

APPROVED
CANDIA ZONING BOARD OF ADJUSTMENT
MINUTES OF September 28, 2010

Present: Boyd Chivers, Chairman; Judith Szot, Vice Chairman; Frank Albert, Ron Howe; Ingrid Byrd; Amanda Soares, Alt; D. Lewis, Road Agent; Dean Young, Fire Chief; Carlton Robie, Board of Selectmen.

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

Approval of August 24, 2010 Minutes

J. Szot **motioned** to accept the minutes of August 24, 2010 as presented. I. Byrd **seconded**. **All were in favor.**

Case 10-582 Applicant: Brian & Lisa McKenna 563 Chester Turnpike, Candia, NH 03034; Owner: Same; Map 404 Lot 22; For a variance under Section XI 6.02: Table of Dimensional Requirements: to permit construction of a family room within the front setbacks.

Brian & Lisa McKenna were present. Chair Chivers asked if the abutters had been notified and they were notified and none were present. Brian McKenna came forward to explain the family room addition. He said he wanted to construct the family room at 46' from the front setbacks in between the barn and the house. The applicant explained he could not go back another 4' because he would lose the entrance of family room into the main house. The main house predates zoning at over 200 years old and is 30' from the front setbacks. Chair Chivers said the Building Inspector did not find any other violations. I. Byrd said the original house is further into the setbacks so this addition would not make it any worse.

Chair Chivers asked if there were any more questions and seeing none closed the public hearing to deliberate the case. Hearing no deliberation, Chair Chivers read into record: *"14.02 C. Variances: The Board of Adjustment shall hear and decide requests for variances from the terms of this Ordinance. No variance may be granted unless ALL of the following criteria are met:*

1. No diminution in the value of surrounding property would be suffered."

It was the consensus of the Board there was no diminution in value.

"2. Granting of the variance would be of benefit to the public interest."

It was the consensus of the Board granting the variance would be of benefit to the public interest.

"3. Denial of the variance would result in unnecessary hardship to the owner arising out of special conditions affecting the land and/or buildings that distinguish the property from other similarly restricted property in the area."

It was the consensus of the Board a denial of the variance would result in unnecessary hardship.

"4. Granting the variance would result in substantial justice."

It was the consensus of the Board granting the variance would result in substantial justice.

"5. The use will not be contrary to the spirit of the Ordinance."

It was the consensus of the Board the use would not be contrary to the spirit of the ordinance.

I. Byrd **motioned** to grant the variance as requested under Section 6.02 to allow construction of the family room within 46' of the front setbacks. F. Albert **seconded**. **All were in favor**. Mr. & Mrs. McKenna thanked the Board for their time.

J. Szot **motioned** to adjourn the public hearing at 7:15pm. I. Byrd **seconded**. **All were in favor**.

Chair Chivers open the public meeting at 7:16pm.

Chair Chivers explained the first case was a public hearing, where the public is permitted to participate and give testimonies. The next case is a public meeting where no input from abutters or the applicant is allowed. The Board has received all the information on case 09-567 and a NOD was made on September 23, 2009. The public is welcome to be present and to watch the Board conduct its business.

Case 09-567 has been remanded back to the Town of Candia to consider the three remaining proposals: 150, 115, and 100 foot towers by the US District Court, Civil Court Case No. 09-CV-387-SM dated August 11, 2010. 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 V 5.02(D, d-2), Section XII 12.02C and Section VI 6.01(G) To permit a wireless communication facility in a Residential ® District. Douglas Wilkins, Anderson & Kreiger and Jaclyn Swenson, KJK Wireless were present for the applicant. All abutters were present.

Chair Chivers started the public meeting by summarizing the case. On September 23, 2009 the board denied the applicant’s request for a special exception and variance to construct a 180’ tower at 606 North Road. The applicant challenged the decision in the US District Court under the Federal Telecommunications Act. There was a hearing in June 2010 where our counsel and AT & T’s counsel were present with Judge Steven McAuliffe presiding. The judge took respective positions under consideration and in August issued his decision. The Federal Court’s decision sent the case back to Candia to consider the alternative towers that were proposed at the same time the Board was considering the 180’ tower. The Board only considered and voted on the 180’ tower but under the Federal Telecommunications Act the Board was to consider all alternatives at the same time.

Chair Chivers continued that the Court upon examining the written decision found fault at how the Board arrived at the decision. They found that the Board does not have the authority to challenge the appraisal report the applicant submitted showing no diminution of value of surrounding properties. The Board concluded there was diminution of value of surrounding properties from facts presented in report submitted.

The Court also found that some of the Board’s reasoning in decision was irrelevant for example the factor on noise. The Court also said the Board did not consider the impact to the surrounding community with the removal of the current antenna.

Chair Chivers said the court remanded the case back to Candia with the implied order to approve a tower. Chair Chivers said it is up to the ZBA to carry out the Court’s order and consider the alternatives the applicant has proposed. All 4 proposals required a special exception. 3 of the 4 options proposed required a variance because the 150% fall zones falls on other properties. Only the 100’ tower does not require a variance. Chair Chivers said the Board understood the applicant said they would be satisfied with a 100’ tower but this could lead to another tower.

F. Albert said any of these towers would be an improvement over the existing antenna and supports the 100’ tower. R. Howe was in agreement that the 100’ tower satisfies the neighborhood as best it can and satisfies the legal demand. J. Szot said AT & T represented to the Board the different heights that they could use so they cannot comeback and say the 100’ tower doesn’t work. She said the applicant admitted they chose the site because of antenna and right from the beginning no other site was going to satisfy the applicant. She said replacing the

18" antenna with 18' cell tower is no comparison. The Board would have liked to see pictures from abutters with these towers with huge arrays on them showing the difference from the antenna to a cell tower. I. Byrd said if the Board does not approve a tower the courts will and she said she would rather have a say in how the Town is developed and was in agreement with the 100' tower with conditions. Chair Chivers agreed with the other Board members.

Chair Chivers read each special exception standard into record: "Section 14.02: Special Exception Standards. *Special exceptions shall meet the following standards: 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;*" The Board previously found there was no hazard and is still in consensus there is no hazard. Chair Chivers said the next criteria is the criteria the Board based the rejection on. "*3. No detriment to property value in the vicinity or change in the neighborhood on account of the location or scale of buildings 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;*" Chair Chivers said in light of the Court's order the Board cannot use the basis of property value detriment to reject this criteria. J. Szot said the applicant could use batteries instead of a generator and this can be made a condition. It was the consensus of the Board there is no detriment. "*4. No creation of a traffic safety hazard or a substantial increase in the level of traffic congestion in the vicinity;*" The Board previously found there was no traffic issue and it still in consensus there is no traffic issue. "*5. No excessive demand on municipal services, including, but not limited to water, sewer, waste disposal, police, and fire protection, and schools;*" The Board previously found there was no excessive demands and is still consensus there are no excessive demands. "*6. No increase in storm water runoff onto adjacent property or streets.*" The Board previously found there was no increase in run off and is still in consensus there is no increase in run off.

Chair Chivers said the applicant now meets the requirements of 14.02 Special Exceptions Standards. The Board was in agreement. The 100' tower does not need a variance. The 115', 150' & 180' towers require a variance. It was the consensus of the Board since the applicant said they could use any of these towers that the Board will grant the 100' tower. Chair Chivers said the applicant would fail the variance criteria for a tower any higher then 100' as they cannot show a hardship and stated the applicant said other sites nearby gave same coverage and a variance was not needed for these sites.

Chair Chivers read the conditions compiled for the tower. The single tower will not exceed 100 feet in height, including all equipment with no guy wires. The existing radio antenna located on the property must be completely removed prior to the construction of the tower. Batteries shall be used in place of diesel generators to supply the tower with emergency power. No lights shall be used on the tower. Site plan approval must be given prior to construction.

There was a discussion on vegetation buffer around the compound. R. Howe said what ever is existing, will be taller then anything planted. There was a discussion requiring the land owner not to clear. R. Howe asked if this was something the Planning Board would make more specific when a site plan came forward and it is. J. Szot suggested that some vegetation be put in place for a buffer. F. Albert was in agreement. I. Byrd discussed including the condition no other towers would be constructed on the site.

F. Albert **motioned** to approve 100' tower with the following conditions 1. The single tower will not exceed 100 feet in height, including all appurtenant equipment with no guy wires.

2. The Tower will be designed and constructed as a monopole. 3. The existing radio antenna located on the property must be completely removed prior to the construction of the tower. 4. Batteries shall be used in place of diesel generators to supply the tower with emergency power. 5. No lights shall be used on the tower. 6. Site plan approval must be given prior to construction. 7. Decision to be recorded in the Rockingham County Registry of Deeds. I. Byrd **seconded. All were in favor.**

Chair Chivers addressed the public and said that once the NOD is written anyone that has been aggrieved by the decision has 30 days to apply to the Board for a re-hearing. The Re-hearing must have new facts not previously considered by the Board to be granted a rehearing. If the rehearing is denied then you have 30 days to go to the Superior Court in Rockingham County where the case will be heard there. Chair Chivers thanked the audience for coming.

J. Szot **motioned** to close the public meeting and reopen the public hearing at 7:45pm. F. Albert **seconded. All were in favor.**

Other Business

Approval of Non-Public Minutes September 2, 2010

J. Szot **motioned** to accept the non public minutes of September 2, 2010 as amended. F. Albert **seconded. All were in favor.** R. Howe abstained.

I. Byrd requested that the variance and special exception criteria be typed out and laminated and copies made for the Board. J. Szot said she can have them laminated.

The next scheduled Zoning Board of Adjustment meeting is October 26, 2010.

J. Szot **motioned** to adjourn at 8:15 p.m. R. Howe **seconded. All were in favor.**

Respectfully submitted
Sharon Robichaud
Recording Secretary