

Town of Otisfield, Maine
Board of Appeals

FINDINGS OF FACT
DELIBERATIONS – CONCLUSIONS - DECISION

March 20, 2012

Administrative Appeal: Mr. John Poto – Appellant

RE: Wireless Telecommunications Siting Facility (Cell Tower)
Proposed Location: Scribner Hill Road, Otisfield, Maine

Marianne Morin, Chair: (read the following statement):

OVERVIEW:

The Town of Otisfield’s Board of Appeals has an Administrative Appeal under review regarding a Planning Board approval of a cell tower, to be located on Scribner Hill Road. This Administrative Appeal is based upon an appellant, and Otisfield resident, claiming that the Planning Board misinterpreted the Town of Otisfield’s Wireless Telecommunications Siting Facility Ordinance.

Although Planning Board approval for this project took place on January 17, 2012, no building permit application has been submitted by the applicant; therefore no permit has been issued by the Code Enforcement Officer.

The job of the Appeals Board is to review the public records pertaining to this issue, conduct a public hearing, request testimony and evidence of the interested parties, listen to public input, deliberate and render a decision to approve or deny the appeal based upon the Appellant proving or failing to prove his case.

Should the Appellant provide proof of the claimed “misinterpretation of the ordinance”, the Board of Appeals shall vote in favor of this appeal and remand the entire cell tower application process back to the Planning Board for full review (with or without conditions upon direction of the Board of Appeals). Should the Appellant not provide proof of such a misinterpretation, the Board shall vote to deny the appeal and allow the Appellant to take his appeal to Maine Superior Court.

NOTE: The following topics and/or statements were openly discussed by the Board and will show only the motions, seconds and voting results:

FINDINGS of FACT

1. Appellant: Mr. John Poto; 265 Cobb Hill Road, Otisfield, ME

*Motion that this is finding of fact #1: MIM/AP-Unanimous.

2. Map/Lot: The location of the proposed cell tower is on Scribner Hill Road; identified as Map R2, Lot 8A.

*Motion that this is finding of fact #2: MIM/SM – Unanimous.

3. Reason for Appeal: Appellant stated his reason for this appeal on page 1 of his application. Appellant states the “approval was based on misinterpretation of the ordinance”.

*Motion that this is finding of fact #3: MIM/AP –Unanimous.

4. Appellant’s Request of Board of Appeals: To “nullify the approval, revoke the permit and allow the Planning Board to reopen the review process”. (As stated on appellant’s application / cover letter)

*Motion that this is finding of fact #4: MIM/AP – Unanimous.

Discussion took place siting “no Permit” was issued.

5. Jurisdiction: This Appeals Board has jurisdiction over this appeal because under the Town of Otisfield’s ordinances, the application and decision was heard and approved by the Otisfield Planning Board, as per Otisfield’s Site Plan Review; Section 9, Letter A, and Otisfield’s Board of Appeals Ordinance Section 5, #6, and Otisfield’s Wireless Telecommunications Siting Facility Ordinance Section 10. **NOTE:** The Wireless Telecommunications Siting Facility Ordinance will hereby be noted as Cell Tower Ordinance.

*Motion that this finding of fact #5: MIM/SM – Unanimous.

6. Applicant for the Cell Tower Permitting process: Mr. Bob Gashlin, KJK Wireless Communications, representing the permitting interests of U.S. Cellular. **NOTE:** Mr. Gashlin will hereby be noted as Applicant

*Motion that this is finding of fact #6: MIM/AP – Unanimous.

7. Dates of Interest. The following is a chronological sequence of dates applicable to this issue:

08-18-11 &	Notice in Portland paper (by Applicant) re: cell tower proposed at this
08-19-11	location. (Otisfield)
10-25-11	CEO met with Applicant (Otisfield Town Office)
11-1-11	Balloon test (by Applicant) to provide visual impact photos to PB.
11-15-11	Applicant placed on PB agenda, cancelled by applicant, rescheduled for 12/20/11.
12-20-11	Applicant placed on PB agenda. (Application deemed complete)
1-17-12	PB Public Hearing (Town Office)
1-17-12	PB meeting to approve/deny (PB approved with specific conditions, by unanimous vote) (Town Office)
2-10-12	Notice of Appeal (John Poto, Appellant)

3-6-12 BOA Public Hearing (Community Hall)
3-20-12 BOA Deliberations (Community Hall)

*Motion that this as finding of fact #7: SM/MIM – Unanimous.

Clarification: MIM: balloon test on 11/1/11; only one balloon test was done / it was scheduled for the early morning but postponed to late morning due to cloudy conditions.

8. Planning Board (PB) application / review / approval process: (per testimony at the BOA Hearing)

Marianne Morin, Chair: (read the following statement):

NOTE: The recorded minutes (taken by laptop computer by BOA Secretary Tanya Taft) of the BOA Hearing on 3-6-12 are part of this public record.

The BOA in its review, notes that the following details **may or may not be directly relevant to the appellant's claim of the "the Planning Board's misinterpretation of the ordinance"**, but were taken into consideration as testimony and evidence and are now part of the public record. The BOA also finds that while these details may or may not be relevant to the Administrative Appeal, they provide validity to the extent of review previously conducted by the Planning Board and reflect both sides of the issues pertaining as to whether or not the Planning Board did its due diligence during their application review and decision rendering.

NOTE: SM wanted to enter the following into public record:

A. Code Enforcement Officer (CEO) Richard St. John stated/testified that he met with applicant prior to presenting his application to the PB. CEO reviewed the Cell Tower Ordinance with applicant, reviewing the special conditions/sections as they refer to the following:

- The use of existing buildings on any of the highest elevations (i.e.; Bell Hill Church).
- The requirement to address collocation and allow 3 more competitors to add antenna to this proposed U.S. Cellular tower.
- Max. height restriction is 180'. No concern regarding other districts, as town has no zoning (industrial, commercial, rural, or residential).
- Special consideration to the ordinance and Comprehensive Plan re: scenic vistas and maintaining the rural character of the town; thus requiring evidence to the PB for their review.
- In lieu of an actual application, applicant must comprehensively address the Cell Tower Ordinance (during PB review).
- CEO ensured applicant's submittal package for PB review was properly prepared prior to placing on PB agenda.

*Motion that this is finding of fact #8A: SM/MIM – Unanimous.

B. Planning Board members Stan Brett, Dan Peaco, Karen Turino, Herb Olsen and Alternates David McVety and Richard Jackson all testified at the BOA Hearing that during the application process they had sufficient evidence provided by the applicant, to render a decision of approval (with conditions read out loud) for the applicant's request to build the cell tower.

*Motion that this is finding of fact #8B SM/AP – Unanimous.

Discussion: Sharon wanted to make sure the conditions were noted. MIM asked any more discussion. Negative.

C. PB Chairman Stan Brett stated that whatever information the PB did not have, they requested and received prior to final approval.

*Motion that this is finding of fact #8C SM/AP– Unanimous.

Discussion: Just repeated for clarification. PB Chairman Stan Brett stated that the PB does not take minutes verbatim; but ensure that they record the topics, the motions and the votes. He went on to state that the Board discussed this application at great length, including multiple possible locations.

BOA questions to Appellant:

9. Anne Pastore: Are you stating that the PB failed to take adequate measures by not asking enough from the applicant? You said this is apparent based on the PB minutes, but did you attend any of those meetings?

REPLY: **John Poto:** No, I did not.

*Motion that this is finding of fact #9: AP/SM – Unanimous.

10. Anne Pastore: I asked the appellant if he spoke with any of the PB members of his concerns?

REPLY: **John Poto:** No, I did not.

*Motion that this is finding of fact #10: SM/DM – Unanimous.

11. Anne Pastore: BOA asked the PB were they satisfied with the information gathered from the applicant in regard to the height and location of the proposed tower? Each PB member echoed the Chair with a unanimous “yes”.

*Motion that this is finding of fact # 11: MIM/SM – Unanimous.

Discussion: Clarification that the PB members did not elaborate but simply replied yes (in agreement) or that they echoed the Chair's reply.

12. Anne Pastore: BOA asked CEO if he was satisfied with the information submitted by Applicant and he said “yes I am”.

*Motion that this is finding of fact #12: MIM/SM – Unanimous

13. Anne Pastore: PB member Herb Olsen stated that the PB did ask all the necessary questions regarding tower height options, locations, concealment and followed the Cell Tower Ordinance one section at a time, and did so one line at a time. Mr. Olsen stated that many questions were asked, the PB got the answers from the applicant and the Board then came back with conditions that they thought were best for the town. Conditions stated by Sharon Mathews.

*Motion that this is finding of fact #13: SM/DM – Unanimous.

14. Anne Pastore: PB alternate member David McVety stated that the Board did in fact discuss the possible camouflage / design of the tower but believed that this design fit the ordinance and the Comprehensive Plan.

*Motion that this is finding of fact #14: SM/DM – Unanimous.

15. Anne Pastore: CEO stated he too was satisfied that during the PB application process, he had sufficient evidence and documentation that followed the Cell Tower Ordinance and Comprehensive Plan.

*Motion that this is finding of fact #15: MIM/DM – Unanimous.

16. Anne Pastore: CEO stated that more than 6 months ago, U.S. Cellular was looking for sites over 800 feet above sea level. There were (3) sites identified at that time. He stated that in the Wireless Ordinance, if there is an existing building on any of the highest points, it must be considered; and the only place practical is Bell Hill Church. Immediately checked out that site and the Applicant demonstrated to the PB that it didn't provide enough coverage due to the flatness at the top of the hill; it couldn't get above the trees and into the adjacent valleys.

*Motion that this is finding of fact #16: AP/SM – Unanimous.

MIM: I remember that if it went into the church tower, it would only have been 40 feet high and it was not going to be a tower that was going to be used to hit any areas.

AP: I remember that, as well as the fact that Bell Hill is a flat-top hill and the church tower wouldn't reach over the trees and into the valleys below. I know that's true because I live directly across from it.

17. Sharon Mathews NOTE: SM would like to add that regarding the Comprehensive Plan: she asked if any Planning Board members were on the last Comprehensive Plan Committee? Both PB Chair & V. Chair raised their hands. Did you discuss and take the Plan into consideration during this review? Dan Peaco /Stan Brett: Both agreed they took Comprehensive Plan into account.

*Motion that this is finding of fact #17: MIM/AP – Unanimous.

Discussion: AP: Should be noted that while they said they were taking the Comprehensive Plan into account; it's only a guide, not an ordinance.

18. Sharon Mathews: Need to add the statements about the Appellant's concern about the word; collocation. John said that he never used the word collocation, and the Applicant only did so because it was required by the ordinance. His (Poto) interpretation is an opinion they (PB) did not do enough.

Discussion regarding "not enough" as being interpretive. It's still following the ordinance.

Board recaps that the finding is related to Appellant's statement that the PB didn't do enough and that BOA feels this is an opinion, not a mis-interpretive fault of the PB,

*Motion that this is finding of fact #18: AP/SM – Unanimous.

19. MIM: Re: what's best for the town: when the cell tower ordinance was developed, the people that were on the committee must have thought that was the best wording because they submitted it to the town and it was approved by the voters. Until now, we have never had any cell tower discussions what so ever.

*Motion that this is finding of fact, # 19. SM/MIM – Unanimous.

Discussion: AP said she was Town Clerk and signed the original document in 1999.

20. MIM: I think it was at this point that Mr. Gashlin, reiterated the reasons he selected this site as opposed to other sites. Primarily; Route 121 was the focus area due to his customers traveling through Otisfield and number of homes covered from this location. He also addressed the 180' height.

SM: About the maximum 180feet. Mr Gashlin replied the ordinance did not require it to be shorter and he needed the full height to reach the targeted customers.

*Motion that this is finding of fact #20: AP/MIM – Unanimous.

Discussion: Because the ordinance did not require it and they needed the full 180' height, the PB considered it and approved it.

21. MIM: Mr. Poto wanted to know if this is the only location and MIM directed that question to Mr. Gashlin, and he replied Otisfield was divided by Scribner Hill into two sections, east side/west side. If the tower was not located at the top of the hill, it wouldn't reach over the opposite side (east or west). This was discussed at great length with the PB and the public.

*Motion that this is finding of fact # 21: MIM/AP – Unanimous.

22. Sharon: Mr Poto questioned the design as approved by the PB and he offered alternatives. Mr Gashlin replied they proposed a galvanized steel tower that blends into the Maine sky. A fake tree, would be a darker color and 35' to 45' wide vs a narrower steel tower. This was presented and approved by the PB, and it's been discussed at the PB Hearing as well. There was a question about the color and material and blending with the environment. SM: I believe the submitted and approved design met the ordinance and it should be a finding.

*Motion that this is finding of fact #22: SM/AP – Unanimous.

Discussion: Mr. Gashlin provided that info at the PB meeting so it was in the PB minutes / public record.

23. Don Mixer: Mr Poto stated that the PB has the right to wave the max height requested by the Applicant, due to visual impact on the town, but the CEO pointed us to the ordinance wording that refers to height limitations in certain zoning sections of the town. I'd like to see a reference to that restriction, and how it doesn't apply, as a finding.

*Motion that this is finding of fact #23: AP/MIM – Unanimous.

Discussion: Otisfield has no commercial, industrial, rural or residential zoning as of today. All BOA agrees.

24. MIM:

After considering the above questions and statements from the Appellant, as chairman I find that there is not one reference, testimony, or evidence submitted to the Board regarding a “misinterpretation of the ordinance by the Planning Board”.

*Motion that this is finding of fact #24: MIM/AP – Unanimous

Discussion: MIM: Did any of you find anything that showed any misinterpretation? Sharon: No. Anne: No.

Don: No I did not. Nothing. MIM: Tanya, let the minutes state that all said “no”.

MIM: I'd like the Board to add statements to these proceedings that were offered as testimony, but not necessarily use them as findings. I have some, do others?

AP: After reading the BOA minutes, I have a few. Kristen Roy (abutter): I feel I have an administrative appeal. Would like you to consider an Administrative Appeal from me as well. **BOA Chair Marianne Morin** reply: The appeal time limit has gone by. There is only one appeal allowed at this time.

*Motion that Kristen Roy stated this. MIM/SM – Unanimous.

AP: Kristen Roy stated her concerns about the limited RF maps and questioned the height of tower.

*Motion that this should be in record. MIM/AP – Unanimous.

AP: Kristen Roy (abutter): I feel I was denied rights as a landowner to be heard in the PB public hearing because I was not properly notified.

Anne read from the Cell Tower Ordinance regarding improper notification not being subject to appeal or delaying/stopping the permitting, and would like that entered into public record.

*Motion that this should be in record. AP/MIM – Unanimous.

Discussion: MIM: Also worth noting that we have conflicting ordinances regarding abutter notification. The Appeals Ordinance is 500' and the Cell Tower Ordinance is 1000', and we sent letters to 1000 feet for this appeal, to err on the side of caution.

AP: Kristen Roy (abutter): I was under the assumption when Mr. Poto filed his appeal that he was filing on behalf of the group of citizens “Friends of Scribner Hill”, and I had signed that document before this was filed. I was under the assumption that I would be an appellant on that appeal. **Anne (BOA)** reply: Sorry but your assumption was incorrect.

*Motion to enter this into public record. AP/SM – Unanimous.

AP: Pete Arnsten (abutter): Appears that if the tower got moved to Porcupine Mountain, you would gain more coverage. No houses on Porcupine either, whereas on Scribner Hill there are quite a few. **Anne (BOA)** reply: Sorry but that issue of location has been discussed at length tonight and is not being addressed in the Administrative Appeal, which is for misinterpretation of the ordinance by the PB.

*Motion to enter this into public record. AP/MIM – Unanimous.

AP: Kristen Roy (abutter): The collocation has not been thoroughly addressed by US Cellular: Did the PB get a list of all the towers within 4 miles of the boundary of Otisfield? Did you get a complete list that US Cellular is not on? Did they give you a list of towers they are on? **Bob Gashlin** reply: It was supplied in the PB packet.

BOA Anne Pastore reply: We (town) need to follow the ordinance. If it requires it, the PB can require it. If it isn't required then the PB can't require it. Mr. Gashlin and others stated the issues of collocation and surrounding towers were thoroughly discussed.

*Motion to enter this into public record. AP/MIM – Unanimous

MIM: Kevin Cook (abutter): How are we going to stop the water coming down the hill? This is a huge problem already in that neighborhood. What about the fact that it's all ledge on that hill and how is the tower going to be anchored so that it doesn't topple over during high winds? **CEO** reply: The tower has been designed and stamped by a professional engineer. It's anchored into the ledge itself. DEP has reviewed the storm water erosion design by the engineer and Maine DEP will issue that permit.

*Motion to enter this into public record. SM/AP-Unanimous.

Discussion: DM: I walked this area last week and it looks solid. All ledge. As far as water run-off, I don't see where this tower is going to cause any more disturbance. Plenty of area for the water to go. SM doesn't think it will cause any either.

MIM: Based upon the above Findings and the voting on each finding, the Board needs to now vote to approve the Findings as a whole. The intent of this vote is to demonstrate the Board's agreement that these Findings, as a whole, represent the facts in this Administrative Appeal. Anyone wish to offer a motion?

*Motion to approve the above Findings and that they represent the facts of this Administrative Appeal.

MIM/SM – Unanimous. Discussion: None.

MIM: (provided in advance and in writing to TT-Secretary)

While the BOA heard testimony from multiple interested parties and the general public, the Board cannot list any of the following discussions or oppositional positions as "findings of fact", as they are either not relevant to the Appellant's administrative appeal for a misinterpretation of the ordinance, or they are considered as opinion and positional in support or opposition to the actual cell tower itself.

The BOA recognizes that there were substantive discussions and opinions on both sides pertaining to the following areas:

1. Protection of the scenic vistas and rural character of the town.
2. Balloon tests; as they apply to tower height projections and visibility to abutters.
3. Lack of additional information that could have been asked by the PB regarding tower heights, alternate locations, and use of existing towers for collocation, tower design, camouflage, and RF testing/studies.

4. Public notification, abutter notification, and the process and guidelines used by the CEO, PB and BOA.
5. Use of the cell tower for the Fire Dept. to add an antenna (at no cost to the town) to be used to improve radio communications during fire and rescue. NOTE: Mike Hooker (Otisfield Fire Chief) stated that antennas have to be above tree tops to operate properly. The FD repeater needs to be a hundred feet or higher. It's beneficial to have it higher if possible.
6. Comprehensive Plan guidelines, policies and strategies pertaining to scenic views and maintaining Otisfield's rural character.

Public testimony:

James Gregory: Photos presented regarding his own personal balloon test. (Submitted into public record) Photos show the balloon visibility from multiple angles from his property. Lois O'Connor, Sunset Lake Real Estate sent a letter stating that real estate will be affected in a negative way with this tower added. (Submitted into public record). **Marianne Morin (BOA)** reply: Reminded everyone this appeal is about the Misinterpretation of Ordinance, not property values.

Pixie Williams: We should preserve our quality of place. Not one word about all the summer people who will be affected by this. My concern is the summer people have not been represented at all.

Katherine Brunette (abutter): If Jim Gregory's balloon test is accurate; she will see it from her driveway, in her bedroom, all around her home. The visual quality of her property is going to be terrorized by a cell phone tower. Is it possible to have another location? It relates to the scenic aspect of neighborhood and town.

Joe Vaillencourt: If you look at the characteristics of the PB decision, there may have been an error. There has been concern about the intent of Comprehensive Plan. The Appeals Board has grounds to remand this to PB for reconsideration. Think it would be well worth it to have it reconsidered.

Linda Poto: Applicant made the point that our ordinance needs work. Very loud and clear that the intent of ordinance is about views. We are not saying "no"; just let's take another look at it.

LA almost reprimanded our board: he stated,

Lenny Adler (Selectman): Feels this conversation is far from the appeal. The PB has to follow the ordinance. He is sure they all cross the t's and dot the i's. They took the information they were given, and still asked for more. They did their job and they did it well. Bottom line is that U.S. cellular complied with the ordinance.

Rick Micklon (Selectman): The BOS appoint board and committee members. We take it very seriously. The PB is a true representation of our residents. They are there with your best interest in mind but as Lenny said, they must follow the ordinances that you have voted into existence. If you have not attended the PB meetings and then complain they didn't do their due diligence, it's hard to see your point of view. You can't just read the minutes and fully comprehend the amount of work and discussions that took place. Other than most of the PB members and the PB Secretary, Hal Ferguson and I were the only people in town who attended all three PB meetings on the cell tower. They were bound by an ordinance and they did their jobs well. Regarding the Comprehensive Plan; the PB referenced it, discussed it, and considered it in their votes. This issue and the appeal have shown that it's an educational experience for the town and "we definitely need to review our cell tower ordinance". We have a mechanism in place to do that, through our Ordinance and Policy Review

Committee.

Hal Ferguson Selectman): Like Rick said; he and I went to all 3 meetings. U.S. Cellular was on the PB agenda since November 15th and this issue was common knowledge to anyone who looked at a posted agenda or talked to anyone involved in the process. They had a public hearing on Jan. 17th. As soon as the public hearing was over, everyone left and did not attend the regular meeting. No one stayed and asked to be recognized by the PB.

Attorney: Kelly Matzen: (on behalf of KJK/U.S. Cellular)

1. Submitted to BOA a letter re: “legal standing” of the appellant. The Appeal application clearly shows that Mr. Poto is the only one who appealed, and showed no evidence in the application or at tonight’s meeting that he is an aggrieved party with legal standing.
2. The substance of the appeal was whether there was a finding of PB approval being contrary to the town ordinance. My reply to that is not whether the BOA agrees; the issue is more that was there evidence presented to the PB in which facts could be derived. They followed the ordinance line by line and evidence was submitted on every issue that was raised. John Poto said it was his duty to prove the PB did something wrong. I contend that he was not able to sustain that duty. He claims he is an aggrieved party and needs to prove that the PB made that error.
3. John Poto thinks PB did not do enough. PB has received evidence and that it was satisfied with that evidence. Whether he thinks the PB fulfilled that duty, or if he would have done it differently is not the issue. Did they fulfill their duty? They conscientiously did.

NOTE: **John Poto** reply: He does think he has legal standing. Supplied letter to rebut that (submitted into public record)

NOTE: **Hal Ferguson (Selectman)**: The BOS doesn’t support the opinion that John Poto should not be here tonight. He is an Otisfield resident and has every right to be here. The town attorney also believes that this hearing should go on. Whether or not there is a question if John has property within 1,000 feet of the proposed land, we still support his right to appeal.

NOTE: **John Poto** reply: He does have land within the 1,000 feet of the leased property for the cell tower, and has a survey to prove it.

Pixie Williams: PB could have requested more input. The lakes associations would have liked to have had an input. **Marianne Morin (BOA)** reply: So noted.

NOTE: MIM asked if BOA members had any more to input. Answer: No.

Conclusion:

MIM: Based upon the above stated facts and supported evidence, and the provisions of the town of Otisfield's Wireless Telecommunications Siting Facility Ordinance, the Board of Appeals concludes that the Appellant, Mr. John Poto, **did / did not prove** that the Otisfield Planning Board misinterpreted the Wireless Telecommunications Siting Facility Ordinance. Moreover, we **found/ found no** testimony or evidence by an interested parties, public records, and Planning Board minutes to prove such misinterpretation.

MIM: My position is that Mr. Poto did not prove any misinterpretation by the PB, nor did he or any interested party provide any such evidence. What do the other members believe regarding such misinterpretation?

AP: I also agree that I did not find any evidence by Mr. Poto or any interested parties to prove misinterpretation of the ordinance. / SM: I did not either. DM: I did not either.

*Motion that we deny the appellant's Administrative Appeal. AP/SM – Unanimous.

Discussion: AP: We would like to say we have to keep our own personal opinions out of this hearing and we had to follow the ordinance, but I feel secure that we have come to the right conclusion. SM and DM both agree.

Decision:

Based on the above findings of fact and conclusions reached by the majority of the Board, the Otisfield Board of Appeals voted to deny the Administrative Appeal by Mr. John Poto. If any aggrieved party is unhappy with this decision, they may file an appeal in Maine Superior Court within 30 days of today's date of March 20, 2012. MIM/AP – Unanimous.

All agree to meet on Monday March 26, 2012 @ 3:30 PM at Town Office, to approve these minutes and review and approve a written decision letter that will be sent to all applicable parties.

*Motion to adjourn at 8:23 PM. AP/MIM – Unanimous.

Marianne Morin, Interim Chair

Sharon Mathews, Interim Vice Chair

Anne Pastore

Don Mixer

Cc: Otisfield Board of Selectmen
Otisfield Planning Board
Otisfield Code Enforcement Officer

Tanya Taft, Secretary
March 20, 2012