

**Wolfeboro Zoning Board of Adjustment  
Regular Meeting  
Minutes  
Monday, 5 April 2010**

**Members Present:** Alan Harding, Chairman, Suzanne Ryan, Vice-Chairman, Steve McGuire, Clerk, David Booth and Kathy Barnard, Members, Mike Hodder, Alternate

**Members Absent:** Charlene Seibel and Geordy Hutchinson, Alternates

**Staff Present:** Rob Houseman, Director of Planning & Zoning and Robin Kingston, Secretary

Chairman Harding called this meeting to order at 7:00 PM in the Wolfeboro Public Library Meeting Room. A quorum was present.

Chairman Harding explained on March 16<sup>th</sup> the applicant has requested a joint Planning Board and ZBA and noted the meeting will take place Tuesday, April 6, 2010. The meeting will be chaired by Kathy Barnard, Planning Board Chairman and this will deal with a Special Exception and Site Plan reviewed if this application is approved tonight.

Chairman Harding requested the postponement of election of regular officers until the next ZBA meeting as the Board of Selectmen are scheduled to make appointments and possibly reappointments Wednesday evening.

*It was moved by David Booth to postpone the election of regular officers of the ZBA until the next regularly scheduled ZBA meeting. Kathy Barnard seconded the motion. All members voted in favor. The motion passed.*

**Applications:**

**TM# 196-6**

**Case # 02-V-10**

**Applicant: New Cingular Wireless PCS, LLC d/b/a AT&T Mobility  
Variance**

**Agent: Will Dodge, Esq.**

Steve McGuire read the abutter and public notification for the record. A site visit was held at approximately 6:15 PM prior to the meeting.

Kathy Barnard stepped down from this application. Mike Hodder was seated.

The applicant has requested a Variance from Section 175-A (2) of the Wolfeboro Planning & Zoning Ordinance to allow for the extension of the existing tower by a total of 10' using monopine design in order to accommodate co-location by AT&T a wireless communication facility consisting of 12 antennas, a new equipment shelter, emergency generator, u/g utility lines and ice bridge. The site will be accessed by an existing woods road. This property is located at 693 Governor Wentworth Highway.

Chairman Harding reviewed the conduct and procedures for this hearing.

Will Dodge, Esq. representing the applicant address the Board. AT & T is asking to allow a 10' extension of the monopine located at 693 Governor Wentworth Highway (Pierce Camp Birchmont) in order to allow AT & T to attach 12 antennas that will be used to provide GSN & 3G Wireless service in areas of Wolfeboro. Specifically this will provide coverage along the Routes 109 & 28, the lake, Lake Wentworth itself and other parts of the area. Eventually in combination with some other sites including collocation on the water tank, provide AT & T Wireless service in the Town of Wolfeboro. The applicant is required to seek a variance from the ZBA as the ordinance clearly states a tower can be permitted for a total height of 10' above the average tree canopy around the tower. At the time RCC / Unicef received permitting, the calculation of the tree canopy was 72' above ground level and the current antennas are at 82'. The applicant is looking to extend the tower height 10'. This would increase the height to 92'. The choice for the applicant and the ZBA is allow collocation or build a new tower. The applicant decided there are no other buildings or structures in the area to locate a tower so collocation is the applicant's request. The question became is the 10' increase less intrusive than building a new tower and the applicant believes it is. Everything can be installed within the existing footprint of the existing site.

Kevin Breuer, Radio Frequency Engineer addressed the Board and reviewed Exhibit E in the application. Current AT&T Coverage in Wolfeboro NH and Proposed AT&T Coverage in Wolfeboro NH. The red area on both plans shows unreliable coverage which currently is a large part of the town. In the proposed coverage plan the red area is reduced significantly. The map showing what the proposed coverage will be when the two towers are located at this site and the Water Tower. There is a 10' rule of thumb for location of antennas in order not to interfere with your competitors antennas. Being too close to another antenna creates too much

interference. If they located the antenna below the antenna currently located on the tower the signal would be significantly reduced and they would be looking other sites in the area of this tower.

Steve McGuire noted the increased coverage map looks like it covers a lot of water. Has there been a study done as to the number of households this will serve or be affected. With AT&T asking for the 10' extension when is Verizon going to be back asking for another extension. When does the tree canopy interfere with the antenna.

Will Dodge explained although there looks to be a lot of coverage on the water, that threshold carries beyond the water along the shore.

Kevin Breuer explained AT & T has never been back for an extension in height of an approval because of a tree canopy. Verizon has a few trees that may cause about 20% derogation but they have alternatives to increase what is lost.

Will Dodge noted on Exhibit B, A1; showing a Future Verizon Equipment Shelter. This looks like Verizon is planning to put more operating equipment into the same compound and further they would not have let AT&T to proceed with this application if they felt the extra height would be needed by them.

Kevin Breuer noted Verizon would be adding new equipment to help with output.

Chairman Harding asked if this is line of sight communication and why you would not just cut the two trees down.

Will Dodge explained there are many ways to address this question. In the past 15 years in Vermont there has not been a reapplication for interference because of increased tree height canopy.

Rob Houseman noted that if Verizon needed to come back because there is a 10' growth in tree height, Verizon can continue directly to Site Plan review. The applicant is only requesting 10' above where it is now.

Kevin Breuer noted that they operate at 1900 megahertz and some of this gets absorbed by the pine needles.

Suzanne Ryan noted the original approval is for 82' and it is not a wise suggestion to cut down trees as there would be a problem with that. You cannot circumvent the process. Unicef (RCC) had a public hearing in 2006 and at that time there was testimony trees would grow 6-18" per year. Why is it that the antennas can't be

changed into new antennas so the height is not affected and still provide the same services? Additionally the applicants states they will provide E911 coverage however this is already provided in the area.

Kevin Breuer explained antennas are passive. There are no electronics in them. They receive some input and pool the energy and send it out. You can increase the size and maybe get a little more gain but the pine needles will take the DB's away.

Suzanne Ryan asked if they were talking power or load.

Kevin Breuer explained that RF (Radio Frequency) are better with height.

Will Dodge noted there is no technology available that would obviate the need for paneling. There is nothing you can stick up on the towers that does the function of the antennas. The 10' rule in the industry that exists to avoid interference between the two sets of antennas with other licensees.

Rob Houseman noted relative to Suzanne Ryan comments about E911, this service is for AT&T coverage only.

Suzanne Ryan noted she is on Sprint and she could be on a roamer. What is there now can do what the applicant is proposing.

Will Dodge noted that it cannot.

David Booth suggested the Board cut off the education program as this is a hugely complex issue and continue on to review the five points required for the variance requested.

Mike Hodder asked if E911 is provided currently by Verizon in the area and if there is currently cell phone service in the area for those who subscribe to Verizon service?

Will Dodge responded that there is Verizon coverage.

Mike Hodder noted there is not a cell coverage gap AT&T will be filling.

Will Dodge explained this is an AT&T gap. The First Circuit has made clear that within MA, NH & RI, they do not follow the single provider rule. When there is a gap it is on a provider by provider basis. The fact that one carrier may have coverage in the town does not mean that the town does not have to look any further providers.

Steve McGuire noted the technology that AT&T uses verses another provider are completely different and this is what makes the need necessary.

Mike Hodder noted Section 175.164 A 2 is part of Article 26 in the P & Z Ordinance and the purpose and intent is to minimize the environmental and visual impact of a Personal Wireless Facility while providing coverage, so clearly the intent of this is to minimize the appearance of cell towers sticking up above tree line.

Will Dodge explained the intent is that is something going above the tree line does not lead to an undue visual impact.

Mike Hodder stated he feels it is clear that the intent of the drafters of the article and the vote of the town is that cell phone towers can be eye sores and they should not be too tall. If they are going to be tall they cannot be taller than 10' above the AGL.

Will Dodge noted there is a presumption that if it is only 10' above the tree canopy then it is OK and anything above that a variance is needed.

Mike Hodder responded that in order to get a variance you will have to show there is an overriding need in the public interest that the variance be given to violate the intent and wording of 175.159 & 164.82.

Will Dodge explained in NH there is an overlay of the Federal Telecommunications Act of 1999 (TCA). When looking at a variance you do not approach it as you would a lot line adjustment. The Supreme Court said in the same way the TCA **ais** you should always be looking for the least intrusive way to fill a significant gap in coverage.

Mike Hodder noted the five variance criteria still apply and the TCA does not trump them. It simply states the criteria should be relaxed a little in order to encourage competition and cell coverage. Also site suitability is one of the criteria and asked if there is another location AT & T can build its own tower and still provide coverage?

Will Dodge noted it could be possible but the environmental impact is more than the affect of the 10' extension. At the time the monopine was built it was a modular structure, with the intention of adding to the existing structure. The Approval seems to be intended to balance the two (visual and environmental impact) together.

Mike Hodder stated that he found that argument not very convincing. A variance is granted because there is a peculiar or particular aspect of the land and in order to do justice to the applicants desire to use the land in a particular fashion. The only unique thing about this parcel is there is an existing tower on which they can hang the antennas.

Will Dodge explained the ordinance encourages colocation where possible.

Mike Hodder noted if it can be done within 10' of the AGL.

Will Dodge noted Unicef found there is no other obvious existing structure where they can collocate.

Mike Hodder asked if there is a sense how many household will be served.

Kevin Breuer noted a lot of the traffic in the area is from people from other areas. They have few customers in Wolfeboro but by building the network they hope to increase the usage.

David Booth noted there are 6,700 people in April and close to 20,000 in July and we need to think about those people coming to the area wanting this coverage.

Will Dodge noted if you know where Verizon is now AT&T will be in the same place once they are through with the Pierce Camp Birchmont and the Water Tower.

Suzanne Ryan asked to talk about the processing of the application. If the Board wishes to do this after the hearing is closed that is fine.

Attorney Dodge reviewed the five points required for the variance application as submitted.

Noted under #4 - Studies have been done and one has been included (Exhibit D) showing conclusions are the same that land and sales record show no diminution in value of properties. No abutters have contacted the applicant or the owners of Camp Pierce Birchmont with any concern.

David Booth noted that previous Zoning Board's also found no diminution of property values.

David Booth commented on the court cases and of particular interest to ensure compliance with a TCA the suitability of the land should be considered.

Mike Hodder note the TCA was passed to encourage cell phone coverage in parts of the country where there was little or none. The First Circuit court also stated that, "The Towns refusal to permit a tower to provide a significant geographic gap in service where no service at all is offered would violate the effective prohibition". There is currently service here. AT&T wants to layer its own service there. We are not talking about a gap in coverage.

Attorney Dodge noted the First and Second Circuit said what you look at is the gap in the particular provider coverage. The goal of the TCA is not to just provide cell coverage generally but to encourage competition. The Board should look at AT&T having a significant gap in coverage.

Kevin Breuer explained it is the phone that does not have real power to get back to the site. It is not a TV or radio which puts out power.

Suzanne Ryan noted you cannot tell what the increase in tower height will look like from the lake. She has reviewed the history of this site and original approval. The applicant asked in 2006 for 92' and was allowed 82'. They already asked for this once and now there back. This application was treated like a building permit and the Boards did not do a pre-application review as required. The Board does not have the advantage of a pre application review because somebody decided they did not have to do one. This whole document in total has to be taken into consideration as to how the process works. She cannot support, although is not objectionable to the height, she cannot tell, without a balloon test or a crane, the height. We did not have the opportunity. We looked under the trees at the tower and cannot tell where the 10' feet is going to be. She does not know why there was no pre application review and this is being treated like a building permit because the process is clear. It was recommended the ZBA not give final approval until after the ZBA hears the public hearing on the Special Exception. This application can be continued till Tuesday night because other evidence may come out during the Special Exception hearing that would make us feel differently one way or the other. The ZBA has not had the full advantage of the Site Plan Review process.

Rob Houseman addressed the Board. His relocation of the original application was the applicant was informed they would need a variance if they wished to go to 92'. The applicant went back to 82' and did not make application for a variance. The applicant was informed at the hearing they would need a variance.

Suzanne Ryan stated they could have then appealed that decision and gone for that.

Rob Houseman stated they were willing to live with the height of the tower at that time. The original application submitted was amended down to 82' to comply with the height requirement.

Suzanne Ryan stated she cannot be a mind reader and the motion said, "Tower no higher than 82'".

Rob Houseman responded that the discussion in the minutes was clear and they would need a variance for 92'.

Will Dodge stated his recollection was Unicef wanted to create a two carrier pole, the reason for asking for 92'. The applicant decided to go to 82' because it seemed a variance would not be forthcoming so they decided to build it as it is with a modular design so they could go up in the future.

Mike Hodder asked there if there was no balloon test because it was at the required height.

Rob Houseman noted a balloon test was done for the original application. It is customary to have a balloon test done on a raw site. There are photos simulations of the 10' of addition and this is as good as balloon tests.

Discussion took place between Suzanne Ryan and Rob Houseman relative to how and when a balloon test is done.

Suzanne Ryan stated because someone chose not to treat this as a new application there could have been a balloon test.

Rob Houseman responded that it was treated as a new application. This variance is a stand alone application. The Board has in its power to decide if there is not enough information to render a decision and to continue the hearing.

Suzanne Ryan stated they do not have to be forced into making a decision.

Attorney Dodge stated they followed Mr. Houseman's guidance and met with TRC and no balloon test was recommended.

Alan Harding asked the accuracy of the photo simulations versus a balloon test.

Will Dodge stated they will have someone at the joint meeting to discuss the simulations and their accuracy and it makes more sense for him to answer. In their experience when you know where the photos are taken from and the height of the



tower, it is possible for Hudson Design Group, to use the computer to create these simulations. This is a fair and accurate representation. The applicant would be very comfortable if the board has a concern making a decision without hearing the joint application to accept delaying the decision until the other applications are heard.

David Booth noted the annual tree growth height is 6" - 18" and that was five years ago so we could be talking, maybe a 8' increase in growth so the variance could be for maybe as little as 2'. You cannot assume there was no tree growth over the past 5 years.

Rob Houseman explained the applicant's agent made application and after discussion with both Chairs' of the ZBA and Planning Board it was deemed the best approach was to hold the Variance application first for the sake of clarity. On a technical side he made the assumptions the photo simulations were representative and accurate and would be acceptable to the board. Given only the 10' increase in height a balloon test would be negligible. If this were a raw site a balloon test would have been conducted. If tonight this application is denied the joint meeting does not go forward.

Mike Hodder noted NH Office on Energy and Planning - June 16, 2006 - Question: Have any ZBA's dealt with Cell Phone Towers. Answer: Your regulations must be technology neutral so if someone wanted to invest in a device that would allow for a single installation to provide coverage to your entire town, you must still allow other types of service providers to establish multiple installations as required by their technology. The applicants point taken as the TCA does not just provide for one carrier but provides for competition between providers.

Steve McGuire agreed as we are not in the position of creating monopolies and commingling of towers is the way to go.

Public Comment:

Ron Cools -Property, Manager and Care taker of Pierce Camp Birchmont and was involved with the balloon test and had been instructed by his boss to make sure he could see the where the balloon was. They drove all around the lake, up on the mountain and into Brookfield and you could only see it from very limited areas. The balloon was visible where the tree tower is not. The balloon was orange and the tree is green. The tower looks like a tree that someone cut the top off. The company that constructed the tower took care of each of the conditions in the approval. The trail looks like a horse trail when it was done until you get to about 50' from the pole. Many people did not like the idea of the pole, and later never realized it was constructed.

Chairman Harding closed the public hearing.

Mike Hodder stated the ZBA should make a decision on the variance case tonight. All information is in the packet. David Booth and Steve McGuire agreed with Mike Hodder although Steve McGuire commented he could also hold off until Tuesday night.

Suzanne Ryan asked to delay the decision until Tuesday night.

Alan Harding noted 10' is insignificant due to the location. There have been no complaints from abutters. The additional 10' and the aspect of competition would be beneficial to the citizens of the town of Wolfeboro and is what is encouraged by the TCA. The applicant has met all of the criteria successfully and he was particularly impressed with the study that shows no diminution of property values.

The Board agreed to make a decision tonight.

1. **The variance will not be contrary to the public interest because:** the Board agreed it would not be contrary because this would create less of an environmental impact than if located elsewhere. This is in the public interest because clearly a second tower would have a much greater visual impact. The structural integrity of the tower is present as required for the 10' extension. Further the goals and intent of 1996 TCA, in accordance RSA 12K1 (I) and this appears to be in the spirit of the 2007 Master Plan.
2. **The spirit of the ordinance is observed because:** allowing 10' extension would have a much less of an impact than an independent site. The 2007 Master Plan calls for providing quality service coverage. Looking at the growth of the tree canopy the height will probably only 3'-5' increase over the canopy now. Suzanne Ryan does not agree.
3. **Substantial justice is done because:** This would bring competition to the Wolfeboro area and provide summertime coverage to visitors. There will be much less of an impact than if this was a new application on a new site. This has a positive impact for visitors. Benefits of bringing a second carrier into town, in accordance of the 1996 TCA far outweigh any inconvenience and the greater good is served.
4. **The values of surrounding properties will not be diminished because:** The survey presented by the applicant was very conclusive. Additionally most people want to know how good cell phone coverage is before they purchase a home.
5. **Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship because:**

**The "Special Conditions" of this property that distinguish it from other properties in the area are as follows:** The 10' rule and collation on a pole overrides the fact of hardship. The Supreme Court states you have to offer more latitude. The hardship diminishes every year. Competition is important and the construction of a new tower would have a greater environmental impact and benefit visitors. The collocation offers a greater benefit to residents.

Mike Hodder discussed the Special Conditions which is the pre-existence of the tower as opposed to the location on a hill. Do other members of the Board agree the special condition is the location of the existing tower.

Steve McGuire indicated the location is a special condition as there are no other places in the area they can attaché to.

Suzanne Ryan asked about Brookfield and if they could go there. The applicant has not explored other areas.

Mike Hodder noted on the USGS Topo Map and the highest point in the area is Mt. Delight which is where the current tower is located which would qualify it as a special condition.

David Booth again noted the Supreme Court direction given and the suitability of a particular parcel of land should be taken into consideration.

Steve McGuire noted Mike Hodder was correct as the location has a tower now.

It was moved by David Booth to approve this Variance Case # 2-V-10 in that the five criteria have been met. No second to the motion.

It was moved by Steve McGuire concerning Case # 02-V-10 having met all of the criteria as discussed 1-5, the special criteria; be approved and the Zoning Board also require the following recommendations:

1. All of the documentation submitted in the application package by the applicant and any requirements imposed by other agencies are part of this approval unless otherwise updated, revised, clarified in some manner, or superseded in full or in part. In the case of conflicting information between documents, the most recent documentation and this notice herein shall be generally determining.

2. The project as submitted to the ZBA does not satisfy all applicable requirements for special exception or site plan approval which is a separate application.
3. The ZBA's action on the application does not pre-empt any of the applicable Zoning and Site Plan requirements necessitated by the joint ZBA and Planning Board consideration to be held tomorrow night.

Suzanne Ryan seconded the motion. All members voted in favor of the motion. The motion passed.

Rob Houseman reviewed the process for the joint meeting of the Planning Board and Zoning Board Tuesday night.

#### Other Business:

Rob Houseman noted the Rules of Procedure Final Draft will be on the Boards agenda on May 3<sup>rd</sup>.

The board will receive the final draft before the meeting.

#### Consideration of Minutes:

1 February 2010

Corrections:

Page 1 -Change "Spectra" to "Spector"

Page 2 - Under Decision's - 1<sup>st</sup> Sentence: remove "sheet in the packets for each case.

It was moved by Steve McGuire and seconded by David Booth to approve the minutes of 1 February 2010 as amended. All members voted in favor. The motion passed.

#### Alternates:

The Board discussed Alternates attending the ZBA meetings and their absences at several meetings.

Rob Houseman will contact Geordy Hutchinson to see if he wishes to continuing serving on the Board.

The status of Chris Britt's residency will be checked and if no longer a resident the ZBA will ask for his removal.

Suzanne Ryan noted that you cannot just keep calling each month and tell the Chairman you will not be attending.

There being no further business before the Board, this meeting was adjourned at 9:06 PM

Respectfully Submitted,

Robin Kingston, Secretary