

DRAFT
Zoning Board of Adjustment
Meeting Minutes
April 7, 2016

Members: Gretchen Wittenborg, Acting Chairman, Bob Handy, Jack Ernst, Carmen Yon, alternate, seated for Davis, Chad Beede, new alternate member.

Others Present: David Maxson, consultant, Susan Silverman, selectmen's representative; Steve Filipi, Cathy Davis and Mike Methe [no representatives from Blue Sky Towers]

CTO: 7:00 PM.

Wittenborg noted that Steve Filipi recused himself from this hearing and Carmen Yon was seated for Davis.

7:00 PM Public hearing. Blue Sky Towers, LLC Amended application, continued for a variance to install a multi-user Wireless Communications Facility outside of the Town's Wireless Facility Communications Overlay District, consisting of a 125 foot monopole tower within a fenced compound located on property known as the Pinnacle, owned by Filipi Contracting, LLC on Upper Troy Road, Map 15, Lot 6-12, Residential, Rural and Historic Districts.

Wittenborg announced that the public hearing had been closed for Board deliberation at the last meeting and so the Board would continue deliberations now. She noted that Attorney Duval would not be in attendance tonight. A draft of the variance conditions and variance criteria findings was given to each Board member. Wittenborg drafted the documents, based on Board input and deliberation at the last meeting, and included input from David Maxson, consultant. They were drafted so they could be incorporated in the minutes following the Board's review with changes, if any.

Mr. Maxson said he had reviewed the draft decision and it looks like it captured the input and recommendations from last meeting. As the Board reviewed the documents, Yon noted that he disagreed with several of the findings, particularly regarding the fifth criteria as drafted, which states: e) *Literal enforcement of the provisions of the ordinance would result in unnecessary hardship;*

e-1) Feasible locations within the WCOD are substantially less effective in providing wireless service to Fitzwilliam than the proposed site would be. The approved site is the most suitable to provide the most wireless service to the largest area and the most people in Fitzwilliam.

e-2) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property.

The WCOD designated in the Fitzwilliam Zoning Ordinance may reflect the somewhat obsolete focus of the past that wireless towers should be located close to areas of heavily traveled roads for purposes of in-vehicle wireless coverage. (revised by the Board later in the meeting.)

e-3) The proposed use is a reasonable one;

The elevation, thinly populated area and limited access on a dead-end gravel road make this location a reasonable use."

Wittenborg and Maxson agreed that while these WCOD sites were modelled to determine extent of coverage, none of the sites were investigated as to availability for leasing. Yon asked if this was material. Wittenborg continued, saying siting in the WCOD did not provide the extent of coverage provided by the single site on the Pinnacle. Maxson said siting in the WCOD would provide coverage but the Pinnacle site provides coverage for

DRAFT
Zoning Board of Adjustment
Meeting Minutes
April 7, 2016

more of the town. If in the WCOD, the coverage gaps will not be filled the town will have to address this issue in the coming years. He added that his observation has been that according to the TCA, the ZBA has the authority to decide to get the most coverage now, or to force the towers into the overlay district and deal with the gap issues later.

Wittenborg asked if the Board is willing to deny the application. Hearing no response, she asked if Mr. Yon wants to see all towers in the WCOD. He said he did, until it is proved not to be feasible to do so. He added that he also disagrees with the second (b.) criteria finding, which states:

“b) The spirit of the Ordinance is observed:

The top of the whip antenna on the existing tower is at 104’ AGL. The proposed tower, which will not exceed 138 feet, is not on the summit of the hill known as “the Pinnacle” and is at a grade that is 17’ lower in elevation making it only 17’ feet higher than the existing tower but potentially able to service three additional providers. The existing tower is structurally unable to support additional equipment and will be removed and the WiValley equipment relocated to the proposed tower.

The areas currently designated by the Fitzwilliam Zoning Ordinance as the Wireless Communications Overlay District run along two heavily traveled roads. A comparable tower in the WCOD would be far more intrusive visually than the proposed site, and would require construction of two 140 foot towers to approach, but not meet the coverage provided the applicant’s site.

The location of the proposed tower is remote, and is secured by an 8’ fence at the end of a gravel drive.”

Yon questioned the premise, adding that three towers sited within the WCOD would provide equivalent coverage to the single tower sited outside the WCOD. He said Blue Sky Towers own numbers indicated that coverage would be satisfactory with three towers sited within the WCOD. The three locations were on Route 119 W by Royalston Road, Route 119 E at the top of the hill (former AT&T site), and Route 12 S at White Quarry road. It was noted that Blue Sky Tower site acquisition manager Jim George testified at a previous meeting, that his client, T-Mobile would not be willing to build two towers to achieve coverage. Wittenborg noted that a tower at the Royalston site would be very visible and there are a lot of residences and activity in that area. [Staff noted the proposed AT&T site is no longer available, according to the property owner.]

Yon felt that this is an economic issue for the company and while he brought it up several times, he has not seen any facts that substantiate this claim. There was a discussion about the cost of a tower, and Maxson said companies are reluctant to share this kind of information because they calculate the cost factoring in the revenue expected from the service provided. Yon said he disagrees with the entire finding. David Maxson noted that the addition of a third site in the WCOD, to work with two other towers sited elsewhere, has not been modelled, and therefore it is not conclusive that three sites would provide a coverage equivalent to the proposed site on the Pinnacle. Wittenborg said the Board cannot decide based on cost issues. She said she has read many court decisions and in those cases feasibility is the determining factor. Boards must examine the initial gap in coverage and investigate all options. She added that the history of these cases is that if the Board passes over the feasibility issue the case is likely to end up in court.

DRAFT
Zoning Board of Adjustment
Meeting Minutes
April 7, 2016

Handy asked if the Board was ready to vote. Wittenborg said the hearing could be continued so the Board can get a legal opinion. Ernst said he understood what Yon was saying, but he questioned if residents would rather see 3 towers within the WCOD, if the land proposed within the WCOD might be available for lease, and if carriers would be interested in co-location at these sites.

Beede asked if carriers would be likely to co-locate on three different towers, given financial considerations of doing that. Mr. Maxson said that coverage modelling done for towers in the WCOD was for 140 foot towers, so space to co-locate would not be an issue, however, it is unlikely that many companies would come in, since it would depend on their market objectives. There exists the possibility that a company could come in, build only one tower and leave without providing the necessary coverage, or go to court.

Ernst wondered how many people in Fitzwilliam actually use T-Mobile for service. It is possible that multiple towers would not appeal to other carriers who already have coverage in town. Mr. Maxson said the network profile looks different for each carrier.

Wittenborg asked Yon if he just didn't want to see towers located outside the WCOD. He said yes. Wittenborg said the ZBA must look outside the WCOD to investigate the benefits of location outside the district, to decide which choice is best for the people in Fitzwilliam.

Again, Wittenborg expressed her reluctance to go forward. However, both Ernst and Handy said they were ready to make a decision. Handy said the Board owes the town a conscious decision. Ernst said people won't want to see three towers. Handy said the WiValley tower will not be removed if three towers are built in the WCOD. Ernst said the three towers would be very visible.

Mr. Maxson said that the Telecommunications act of 1996 changed the way cellular towers were treated. It added an additional layer of oversight to the normal ZBA criteria, which is based on state, not federal regulations. If the ZBA determines they cannot grant a variance under state regulations, the TCA and case law allows granting a variance under federal law. He said some boards deal with service provision as well.

Silverman said the ZBA had come to the Selectmen with a request for legal advice and they were reluctant to incur that cost at the time, but if the Board wants that advice now, it is still an option.

Filipi noted that when the Board first looked at the original application from Blue Sky Towers, Ernst had pointed out the considerable gaps in coverage remaining if the initial proposal was approved. The Board asked and the applicant provided extensive information and research regarding various coverage options. He asked what the goal of a hearing is, if not to get the best coverage it can. He added that the Board could have suggested three towers months ago. Wittenborg said the goal is to get the solution that benefits the most people.

Mr. Maxson suggested bifurcating the vote, reserving the right to revisit the decision after talking with counsel. Wittenborg asked the Board about that option and Handy was emphatic that the vote not be postponed any longer. Mr. Maxson also noted that there must be a structure for any decision or the Board may lose the opportunity to base the decision on the provision of service.

DRAFT
Zoning Board of Adjustment
Meeting Minutes
April 7, 2016

Yon moved, Ernst seconded and the Board voted to go through each of the variance criteria and to reserve the right to revisit the decision based on the TCA standpoint. Wittenborg reminded everyone that historically in Fitzwilliam it has been the role of board members to work to persuade each other to a shared point of view.

Ernst moved, Handy seconded and the Board voted to grant the variance with conditions, it reads:

“You are hereby notified that on April 7, 2016, after a duly noticed public hearing, the Fitzwilliam Zoning Board of Adjustment voted to grant a variance to construct a multi-user Wireless Communications Facility consisting of a 125 foot Monopole tower (“Tower”) at Latitude 42°46’57.52”, Longitude 72°09’23.09” on property owned by Filipi Contracting LLC located at 45 Upper Troy Road in the Town of Fitzwilliam (parcel 15-6-12). No appurtenance attached to the Tower shall cause the Tower to exceed 138 feet above ground level.

The Tower shall be a steel monopole with no FAA obstruction lighting, constructed with sufficient loading capacity to support the public safety antennas and the WiValley broadband internet service antennas and equipment that are presently operating on the existing tower on the parcel, plus the antennas and related equipment of co-applicant T-Mobile, and collocation capacity for at least three other wireless service providers.

The Tower and all equipment and related material shall be located on a leased area of 75’ X 75’ square feet within which is to be a 65’ X 65’ fenced area of chain link 8’ high from the ground level, topped by 1 foot of 3 strands of barbed wire with a 12’ wide double door gate. The entire facility shall be developed and maintained consistent with the Lease exhibit dated March 28, 2016, attached hereto (pages 1-3).”

Conditions:

The Variance is conditioned on the following:

1. The dismantling and removal of all equipment and materials related to an existing tower owned and operated by WiValley LLC.
2. Sufficient documentary evidence that the Tower does not require FAA lighting. [received]
3. The Tower be constructed and operated consistent with all representations made in the amended application filed with the Board by Blue Sky Towers, LLC on March 8, 2016 in all particulars.
4. An independent certified engineer of the Board’s choice and paid for by the applicant shall certify, on completion of the Tower, that the Tower with appurtenances does not exceed the height of 138 feet.
5. Applicant will pay all expert consultant fees until case is finalized.

Further, the Board takes administrative notice of section 6409 of the Middle Class Tax Relief and Jobs Creation Act of 2012, which among other things enables modifications of wireless facilities that are not considered substantial. In ensuing regulations the FCC has determined that, in the absence of clear restrictions to the contrary, an increase of up to 20 feet in height of the Tower would not be a substantial modification.

DRAFT
Zoning Board of Adjustment
Meeting Minutes
April 7, 2016

The Board finds, however, that based on the evidence in the record, the maximum height of 138' AGL granted in this Variance is in fact, the maximum reasonable height of the facility and that any increase whatsoever in the height of the facility will be a substantial modification and deleterious to the purpose and intent of the ordinance. Applicants seeking to increase the Tower height by any amount shall apply to the Board for relief, notwithstanding the aforementioned Section 6409.

Wittenborg read the variance criteria as drafted.

Findings: Variance decision of April 7, 2016 in Blue Sky Towers, LLC application for a Wireless Communications Facility:

a) The variance will not be contrary to the public interest;

The Town of Fitzwilliam, New Hampshire, with a total land area of 35.97 square miles has limited cell phone service from any carrier as shown by a radio frequency propagation map attached hereto entitled "T-Mobile Existing Coverage Around Fitzwilliam, NH." The attached map shows very little in-vehicle coverage and virtually no in-residence coverage establishing that there is a significant coverage gap.

Testimony and evidence submitted suggest that the Applicant's proposed tower will give T-Mobile the potential to provide wireless service in-residence or in-vehicle with coverage over an area of 35.2 square miles, as shown on Propagation map entitled "T-Mobile propose Coverage at Candidate D/Pinnacle at Rad Ctr of 116 feet" attached hereto.

The proposed tower is only marginally more visible than the existing tower. It is a considerable distance from heavily traveled roads and more than 500' from the nearest residence.

The proposed tower will provide collocation sites for three wireless carriers in addition to the public safety antennas, the WiValley and T-Mobile equipment reducing the proliferation of wireless communications towers in Fitzwilliam.

Wittenborg, Handy, Ernst and Yon agreed.

b) The spirit of the Ordinance is observed:

The top of the whip antenna on the existing tower is at 104' AGL. The proposed tower, which will not exceed 138 feet, is not on the summit of the hill known as "the Pinnacle" and is at a grade that is 17' lower in elevation making it only 17' feet higher than the existing tower but potentially able to service three additional providers. The existing tower is structurally unable to support additional equipment and will be removed and the WiValley equipment relocated to the proposed tower.

The area designated by the Fitzwilliam Zoning Ordinance as the Wireless Communications Overlay District runs along two heavily traveled state roads. Towers located in the WCOD would be far more intrusive visually than one tower at the proposed site outside of the WCOD, and would require construction of two 140 foot towers to approach, but not meet the coverage provided the applicant's site.

DRAFT
Zoning Board of Adjustment
Meeting Minutes
April 7, 2016

The location of the proposed tower is remote, and is secured by an 8' high fence at the end of an existing gravel drive. **Wittenborg, Handy and Ernst agreed, Yon opposed.**

c) Substantial justice is done; The benefits to the residents and travelers in Fitzwilliam, the lack of any material detriments to the abutters and to the viewshed and the ability to collocate future providers on the structure make this proposal a benefit to the town. **Wittenborg, Handy, Ernst and Yon agreed.**

d) The values of surrounding properties are not diminished; The applicant submitted a real estate market study concluding that the proposed tower will not negatively affect the real property values. No evidence was produced at any of the multiple hearings on this matter that there would be any diminution in value of abutting properties.

Wittenborg, Handy, Ernst and Yon agreed.

e) Literal enforcement of the provisions of the ordinance would result in unnecessary hardship;

e-1) Feasible locations within the WCOD are substantially less effective in providing wireless service to Fitzwilliam than the proposed site would be. The approved site is the most suitable to provide the most wireless service to the largest area and the most people in Fitzwilliam.

Wittenborg, Handy, Ernst agreed, and Yon opposed.

e-2) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property

Wittenborg read 127-16.2 B – purpose and goals of the WCOD. She noted that this ordinance was passed 16 years ago and was amended in 2002, 2004 and 2010. She said it was designed in 2000 to provide in-vehicle coverage along the main thoroughfares in town to meet the needs of the times. Proof of in-vehicle coverage alone no longer meets the needs of the town and therefore it is time to serve the needs of residents now. The Board agreed with this statement.

Wittenborg, Handy, Ernst and Yon agreed.

e-3) The proposed use is a reasonable one;

The elevation, thinly populated area and limited access on a dead-end gravel road make this location a reasonable use. **Wittenborg, Handy, Ernst and Yon agreed.**

Wittenborg moved, Handy seconded and the Board voted to approve the variance subject to the conditions voted earlier. Wittenborg, Handy, Ernst approved, and Yon abstained.

Filipi noted that there is an appeal period of 30 days, reminding Board members that there should be no outside communications regarding this case during that time.

Minutes:

March 24, 2016 – Ernst moved, Handy seconded and the Board approved the minutes.

March 29, 2016 – Yon moved, Ernst seconded and the Board approved the minutes with one typo corrected.

Ernst moved, Yon seconded and the Board adjourned the meeting at 8:40 PM.