

APPROVED
CANDIA ZONING BOARD OF ADJUSTMENT
MINUTES OF September 22, 2009

Present: Boyd Chivers, Chair; Frank Albert, Vice Chair; Judith Szot; Ingrid Byrd; Amanda Soares, Alternate, Fred Kelley, Board of Selectman Chair, Carleton Robie, Board of Selectmen

Absent: Ron Howe

Chairman Chivers called the meeting to order at 7:00 p.m. He noted that there was a quorum of the Board. Judith Szot arrived at 7:05pm.

Approval of Minutes

F. Albert **motioned** to accept the minutes of August 25, 2009 as amended. A. Soares seconded. **All were in favor. All were in favor.** The following amendments were made:

- Page 3, 2nd paragraph: insert “that” after “record”, capitalize “N” on “north” and insert “it” after “and” in the last sentence.
- Page 3, 3rd paragraph: strike the entire sentence.

Case 09-567 Notice of Decision Formal Acceptance

Applicant: New Cingular Wireless PCS, LLC (“AT & T”) c/o Stephen D Anderson, Anderson & Kreiger, LLP One Canal Park, Suite 200, Cambridge, MA 02141; Owner: Paul Hunter 606 North Road, Candia NH 03034, Map 402 Lot 10: For a Special Exception under Section V 5.02 (D, d-1), Section XII 12.01(B) and Section 13.02 and Variances under Section VI 6.01(G) and Section XII 12.02C. To permit a wireless communication facility in a Residential District consisting of a 180+/- lattice tower with side yard “fall zones” of less then 150% of the tower’s height within a 75’ x 75’ fenced equipment shelter will be located. The compound will include an equipment shelter and diesel generator. A gravel access drive is also proposed and utilities will be brought in from existing sources on the property.

Applicant Douglas Wilkins, Anderson & Krieger LLP and Jacqui Swenson, K.J. Wireless were present. Abutters, Mr. & Mrs. Kevin Deslongchamps 608 North Road, Mr. Dennis Orzechowski 55 Halls Mill Road and Mr. Mike Davis 59 Halls Mill Road were present.

Chair Chivers said this was not a continuance of the public hearing. The public hearing was closed at the last meeting on August 25, 2009. After closing the public hearing the Board considered the two applications. The consensus of the Board was that neither the variance nor the special exception be approved. The Board was in agreement to draft a decision and appoint I. Byrd and J. Szot to draft the Notice of Decision. Chair Chivers also helped in drafting the Notice of Decision. The draft was then given to Town Counsel to review for any corrections, amendments or suggestions. The final draft was received back on Friday September 18th and mailed to the Board members with a note to consider it before the meeting tonight. He explained that tonight the Board would vote on the area variance and the special exception after discussion of the final draft.

Variance Section 6.01 G

Chair Chivers read into record from the draft:

“B. AREA VARIANCE

Having considered the evidence contained in the record, the Board concludes that AT&T has not satisfied its burden of proving that it is entitled to an area variance for its proposed telecommunications tower.

In order to receive a variance, it is the applicant's burden to prove that:

1. *the variance will not be contrary to the public interest;*
2. *special conditions exist such that literal enforcement of the ordinance results in unnecessary hardship;*
3. *the variance is consistent with the spirit of the ordinance;*
4. *substantial justice is done; and*
5. *granting the variance will not diminish surrounding property values.*

First, the Board finds that the evidence does not support a finding that granting AT&T a variance will not be contrary to the public interest. In evaluating this criteria, the ZBA inquires whether the variance unduly, and in a marked degree conflicts with the ordinance such that it violates the ordinance's basic zoning objectives. One way to ascertain whether granting the variance would violate basic zoning objectives is to examine whether it would alter the essential character of the locality. Another approach to determining whether granting the variance would violate basic zoning objectives is to examine whether granting the variance would threaten the public health, safety or welfare.

The Purpose of the Town's Zoning Ordinance includes, among other things:

To provide for the orderly and planned growth of our Town;

To promote health and general welfare;

To provide adequate light and air; to prevent the overcrowding of land;

To provide architectural standards for development or renovation of commercial, industrial and institutional structures that ensure an esthetically pleasing structure that compliment the traditional New England heritage of Candia.

Town of Candia Zoning Ordinance, Article I, Section 1.02.

AT&T seeks an area variance from the tower setback provision in the Zoning Ordinance. This provision states

No buildings, roads or driveways that are not part of the tower site shall be built within 150% of the height of any tower that is located in any zone. Towers must be set back a distance equal to 150% of the height of the tower from any unaffiliated structure, parking areas or lots, driveways, roads, developed areas or property lines.

Town of Candia Zoning Ordinance, Article VI, Section 6.01 (G). It is noteworthy that the State's small wind energy system statute also permits municipalities to impose tower setback requirements of up to 150% of the tower's height.

The evidence in the record shows that fall zone of the proposed 180' tower would include parts of abutting properties and even one structure (garage) on one lot. As a result, the Board finds that the proposed tower would violate basic zoning objectives by altering the essential character of the area given its close proximity to nearby properties. Further, because some of the abutting properties are owned and occupied, the Board finds that granting a variance in this circumstance would violate basic zoning objectives by potentially threatening the safety and welfare of these nearby residents. The ZBA acknowledges that AT&T submitted a report stating that the tower would be designed so that it would essentially break in the middle and not fall over completely, but that is not a guarantee that the tower could not fall over completely one day. For the reasons just recited, the Board also finds that the evidence does not support a finding that an area variance for this tower would be consistent with the spirit of the zoning ordinance."

Chair Chivers stopped at this point and asked for input from the Board. F. Albert, J. Szot, I. Byrd and A. Soares said they did not have anything to add.

J. Szot **motioned** to accept the first finding as stated concluding that granting the variance would be contrary to the public interest and would not be in the spirit of the ordinances. F. Albert **seconded**. **All were in favor.**

J. Szot read the following into record:

"Second, the ZBA does not find that AT&T has satisfied its burden of proving that it will experience an unnecessary hardship if the area variance is denied. Specifically, AT&T has not shown that the zoning restriction interferes with the applicant's reasonable use of the property, considering the unique setting of the property in its environment.

The evidence does not support a finding that the restrictions imposed upon AT&T are the result of some unique conditions of the property as opposed to the area in general. When considering an area variance for a telecommunications tower, the ZBA focuses on the various characteristics of the applicant's chosen property to determine whether that site is unique in the sense that there are no

alternative sites capable of meeting the applicant's telecommunications coverage needs. Here, AT&T has conceded that there are other properties in town that it could use for its facility that would provide comparable coverage to the area and provide less of an impact to surrounding neighborhoods. As a result, the Board finds that the evidence does not support a finding that the area variance is needed due to any unique conditions of the property. Moreover, AT&T has conceded that it would be able to locate a smaller, 100-foot, tower on the property, which would not require an area variance. Thus, AT&T can achieve its objective without the need for an area variance. As a result, the Board finds that AT&T has failed to demonstrate that denial of its area variance request would result in an unnecessary hardship."

Chair Chivers stopped and asked for input from the Board. F. Albert, J. Szot, I. Byrd and A. Soares said they did not have anything to add.

I. Byrd **motioned** to accept the second finding as stated concluding that there would not be any unnecessary hardship. A. Soares **seconded. All were in favor.**

I. Byrd read the following into record:

"Third, for the reasons explained with respect to AT&T's special exception request, the ZBA finds that the evidence does not support a finding that granting AT&T an area variance will not cause a diminution in surrounding property values."

Chair Chivers stopped and asked for input from the Board. F. Albert, J. Szot, I. Byrd and A. Soares said they did not have anything to add.

I. Byrd **motioned** to accept the third finding as stated concluding that there would be diminution in surrounding property values. A. Soares **seconded. All were in favor.**

A. Soares read the following into record:

"Fourth, the Board finds that granting the requested area variance will not result in substantial justice. To prove substantial justice, the applicant must prove that the harm it will suffer in not receiving its variance outweighs the benefit to the public in denying the variance. As the evidence illustrates, there is little, if any, harm that will be caused to AT&T if this variance is denied since it has the ability to locate a telecommunications tower at another site that will meet its coverage needs and not pose the same threat to abutting properties. Thus, any claimed harm that AT&T will sustain does not outweigh the benefit to the surrounding neighborhood."

Chair Chivers asked for input from the Board. F. Albert, J. Szot, I. Byrd and A. Soares said they did not have anything to add.

A. Soares **motioned** to accept the fourth finding as stated concluding that granting the variance would not result in substantial justice. I. Byrd **seconded**. **All were in favor.**

Chair Chivers said that the fifth criteria “the variance is consistent with the spirit of the ordinance” was covered in the first finding. The Board was in agreement it was covered in the first finding and voted on.

J. Szot **motioned** to deny the area variance under Section 6.01 G for the reasons stated above. I. Byrd **seconded**. **All were in favor.** Chair Chivers stated the area variance for the 180’ Tower has been denied.

Special Exception Section 5.02 D d-1

J. Szot read into record the following:

“A. SPECIAL EXCEPTION

Having considered the evidence contained in the record, the ZBA concludes that AT&T has not satisfied its burden of proving that it is entitled to a special exception for its proposed tower.

In order to receive a special exception in the Town of Candia, the applicant must satisfy the following conditions:

- 1) Standards provided by this Ordinance for the particular use permitted by Special Exception;*
- 2) No hazard to the public or adjacent property on account of potential fire, explosion or release of toxic materials;*
- 3) No detriment to the property value in the vicinity or change in the neighborhood on account of the location of scale of building and other structures, parking areas, access ways, odor, smoke, gas, dust, or other pollutant, noise, glare, heat, vibration, or unsightly outdoor storage of equipment, vehicles or other materials;*
- 4) No creation of a traffic safety hazard or a substantial increase in the level of traffic congestion in the vicinity;*
- 5) No excessive demand on municipal services, including, but not limited to water, sewer, waste disposal, police and fire protection, and schools;*
- 6) No significant increase of storm water runoff onto adjacent property or streets.*

Town of Candia Zoning Ordinance, Article 13, Section 13.02. It is the applicant’s burden to present sufficient evidence to support a favorable finding on each of the special exception requirements. In addition, there must be sufficient evidence before the ZBA to support favorable findings on all of the ordinance's requirements.

The ZBA finds that there is insufficient evidence to support a finding that AT&T's proposed telecommunications tower will not be a detriment to the property value in the vicinity or change in the neighborhood on account of the location of scale of building and other structures, parking areas, access ways, odor, smoke, gas, dust, or other pollutant, noise, glare, heat, vibration, or unsightly outdoor storage of equipment, vehicles or other materials.

First, the evidence does not establish that the presence of the proposed tower will not be a detriment to some nearby property values. The evidence, in the form of photographed simulations and balloon tests, as well as visibility studies, reveals that the proposed 180-foot tower will be visible from some nearby residences. The ZBA also took a view of the proposal from property owned by abutters Kevin and Deborah Deslongchamps and notes that the tower, as proposed, appears to be much more of a visual detriment when on-site as opposed to reviewing photographed simulations. The ZBA reaches this conclusion based upon its experience in observing the proposed site from various areas of the Deslongchamps' property that were not captured photographically.

Two real estate studies were also submitted to the ZBA, one of which was prepared specifically for the Board on an independent basis. Although both studies concluded that the presence of a tower would not have any detrimental effect on surrounding property values, the Board has scrutinized these studies and finds that the data contained in the reports does not support the conclusions reached. For the purposes of this decision, the Board finds that the data provided in the independent report, prepared by Fremeau Appraisal, Incorporated, illustrates this point and actually provides evidence that the proposed tower will cause a detriment to property values. In the Fremeau report, the data reveals that in many instances the sale price of residences was well below the equalized value of the particular home. Further, the report states that with some of the properties, as many as 50% of prospective buyers were not interested in purchasing the property due to its proximity to a telecommunications tower. In addition, the data in the Fremeau report shows that most of these properties stayed on the market much longer than the average for that particular area.

Based upon the information provided in the Fremeau report, and the ZBA's own knowledge after having physically examined the area, the Board finds that the evidence is insufficient to establish that AT&T's proposed tower will not be a detriment to nearby property values. The Board recognizes that a radio tower is currently located on the property and has been in place for many years. The evidence, which again includes the ZBA's own observations, shows that this radio tower is considerably smaller in scale than the proposed tower and does not have the additional compound to house the various equipment that is customarily connected to telecommunications towers."

Chair Chivers opened the first finding for discussion. F. Albert, A. Soares and J. Szot did not have anything to add. I. Byrd asked to replace "tower" with "antenna" where there is reference to the existing structure. She said the existing structure is a personal radio antenna as noted in Notice of Decision dated 4/25/1990. The board was in agreement.

A. Soares **motioned** to accept the findings with the amendment of "tower" to "antenna" in areas that the existing structure is noted. I. Byrd **seconded. All were in favor.**

I. Byrd read into record:

"Second, the Board finds that the evidence is insufficient to establish that the proposed tower would not result in a change to the neighborhood on account of its location, scale, and noise. As the record shows, the proposed tower will be as close as 134 feet to the nearest boundary line. Based upon the visibility studies presented, and the ZBA's own observations, the evidence shows that the proposed tower will have an adverse impact on the aesthetic quality of the surrounding neighborhood.

The evidence also shows that this tower will be surrounded by a compound that is approximately 75 feet by 75 feet in area. This compound will house additional equipment for the tower such as air conditioning (HVAC) units and emergency generators. AT&T has provided the ZBA with two noise studies analyzing the possible levels of noise that may be generated at the compound. These studies analyzed the noise caused by HVAC units and emergency generators separately. With respect to HVAC units, the report stated that two units operating could generate up to 46 decibels at the nearest property line. Emergency generators would be louder, and one unit is said to generate up to 57 decibels at one boundary line and two generators could generate up to 60 decibels. The reports provide that the noise levels of both forms of equipment, separately, would be around the decibel level of a suburban area in the daytime.

The Board finds that the potential noise that may be generated from a compound at the proposed location would change the surrounding neighborhood. While there is no State statute addressing local review of telecommunications towers, the Board finds recent State legislation addressing small wind energy systems to serve as a useful guide in evaluating the reasonableness of noise levels generated at a site. Pursuant to the small wind energy system statute, local zoning ordinances would not be considered unreasonable if they set noise limits on such uses to 55 decibels or higher from the nearest boundary line. Here, the emergency generators would surpass that noise limit regardless of whether one unit was running or multiple units are running. Finally, the Board finds that these noise studies are incomplete, in that they do not attempt to measure the combined noise level of the HVAC units and emergency generators together. As a result, it is reasonable to infer that the noise from the HVAC units and emergency generators operating simultaneously will generate more noise than what was reported in the noise studies.

The Board understands that the intention of AT&T is to run these generators for very brief periods of time for testing purposes only, but the Board must also take into account the possibility that these units will be used more extensively at times due to emergencies and power outages. Moreover, because collocation on an existing telecommunications tower is required, the Board must also take into the account the possibility of more HVAC units and generators being located at the site in the future to support additional carriers.

As a result, the Board finds that the evidence is insufficient to establish that the proposed tower would not result in a change to the neighborhood on account of its location, scale, and noise.

While the Board understands that AT&T has expressed a willingness to reduce the height of its tower from between 150 to 100 feet, the Board finds that the evidence submitted is insufficient to establish whether a shorter tower would eliminate some, or all, of the problems outlined above. Moreover, while shorter towers may arguably minimize aesthetic impacts to nearby property owners, AT&T suggested that it may be less likely that other telecommunications companies will want to

collocate on a shorter tower, which could result in the need for more towers throughout town, thereby raising additional aesthetic concerns in other parts of town.”

Chair Chivers asked if there was any discussion on the findings. A. Soares, F. Albert, J. Szot and I. Byrd did not have anything to add.

J. Szot **motioned** to accept the findings as stated that there would be a change in the neighborhood on account of scale, noise, and location. I. Byrd **seconded. All were in favor.**

Chair Chivers said that in order for the applicant to be granted a special exception they must meet all 5 criteria. The applicant has failed to satisfy 2 criteria that were just discussed. For that reason the Board cannot grant a Special Exception.

I. Byrd **motioned** to deny the Special Exception under Section 5.02 D, d-1 for the reasons stated. A. Soares **seconded. All were in favor.** Chair Chivers said the Special Exception is denied.

D. Wilkins asked for a copy of what the Board read from. Chair Chivers said they read from a draft and that the applicant will receive a NOD by mail in its final form. Abutters Mr. & Mrs. Kevin Deslongchamps, 608 North Road, Dennis Orzechowski, 55 Halls Mill Road and Mr. Mike Davis, 59 Halls Mill Road requested a copy of the NOD to be mailed to their homes.

Chair Chivers said the applicant can apply for a re-hearing within 30 days of the Notice of Decision. For the applicant to be granted a re-hearing they must present new information that has not been heard before and if denied the re-hearing they can then go to the Superior Court. D. Orzechowski asked how they would know if AT & T pursued a re-hearing. Chair Chivers said that they would not receive written notice.

Chair Chivers thanked D. Wilkins for his patience in this matter.

Case #09-574 Applicant: Cher Griffin 174 Raymond Road, Candia NH 03034; Owner: same; Map 405 Lot 409-105-1; For a Variance Section 8.06: Size Restrictions – Commercial, light Industrial to erect a 41.8 sq foot sign in addition to a Purina on the sign support. Cher Griffin both owner and applicant was present. Public noticing was given. All abutters were notified and none were present. Chair Chivers summarized the 5 reasons the Building Inspector refused her building permit: 1. No site plan was provided to show the location of the sign. 2. The sign location appears to be located in the State right away. 3. The sign permit does not show location, size and illumination. 4. Drawings show a 41.8 sq foot sign which exceeds the 40 sq ft maximum allowed. 4. The height proposed is 14' which exceeds the 10 foot maximum allowed.

C. Griffin said the original site plans signed by the Planning Board did not have the sign location included. She explained the drainage swale had to be installed before a location for the sign could be determined so that is why the sign location is not on the signed plans. C. Griffin said she had submitted a revised site plan showing the sign location. The revised site plan was in the file. The Board examined the site plan and found the setback not to be sufficient. Chair Chivers asked how much the land sloped from the road. C. Griffin said from the pavement it is a 3.6 foot elevation drop.

C. Griffin said she had changed the 41.8 sq ft sign and submitted a 40 sq ft sign plan. Chair Chivers said all paperwork submitted showed a 41.8 sq ft sign so the Building Inspector had no choice but to send the applicant to the Zoning Board for a variance. C. Griffin said that she had told the sign company she needed a 40 sq ft sign plan. She said all she needed relief from was the 14' sign.

C. Griffin said the reason the sign was set at 14' was for safety reasons, because the land slopes down and if left at 10' pickups would have the corner at sight level.

Chair Chivers said once the plans are revised to show a 40 sq feet sign, the only issue will be the height. He said the ZBA is not involved with the height issue. J. Szot advised her to write a letter to the Planning Board requesting a waiver for the height of the sign. She said the Planning Board has the right to grant waivers at their meetings.

C. Griffin withdrew her application as it was no longer necessary and said she would write a letter to the Planning Board requesting a waiver for a 14' sign. She said she would have the site & sign plans revised.

Chair Chivers asked the secretary after the applicant left to contact her to make sure when she contacts her engineer for new site plans, to make sure the sign meets the setbacks which includes the edge of the sign.

Other Business

October 22, 2009 is the next scheduled Zoning Board of Adjustment meeting.

F. Albert **motioned** to adjourn at 8:05 p.m. A. Soares **seconded**. **All were in favor.**

Respectfully submitted
Sharon Carrier
Recording Secretary