he had submitted as part of the **DES application**; he submitted the referenced application, letter and a copy of November 11, 2003 Conservation Committee minutes – **Exhibit 102**.

_____ stood to say public notice was in the Portsmouth Herald July 7, 8 and 11 for the July 12th balloon test to be flown from 8am to 2pm. There were 2 subsequent tests; one in August and one November. This most recent test had been requested by the ZBA for residents who may have missed the first 2 tests. Mr. Simmons said he had shown up for the test in the afternoon, and the balloon was not in the place (at the height) it would actually be at due to a sea breeze. He asked if anyone in the audience had come with comments or feedback specifically on the July 12th balloon test.

Exhibit 103 - **Allan Williams , 38 Chapel Road, North Hampton** submitted photographs taken from his driveway around 11am on July 12th. The balloon's position was highlighted. (Mrs. Williams?) said her recollection was that the balloon had gone down over the course of the test. Mr. Williams thought the photograph represented the balloon close to maximum height.

David Tivman – site acquisition consultant for Verizon stood to say he thought it was shortly after lunchtime on July 12th that they had rigged the balloon with a fishing pole and bungi cord to try to get it back to the representative height after the wind had visibly altered the balloon's position.

Cathy Megna – formerly of 43 Chapel Road, North Hampton, (currently at 21 Atlantic) had spoken with the Verizon representative at the balloon test at noon. Although planning on taking pictures, she had been told the balloon was at the wrong height and so did not take any. She had been told the wind had been blowing inland, so the balloon would have been blowing away from her house towards Maple.

Bob Millikin – 39 Chapel Road, North Hampton observed the balloon test with ZBA member Ted Turchan the morning of July 12th from his property around 10:30am. He submitted photographs taken from the middle of his driveway in the front yard – Ms. Lerner asked him to confirm that the balloon was at the correct height at the time of the photos. He said he believed so, that he had tried to get the balloon at its highest point, and he stated he had used a regular lens, not telephoto. He also submitted pictures he had taken at the winter balloon test to illustrate that the proposed tower would be fully visible from his property (which he's not happy about). Photographs were taken with different cameras, but Mr. Millikin stated he believed they were pretty consistent (about in the same spot) as to positioning of the balloon when the pictures were taken on each occasion.

Exhibit 104. – Photographs taken at the July 12th balloon test.

Exhibit 105 – Photograph taken from the front yard of Mr. Millikin’s property at the November 12, 2004 balloon test.

Exhibit 106 – Photograph taken from the back (street) of Mr. Millikin’s property at the November 12, 2004 balloon test.

Exhibit 107 – Photograph from the back yard of Mr. Millikin’s property overlooking 41 Chapel Road (formerly owned by the Megnas) at the July 12, 2005 balloon test.

7:00pm Attorney Russ Hilliard arrived; Mr. Simmons introduced him to the room.

Monica Cornelia – 18 Pond Path – Seacoast area Real Estate broker – spoke of 2 instances where buyers perceptions of the possibility of a cell tower affected their decision to buy in North Hampton. (1) She testified that her clients changed their minds about buying the Megnas property based on the November balloon test (which they attended), concerns about emissions and they felt the potential cell tower diminished the value of the property. They chose to buy a home in Boxford Massachusetts instead.

(2) She is the listing broker of 36 Chapel Road North Hampton; she spoke of the discrepancy in list price based on the buyer’s contention that if a cell tower is erected on Chapel Road, all of the properties will lose substantial value. There was a P&S on that property, rejected by the seller due to the potential buyer’s offer reflecting the potential cell tower siting. The property was valued at \$995,000 – she was not at liberty to disclose the actual offer, but it was considerably less.

Mr. Simmons asked if there had been any appraisers involved in either decision, or in her statement that a cell tower will drive down all North Hampton property values due to a trickle effect. Ms. Cornelia indicated it to be her instinct from her 23 years experience.

The Megnas stood to say they felt their property sale (43 Chapel Road to the Glendons) had been affected by the proposed tower. They had started at \$1,995,000, dropped to \$1,850,000 after the announcement of the potential tower siting and ended up breaking the property up; the house sold for \$1,500,000. They submitted a copy of the bank’s appraisal of that property at the time of the sale to the Glendons; that appraisal reflects \$1,650,000. **Exhibit 108** The final sale was 9% below that appraisal. The Megnas still own the adjacent lot (43 Chapel Road, purchased 4 years ago for \$290,000 - listed at \$375,000; under contract now for \$275,000 –) – they feel the \$100,000 difference is due to the proposed tower.

Kim Glendon – 43 Chapel Road, North Hampton – current owner of the Megnas old home – stated that her family will not keep the property if the cell tower is erected. They bought the property at below market value with that risk in mind; the house would go on the market the next day if the cell tower is approved.

Exhibit 109. – **Allan Williams , 38 Chapel Road, North Hampton** – submitted a letter from a member of his tennis club who lives next to a cell tower in Hampton New Hampshire. The letter states that contrary to information and assurances the residents were given at the original hearing, the noise level is quite invasive, particularly between the hours of 4:00am and 7:00am.

(T2 53:00 muffled question about decibel level – not sure if there was an answer)

Gerry Billideau – 10 Cherry Lane, North Hampton – stood to re-affirm the beauty of the area and appealed to the Board not to let large corporations contaminate our land assets. Spoke of ugly monopines in the NH mountain areas that are clearly visible and out of place.

Mr. Simmons closed the public portion of the hearing , reminded the room that the meeting needed to be adjourned by 8:30pm, and turned the floor over to Attorney Sokul.

Attorney John Sokul representing John and Kathleen Magma – recapped his presentation from the prior meeting about variance standards and use variance request.

Attorney Sokul put up a property plan and explained that he wanted to give the Board and audience a better understanding of the it, now that he better understood the applicant’s legal arguments with respect to the wetlands and special conditions. He said it would tie into conservation restrictions on portions of the parcel that were previously granted to the Town of North Hampton Conservation Commission. The plan he put up showed all of the land owned by the current property owner – about 76 acres. Wetlands were marked in green crosshatch; white area is non wet according to wetlands mapping . . . everything in red is land owned by the property owner not subject to the existing conservation easement deed. That land was reserved by the property owner for himself, for future development (approximately 25.02 acres); everything else was deeded to the Town of North Hampton by Conservation easement deed. The property owner acquired the property in November, 2003. In December 2003 he granted the conservation easement to the town. According to materials submitted by the applicant, the former owner of the property reserved any future income from a tower site on this property to the Town of North Hampton Library. The point being that there is no economic benefit to the current property owner in approving this tower; all rent was assigned by the prior property owner to the town of North Hampton.

(T2 1:02:10 - Board discussion and questions, testing for understanding)

Attorney Sokul pointed out the Megnas lot as well as the lots of some of the other people who had spoken, then showed the proposed siting of the cell tower and pointed out the wetlands needed to cross in order to get there. Mr. Simmons interrupted to ask him to go back to the revenue issue. He referred to section 415.3 the overlay district – “*all unrestricted town owned land or land on which the town owns the right to develop such a facility . . .*” and asked Attorney Sokul if he would characterize to this parcel as land on which the town owns the right to develop. Attorney Sokul said “no, . . . and I’m going to tell you later because the landowner isn’t going to see a penny from this cell tower proposal, he can’t have a legal hardship.”

Attorney Sokul said that, to the best of his understanding, is that he has something so unique in this piece of property that unless he is granted this variance this special piece of property will never be developed for reasonable use. Attorney Sokul pointed out that on the property owner’s 76ish acres, there are parcels just like the one in question that would have been better from the point of (eliminating?) the needs for a wetlands crossing and possibly setback variances as well. His contention was that the land chosen to lease for the proposed tower was the piece that resulted in the least damage to the property owner while maximizing his own development purposes and/or tax advantage in donating it to the town. He says these is nothing special about the piece of land – particularly in the context of the overall 76 acres - he is trying to turn wetlands into a special condition entitling him to a variance; any hardship would be entirely self-created by the landowner.

Exhibit 110 – copies of all the cases cited in Attorney Sokul’s prior correspondence. Of particular note – Rowe v. Town of North Hampton in which the Supreme Court upheld the finding of the Trial Court which a property owner had come in looking for a variance because he had some wetlands he wanted to build on; the lower court said “the plaintiff established nothing unique about her property which distinguished it from any other 2 acre parcel, more than 50% of which are wetlands . . .”

Attorney Sokul said that in reality, the ZBA would be relieving the owner from any hardship by denying the variance because then Verizon could not lease it, and so the owner would have control back himself. He said there are plenty of other uses elsewhere on the property that the property owner can benefit from, and that approving the variance could be conceived as equivalent of “selling” variances for donations made to the town. (*T2 1:15:00*)

Exhibit 111 – copy of David Maxson’s report and its attachments from the Woodland Road case. Attorney Sokul feels the alternatives in this report deserve to be looked at in the Chapel Road case as well – he pointed out that the town ordinance would permit the construction of new towers only where all reasonable opportunities have been exhausted. He does not feel other reasonable opportunities have been explored or analyzed in any meaningful way by the applicant – especially considering the size of the gap Verizon is saying they need to cover. After hearing Mr. Maxson’s report, he had been intrigued enough to look into it and had found several alternatives he felt worthy of exploring right in the North Hampton area.

Exhibit 112 – the colored map Attorney Sokul used in his presentation.

Attorney Sokul stopped at 8:15pm. He informed the Board that he had about 45 minutes left, which he could pick up at the next meeting.

After a short break, Mr. Simmons recognized **Monica Cornelia – 18 Pond Path** – who stood to ask if committee members had ever seen a monopine. She gave her opinion that they are a blight on the landscape; they make her want to drive into a gas tank, and again appealed to the Board to help preserve the Seacoast area.

New Business

None

Next regular meeting – September 27, 2006 – tentatively on the agenda;

- Yankee Fireplace
- Fuller re-hearing (decision about whether to re-hear)
- Continuation of Chapel Road cell tower hearing **2005:19**.

At 8:24pm Mr. Simmons moved and Ms. Peckham seconded the motion to adjourn.

Vote was Unanimous (5:0)

Board met with Attorney Hilliard for consultation on information collected thus far in Chapel Road cell tower hearing.

