

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

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

Chairman Chivers called the public meeting to order at 7:00 p.m. immediately followed by the Pledge of Allegiance.

Approval of November 23, 2010 Minutes

J. Szot **motioned** to accept the minutes of November 23, 2010 as amended. I. Byrd **seconded. All were in favor.** The following amendments were made: Page 2, 4th paragraph from the bottom add "where" after tower, last paragraph add "the Board" after mean, Page 4, 1st paragraph add "a" after in, 2nd paragraph, 5th line change "the" to "they", 6th line remove "with", 11th line remove "is" after sign, 4th paragraph, 2nd line change "closet" to "closest", 6th line add "3" after exit, 8th line change "visibly" to "visibility", Last paragraph capitalize Lane, page 5, 6th paragraph correct spelling of Howe, page 6, 3rd paragraph add "He showed a picture of the Jumbo Tron", 5th paragraph change "endure" to "ensure".

Case 09-567 Rehearing against NOD dated 9/28/2010 for use of generators only; 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 Original 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. Ann Robbins from Anderson & Keriger LLP and Kenneth Kozyra, KJK wireless were present. Abutters, Mr. & Mrs. Kevin Deslongchamps, 608 North Road Candia NH 03034, Dennis Orzechowski, 37 Arthur Ave, Manchester NH 03104 and Mr. & Mrs. Michael Davis, 59 Halls Mill were present.

Chair Chivers began by summarizing the case. AT & T originally applied for a Special Exception and Variance to construct a 180' tower. At the same time the applicant proposed 3 alternatives; 100', 110' and 150' cell towers. It was acknowledged by AT & T that these heights would meet their coverage needs. The Board found no basis for a Special Exception or Variance for the 180' and denied their request. AT & T brought suit against the Town of Candia through the Federal Telecommunications Act. The case was heard in the United States Federal Court wherein the Judge issued an order dated August 11, 2010 remanding the case back to Candia to consider the remaining alternative height proposals, 100', 115' and 150'. The Zoning Board of Adjustment reviewed the remaining alternatives and approved a 100' cell tower subject to 8 conditions. AT & T questioned those conditions and asked the Federal Court to grant a summary judgment to approve a 150' cell tower and amend condition #4 that batteries are to be used in place of a diesel generator for emergency back up power. Chair Chivers said it was represented in the Federal Court hearing in June of 2010 that AT & T could use batteries for back up power and that they did not need a diesel generator. Chair Chivers said the counsel and Board took that to mean they did not need a standby diesel generator so the Board made that a condition of the approval. It turned out that the information was wrong or misinterpreted and, in fact, they do need a standby diesel generator. The Federal Court sent the case back to Candia to reconsider the 115' & 150' cell towers and condition #4 regarding the use of a diesel generator as back up power.

The Board at the last meeting agreed to rehear this case with respect to condition #4 only on whether to delete the requirement that only batteries are to be used for back up power.

Chair Chivers said for the purpose of fully complying with the Federal Court's order this Board must also now reiterate its position with respect to the other tower heights. The Federal Court doesn't feel Candia has fully complied with the order by not addressing in writing the other heights. Chair Chivers said he felt the Board had complied and, by approving the 100' cell tower, that the Board did not have to consider the other heights of 115' and 150'. Chair Chivers said it turned out the Board was wrong and the Federal Court wants the reasoning on why the Board did not consider the other heights in writing.

Chair Chivers said the hearing tonight is in two parts. The first part is to respond to the Federal Court on the alternative tower heights by reiterating the Board's position with respect to the 115' and 150' cell tower heights. The second part of the hearing will be on the diesel generator issue.

Chair Chivers said for the purpose of clarifying the Board's intent to comply with the order from the United States Federal Court the Board has to explain in writing why they approved the 100' cell tower and did not approve either the 115' or 150' cell towers.

Ann Robbins said in respect to the notified abutters on the generator issue she asked to clarify that the height issue is a public meeting not a public hearing. Chair Chivers clarified that the first part tonight is a public meeting on the alternative tower heights. He said once that is done he will open the public hearing on the diesel generator issue.

J. Szot said she thought she made it clear the reason the 180' tower was denied was because there were no grounds for a variance. She said there was no hardship and if there is no hardship for the 180' cell tower then there is no hardship for the 115' or 150' cell towers. She said there were other places they could put the tower and AT & T said they chose this location because there was an existing antenna. J. Szot said the antenna was mislabeled in Candia's Master Plan as a cell tower and it was a Ham radio antenna that was granted for personal use only. She said the other heights were not considered because; if there was no hardship for the 180' cell tower then there is no hardship for the 115' or 150' cell tower.

Chair Chivers said, for the record it is important to clarify the unnecessary hardship. Hardship has to be met through both the Town's ordinance and requirements in the Daniels vs. Londonderry case. By AT & T's own admission they said they could live with a 100' tower. In the report dated April 9, 2009 AT & T stated in the event the variance is denied for the 180', 150' & 115' cell towers, AT & T would be willing to accept the alternative 100' cell tower. He said by their own admission they said they can live with the 100' tower which would only have room for AT & T and no other carriers could collocate. He said the Board found there was no unnecessary hardship since the property is not unique and by AT & T's own admission can meet their coverage goals without a variance. The Board was in agreement with Chair Chivers. Chair Chivers said this should take care of the height tower issue for the Federal Court and the Board will be put this in writing.

Chair Chivers opened the public hearing for the back up diesel generator issue. Ann Robbins from Anderson & Krieger introduced herself and Kenneth Kozyra from KJK Wireless. She said since there is already information on the record she would like to highlight a few items. First, is the issue on the noise concerns and second the necessity of a diesel generator to ensure operation of the cell tower in case of a power outage. A. Robbins said Federal regulations already in place or currently being put in place contemplate continuous wireless coverage in the event of natural disasters. She said cell phone coverage is invaluable since landlines may not work due to electricity outage. A standby diesel generator is necessary to ensure wireless coverage. The back up diesel generator will be tested once a week for 30 minutes otherwise it only operates in the event of a power outage and most likely when this happens there will be other generators running as well. A. Robbins said concerning the decibel rating there are no town

ordinances. She said the 55 decibel rating stated was taken from a wind statute that does not comply with diesel generators. Even if that statute applied which it doesn't, AT & T would still be in compliance. Sound studies submitted December 30, 2008 with the original application showed 49 decibels at the lot line of the closest residence and 57 decibels on the lot line away from the closest homes. Those studies submitted were based on generators with external mufflers. The generator being installed has an internal muffler that faces down to the ground which further muffles the sound and lowers the decibels.

K. Kozyra gave each Board member a handout on the 50 KW Generac diesel generator with the internal muffler. The handout had pictures, technical data and a site plan showing where the diesel generator will be placed. He said it is the same generator proposed but now it comes in the quietest enclosure made by Generac and has become standard for cell towers. He said the generator sits on a base that doubles as the fuel tank as seen in the handout. K. Kozyra said the generator would run once a week for 30 minutes with start up done remotely by a computer and would also be monitored remotely. He said it can be set to run anytime Monday through Friday. He said exercising and monitoring the diesel generator and fuel levels will ensure the diesel generator will work during a power outage.

R. Howe asked if the diesel generator charged other batteries in case the diesel generator failed and K. Kozyra said it does. There are batteries installed as an additional failsafe however the equipment is sequenced to work off the diesel generator in case of a power failure. The diesel generator kicks in within 15 seconds with an automatic transfer switch. K. Kozyra said the decibel rating has not been tested yet but they were told that it is less than the original generator. R. Howe asked how it works as it appears pressure will build up in the enclosure. K. Kozyra said the enclosure is insulated with vents at the top to release heat and the muffler points down.

J. Szot said on two sides north and west there are properties, and questioned if the generator may be placed so it does not face a property. K. Kozyra said it is set up to exhaust toward the east where the pond is located. J. Szot said the sound will go down the proposed terraced hill. K. Deslongchamps said sound travels well down past the pond towards the homes in the valley. Chair Chivers asked if the generator could be placed away from the pond and K. Kozyra said it can be placed anywhere within the closure. J. Szot said the area is a deciduous forest and when the leaves come off the trees there is not much of a buffer left. R. Howe asked if any baffling can be added to the generator. Chair Chivers said this will be an issue for the Planning Board.

J. Szot said Halls Mill Road is not shown on the plans. K. Kozyra said the software used was before the road was built. K. Deslongchamps noted that in all the drawings and plans throughout the hearings showed Mr. Hunter's home and his swimming pool, but never his garage which is close to property line near where the proposed cell tower will be located. He said the Federal Judge did not get an accurate picture without Halls Mill Road and his garage shown on the plans. I. Byrd said it should be shown on the plans. J. Szot said not showing Halls Mill Road on the map is deceiving and most likely gave the judge a skewed picture and if shown the road his ruling may have been different. Chair Chivers said unfortunately this should have been brought up during the hearing. K. Deslongchamps said he believes this was brought up several times in previous meetings.

D. Orzechowski, an abutter, said originally the proposal was for a 180 +/- cell tower and a 75' x 75' compound. Now that it will be single carrier; he asked if whether this size compound is still required and appropriate. He said reducing the compound will help give additional buffer to reduce the decibel level.

Chair Chivers said the cleared area to be fenced in is not a concrete pad and believes it is the minimum size to build the tower. J. Szot said the compound was originally for the possibility of 4 wireless carrier's diesel generators and asked if they would still require the same size

compound for one generator. She said the more area you clear the less sound dampening buffer area you will have.

Chair Chivers said they are under orders from the United States Federal Court to consider the use of a standby diesel generator. He said building related issues will be dealt with by the Planning Board. He asked if anyone else had any concerns or questions and if the applicant had any closing statements. K. Kozyra said he did not.

K. Deslongchamps would like to see the plan updated with his garage on it. J. Szot said this will have to be brought to the Planning Board. She said at this point Halls Mill Road and his garage can be added to the plans. She said AT & T has to go to the Planning Board which will revisit all these issues brought up tonight such as trees, size of compound etc. A site plan review will be done. The Board was in agreement the mapping was in error.

Chair Chivers said the issue before the board is what to do with restriction #4 Batteries shall be used in place of diesel generators to supply the cell tower with emergency power. F. Albert **motioned** to delete restriction #4 Batteries shall be used in place of diesel generators to supply the cell tower with emergency power from NOD dated September 28, 2010. R. Howe **seconded. All were in favor. Motion carried.**

Chair Chivers said the AT & T will get a written decision showing restriction #4 is deleted and then the decision will go to Federal Court. K. Kozyra and A. Robbins thanked the Board for their time.

Case 10-584 Applicant: Jeff Kanter 128 Raymond Road Candia NH 03034; Owner: Romeo D. Danais Jr 740 Chestnut Street Manchester NH 03104; Map 410 Lot 158-1; For a Special Exception under Section 8.02 Signs Not Advertising Use Of Lot On Which Located and a Variance under Section 8.02-1 Signs Not Advertising Use Of Lot On Which Located: Size of Sign: to permit construction of a aluminum commercial sign measuring 8' x 10' wide mounted on a frame not exceeding 10', off site in the Light Industrial 2/Residential Zones.

Chair Chivers said the applicant Jeff Kanter sent a letter withdrawing his case. J. Szot read the letter into record "Dear Sharon, I would like to let you know that I am withdrawing my application for the sign in Candia at the present time. However, I will not give up working on this in order for us to accomplish our goal. Sincerely, Jeff Kanter" The Board accepted the applicant's letter and withdrew the case.

Other Business

Request for re-hearing Case 10-583 Applicant: Craig B St. Peter, Wildcat Land Development Services LLC, 43 Lawson Farm Road, Londonderry NH 03053; Owner: CCS Realty Trust LLC, 424 Old Candia Road, Candia NH 03034; Map 413 Lot 111; For a Special Exception under Section 8.02 Signs Not Advertising Use Of Lot On Which Located, and a Special Exception under Section 8.06 Size Restrictions – Commercial, Light Industrial: to permit construction of a commercial sign measuring 20' x 30' (600 sq ft) mounted on a frame not exceeding 50' in height from ground level, off site in the Light Industrial 2/Residential Zone. Joe Sobol was present. Abutters John & Stephanie Helmig 75 Fieldstone Lane, Candia NH 03034 and Greg Herbert 81 Fieldstone Lane, Candia NH 03034 were present.

Chair Chivers summarized the case. He said the applicant came to the Board for a Special Exception under 8.06 and a Variance under 8.02 to permit construction of a sign to promote and advertise commercial properties/business located off route 101, Exit 3 in Candia NH. The case was noticed as a Special Exception for Section 8.06 Size Restrictions – Commercial, Light Industrial and Special Exception Section 8.02: Signs Not Advertising Use Of Lot On Which Located. The Variance for 8.02 was not noticed. The Board only heard the two Special Exceptions last month. The Special Exceptions were denied. The Variance was not considered last month. The error was found only after the Board had voted. The Board apologized to the

applicant and said the Board would waive the fees for the applicant to come forward with the Variance.

Chair Chivers said the problem is the applicant needs both a Special Exception and a Variance for the proposed sign. He said the proper procedure is to agree to re-hear the Special Exception and hear the Variance at the same time. He said the applicant has not come forward to ask the Board to hear their Variance and if the Board agrees to rehear the Special Hearing there isn't a Variance to consider.

J. Sobol said when they do come forward they want to come forward with a smaller sign. He said realizing the complexity of a variance they wanted more time to prepare. He felt there has been a lot of confusion on the process.

Chair Chivers asked J. Sobol if he was willing to withdraw the Variance request previously submitted. Chair Chivers said the Board either has to hear the Variance requested or it has to be withdrawn. He said they cannot leave a Variance request on file unheard. J. Szot said the variance can be heard at any time. J. Sobol said he did not want to commit to a date tonight.

Chair Chivers asked if they were going to come forward with the same Variance request or something different. J. Sobol said it would be a Variance for the smaller sign. J. Szot said the Board made the mistake with the Variance and that the Board would not charge them to re-notice the Variance. She said if they withdraw the original Variance and comeback they will not be charged for the new Variance.

J. Sobol said the confusion was whether to come forward with the original Variance when they need to ask for a rehearing on the Special Exception. He said they are asking for a rehearing for an unknown future date. J. Szot said if it is not going to be the same sign then it would be a new case. I. Byrd was in agreement that it should be a new case if they are coming back with a new sign.

Chair Chivers asked J. Sobol if he was coming back at some point with a smaller sign and if so the Board would not be rehearing the original case. J. Sobol said they wrote the letter for the rehearing to protect themselves and to try to understand the process. Chair Chivers said if they are going to come back with a smaller sign then they do not require a rehearing.

Chair Chivers said the Board needs to administratively do the correct process and rehear the case and set up to hear the Variance at the same time and do right by the applicant. Chair Chivers said if they withdraw the re-hearing request and original Variance, then when they come back with a new application the Board will waive the fees for the Variance. R. Howe was in agreement that this sounds reasonable and will make it right for everyone.

J. Sobol asked about a continuance, Chair Chivers said the re-hearing request has to be dealt with tonight. J. Sobol formally withdrew the request for re-hearing Case 10-583 and the request for the Variance Case 10-583. He said they will come forward in the future with a new case. Chair Chivers confirmed the applicant withdrew his request for re-hearing and withdrew his request for a variance. Chair Chivers said when they come back; the new case will be properly noticed for the Special Exception and Variance. J. Sobol thanked the Board for their time.

J. Szot asked the Board if they had read the architectural design standards considerations regarding signs. She said neon tubing in all forms and internally lighted signs are prohibited which is part of the Minor Site Plan review. Chair Chivers asked J. Sobol if he knew what the State's setback requirements for building a sign this large on the highway was. J. Sobol there cannot be two signs within 500' that are visible to the highway. J. Sobol said the State discourages tree cutting on the right of way but land owners can cut trees. He said because of the configuration of Exit 3 there are limited areas where a sign would be visible to Route 101 and he said the site they selected is one of the few if the only site that is visible. He said the site is also zoned properly.

J. Sobol said the State allows an off premise sign visible to the highway to be a maximum of 720 sq feet. He said if they were to come back in for a 40 sq ft sign which is allowed in the Industrial Zone they were not sure if it would be visible from the highway. He said they are thinking more along the lines of 100-150 sq ft sign if they come forward with another application.

R. Howe said the Board now has time to find out and question where the town stands on signs like these. He said the Board has this one chance to do it right the first time and not make any mistakes because in the future a grocery store could come forward and want to build a sign that large too. He feels before the applicant comes back the Board they should have some direction and answers. There was discussion about noticing a community sign in the zoning amendments. A. Soares said it would be good to find out what signs the town would like to see. If this is to be done it would have to be noticed quickly.

The next scheduled Zoning Board of Adjustment meeting is January 25, 2010.

I. Byrd **motioned** to adjourn at 8:15pm. R. Howe **seconded**. **All were in favor**.

Respectfully submitted
Sharon Robichaud
Recording Secretary