

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

Present: Boyd Chivers, Chair; Frank Albert, Vice Chair; Judith Szot; Ingrid Byrd; Ron Howe; Amanda Soares, Alternate

Absent:

Chairman Chivers called the meeting to order at 7:00 p.m.

Approval of Minutes

F. Albert **motioned** to accept the minutes of September 22, 2009 as amended I. Byrd **seconded**. B. Chivers, F. Albert, J. Szot, I. Byrd **were in favor**. R. Howe **abstained**. The following amendments were made:

- Page 9, 3rd paragraph from the bottom add “height” after “14’ sign”.
- Page 10, 3rd paragraph: remove “R. Howe” and replace with “A. Soares”

Request for Re-Hearing Case 09-567

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 than 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.

Jacqui Swenson from K.J. Wireless and Adam Kurt from Anderson & Kreiger, LLP were present.

Chair Chivers summarized the case and the reason why the Board is meeting today, Thursday October 22, 2009 instead of Tuesday October 27th. On August 25th, the Board developed a consensus on how to rule on the case and appointed a committee to seek counsel advice. The committee returned with draft decision on September 22, 2009 to formally discuss and vote on. AT & T wasn’t sure if the decision was final in August so to protect themselves they filed a request for a rehearing which was received September 23, 2009 based on the August 25th hearing. The Board is required by law to either grant a rehearing or not grant a rehearing within 30 days which meant a meeting had to be held before October 27th the regular scheduled meeting and that is why the Board is meeting tonight.

The Board unanimously rejected the application on September 22, 2009. Chair Chivers said the NOD was signed and mailed on September 23, 2009. The applicant received the NOD and filed an amended request for rehearing on October 9th. Technically the Board has 30 days from October 9th to consider the amended request for rehearing. Chair Chivers said there is no point waiting until November 9, 2009 which is only two weeks away.

Chair Chivers said all the Board members were sent a copy of the September 23, 2009 request for rehearing and the October 9, 2009 amended request for rehearing. The Board members said they had read both requests. Chair Chivers said there were more reports and minutes in the October 9, 2009 request and it included comments from the applicant on the NOD dated September 23, 2009.

Chair Chivers said that before they continue, that R. Howe was not present for the vote on September 22, 2009. There was discussion whether A. Soares who sat for R. Howe on September 22, 2009 and voted should sit and consider the request for rehearing tonight. It was the consensus of the Board to have A. Soares sit and hear the request since she had voted on the decision that was made on September 22, 2009. R. Howe was in agreement. Chair Chivers asked for the record if A. Soares had received and read both requests for rehearing and she has and is prepared to sit and cast her vote.

Chair Chivers said the question before the Board is whether the applicant raised any new issues or new information that has not been properly discussed. A. Soares said she felt the applicant did not raise any new issues. She noted the applicant had done a noise study on October 6th that was in the amended request. She felt the numbers presented would not change her decision. She said looking through everything she felt there weren't any changes significant enough to change her position.

I. Byrd agreed with A. Soares and said the Board would have had to make a grievous error to grant a rehearing and the Board has not

F. Albert said after reading the request he felt the point about the impact of the existing tower was missed. He said the Board discussed the tower impact on the neighborhood versus no tower when in fact there is an antenna present. He felt a 150' tower would not be seen above the tree line. He said the proposed tower would include local emergency service, receive regular maintenance, the proposed tower is stronger and less likely to collapse than the existing tower, and that the proposed tower is shorter and less visible. F. Albert said he can only conclude the proposed tower is an improvement over the existing tower. He said if no tower was present to begin with, he would feel differently and continued if he had thought about it in that light he would have not voted the way he did.

J. Szot said she disagrees with F. Albert. She read from the ZBA handbook Part 4 p. 53 *"Therefore no purpose is served by granting a rehearing unless the petitioner claims that technical error has been made to his detriment or he can produce new evidence that was not available to him at the time of the first hearing. The evidence might reflect a change in conditions that took place since the first hearing or information that was unattainable because of the absence of key people. The rehearing is geared toward the proposition that the Board should have the first opportunity to correct any action if correction is necessary before an appeal is filed."*

J. Szot said there is a large difference in the two structures. One is a slender residential CB tower compared to a larger triangular structure with large receivers that are mounted on the top. She said pictures with balloons do not do properly show what the antenna will actually look like. The site walk gave a much better view. She said there is nothing to be served, there is no new evidence. The decision the Board has made was based on information presented. She said it is unfair to all the people who came to all of the meetings to now say the tower won't look so bad and grant a rehearing. J. Szot reiterated the applicant said they picked the location because of the existing antenna. She said the applicant continually keeps calling it a cell tower. The existing tower emits short wave transmission and is a residential accessory use private CB antenna and there is no comparison to a commercial tower. It is like comparing apples and oranges. She said the applicant had other options. J. Szot felt that additional studies would not change her decision.

F. Albert said he agreed with J. Szot that you cannot compare the two and reiterated that the existing tower is present and has impact.

I. Byrd asked J. Szot to reread what she read from the ZBA handbook RSA 677. She felt the Board did not make a technical mistake and that everything that was brought forth was considered. The Board conducted a site walk and they extended time when necessary. She said granting a rehearing does not serve any purpose. She said the ZBA's duties are very clear, was there a technical mistake or was something not considered that was brought to the Board? I. Byrd said everything was considered and the Board did not err.

A. Soares said there is a special exception for the existing CB tower as a residential accessory use case 284 dated April 25, 1990. I. Byrd said the Master Plan has many mistakes including identifying 606 North Road as a cellular communications tower. She said the applicant's argument is based on the fact that the existing tower is a commercial communications tower. A. Soares said the Master Plan is an ever-changing document and is continually being worked on and revised every 4-5 years. She said this is a basis of their challenge which has been already adequately considered. There is a legal document stating the antenna is not a commercial cell tower.

Chair Chivers said the applicant raises an argument regarding lack of minutes for site walk 8/11/09. I. Byrd said she took minutes but were not long, she listed people, times they arrived and left. She said the Board looked at the site and checked the garage. She said they noted how visible everything from the deck and the kitchen was. She said she had contacted the secretary the next day to transcribe her verbal notes.

Chair Chivers said there is a clear parameter on what constitutes a reason to grant the applicant a rehearing and they are found in RSA Chapter 677 Rehearing and Appeal Procedures that govern rehearing procedure. He said the applicant met all time lines. Chair Chivers read from RSA 677:6 Burden of Proof, *“The trial court’s review is not to determine whether it agrees with the zoning board of adjustment’s findings, but to determine whether there is evidence upon which they could have been reasonably based; the court thus may not review the evidence de novo.”*

Chair Chivers asked the Board the question if this ends up in Superior Court is the evidence upon which their findings were reasonable based. J. Szot said she was in agreement that the findings were reasonably based and the ZBA did not err. A. Soares and I. Byrd were in agreement. F. Albert reiterated that the existing tower is present and it’s impact was not discussed. He also said the Board did not accept the applicant’s reports findings. Chair Chivers said the Board can decide to accept or deny the applicant’s evidence. Chair Chivers said regarding the expert witnesses on an appraisal report their own data stated that properties took longer to sell with an average of 80% of the market value and that certainly affects a seller financially. It was concluded the Board considered all that was presented.

Chair Chivers said the vote was unanimous last month. He said he realizes that F. Albert has second thoughts but it is now too late to argue the point. He has already voted unanimously to deny the application.

Chair Chivers read under RSA 677:6, *“The trial court, in reviewing the decision of a zoning board of adjustment, is limited to the determination of whether, on the balance of probabilities, the decision made is unlawful or unreasonable”* He asked the Board if the decision they made last month was unlawful or unreasonable. A. Soares, I. Byrd, B. Chivers and J. Szot said the decision was not unlawful or unreasonable.

R. Howe asked to speak. I. Byrd said he is a private citizen and public input is not taken. The discussion is between the Board members. J. Szot said it is a public meeting not public hearing.

Chair Chivers asked the Board if they were was any more discussion. Hearing none accepted a motion by I. Byrd.

I. Byrd **motioned** based on the points of Law that would permit a rehearing, the Board finds they have not erred in its decision and denies the request for the rehearing. A. Soares **seconded**.

Chair Chivers, J. Szot, I Byrd, F. Albert and A. Soares had no comments or discussion.

B. Chivers, J. Szot, I Byrd, and A. Soares **were in favor**. F. Albert was **opposed**. **Motion carries 4-1**.

Chair Chivers told the applicant their request for rehearing had been denied.

Other Business

It was the consensus of the Board that the meeting on October 27, 2009 be cancelled due to lack of applications.

November 24, 2009 is the next scheduled Zoning Board of Adjustment meeting.

I. Byrd **motioned** to adjourn at 7:50 p.m. A. Soares **seconded**. **All were in favor**.

Respectfully submitted
Sharon Carrier
Recording Secretary

Counsel co