

REGULAR MEETING

**Lebanon Township Board of Adjustment
Municipal Bldg 530 West Hill Road Glen Gardner, N.J.**

April 25, 2012

The Regular Meeting of the Lebanon Township Board of Adjustment was called to order at 7:33 p.m. by Chairman Bruce Terzuolo. Present were: Mr. Kozlowski, Mr. MacQueen, Mr. Abuchowski, Mr. Perry, Mr. Nagie, 1st Alternate Maurizio, Attorney Gallina, Planner Bolan and Engineer Risse. **Excused:** Mr. Eberle, Mr. Machauer.

Notice of this meeting was published in the "Annual Meeting Notice Schedule" adopted by this board on January 25, 2012, faxed to the Hunterdon Review, Hunterdon County Democrat, Express Times, Courier News, Star Ledger and posted on the bulletin board in the Municipal Building on April 18, 2012.

FYI: Ethics Financial Disclosure Form

Ms. Glashoff reminded everyone that she needs the forms in by April 30, 2012 or board members will be fined \$500.00 per the State.

PRESENTATION OF MINUTES: Regular Meeting March 14, 2012

Motion by Mr. Maurizio and seconded by Mr. Abuchowski to approve the minutes with corrections. Unanimously approved.

RESOLUTIONS:

Shawn & Holly Smith Block #58 Lot #2
Interpretation of Section 400 Attachment 4:1 Musconetcong River Rd RC 7½
Schedule I

Motion by Mr. Kozlowski and seconded by Mr. Abuchowski to adopt the Resolution as presented with minor corrections.

ROLL CALL Yes: Mr. Kozlowski Mr. Nagie Absent: Mr. Eberle
Mr. MacQueen Mr. Abuchowski Mr. Machauer
Mr. Terzuolo Mr. Maurizio Abstain: Mr. Perry

Davara Industrial Center Block #6 Lot #1
Variance for Height & size with conditions Route 31 B2

Motion by Mr. Kozlowski and seconded by Mr. Maurizio to adopt the Resolution for Davara Industrial Center with corrections..

ROLL CALL Yes: Mr. Kozlowski Mr. Nagie Absent: Mr. Eberle
Mr. MacQueen Mr. Abuchowski Mr. Machauer
Mr. Terzuolo Mr. Maurizio Abstain: Mr. Perry

UNFINISHED BUSINESS:

New Cingular Wireless Block #24 Lot #37
340 Mt. Kimble Ave Wilde Lane RC 7½
Morristown, N.J. 07962

CONTINUATION OF A PUBLIC HEARING Conditional Use/Site Plan/Variences

Chairman Terzuolo announced that all the testimony from both the applicant and the objectors has been heard and this evening we will be hearing the summations from both sides and then the board will deliberate. Chairman Terzuolo asked who wanted to go first with their summation. Attorney Schmidt for the objectors gave his summation first on behalf of his clients.

Attorney Schmidt started his summation saying that this board can not arbitrarily deny a Telecommunication Company for constructing a Cellular Tower to advance it's telecommunications services. The board can refuse to allow the construction of a cell tower if the Telecommunication Company is unable to meet it's burden of proving four specific items. The Appellate Division of the Superior Court of NJ said in New York State SMSA Limited versus Township of Mendham Zoning Board, a wireless communications provider seeking variance

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approval to construct a cellular telephone tower must show 1) There is an existing significant gap in service within the municipality, 2) The proposal that is being proposed will fill the gap in the least intrusive manner, 3) The applicant has made good faith efforts to investigate alternative technologies and alternative sites that may be less intrusive in the community and 4) The area is not already being serviced by another wireless provider. The board must also remember that the applicant has the burden of proof. Attorney Schmidt said AT&T must prove their case. It must prove all the elements necessary to justify the variances requested. Attorney Schmidt said that AT&T has failed to prove the need for a 180' tower. The board can reject the applicant's experts if they believe that the experts presented a net opinion. A net opinion is an opinion that is given by an expert without adequate factual data to support that opinion. Attorney Schmidt gave a couple of case opinions at this time. Attorney Schmidt said the applicant has to prove that there is a gap in service. The court has not defined what a sufficient gap of service is. Attorney Schmidt referred testimony by RF Engineer Joseph showing the gap in service with a radio frequency exhibit which was marked as **A10**. Quoting Mr. Joseph that the exhibit illustrated the alleged gap in coverage at negative 85 dBm. The frequency strength that AT&T claims that is necessary for the customers to get reliable service. The alleged gap in service was along County Road 513. Mr. Joseph said the site of the proposed tower will fill a sufficient portion but not all of the alleged gap in coverage. Mr. Joseph said there will still be a minimal gap in coverage. Mr. Joseph also said their proposal is to basically fill as much of this gap in service as they can with one facility.

Attorney Schmidt referred to testimony of Mr. Menkes stating the selection of negative 85 dBm is arbitrary. In their application to the FCC, AT&T had indicated that they were going to use a signal strength of 102 dBm to satisfy its burden of providing coverage to their customers. Attorney Schmidt said there has been no testimony providing any information regarding the coverage and what that coverage would be at a signal strength of minus 102 dBm. Attorney Schmidt referred to Appellate decisions in New Jersey at this time. Since AT&T failed to provide any testimony regarding coverage at any other strength other than 85 dBm, they failed to show a sufficient gap in coverage that could not be filled with a lesser signal strength. Since the owner of the property offered his property there was no search ring provided. There is no comprehensive report and Mr. Joseph's presented no information on the terrain, topography data base that he used with the computer predicted RF coverage models or modes and there is no testimony that the clutter data base that was used in producing is computer predictions. Attorney Schmidt again referred to testimony of Mr. Menkes, stating after a viable property is selected a crane test should be performed especially in situations of adverse terrain or clutter as in this case. There was no testimony about any crane test being done. Attorney Schmidt said it is important because AT&T is proposing a tower of 180' and if AT&T had done a crane test then maybe they would have found that they didn't need a tower of 180' but 150'. Attorney Schmidt referred to testimony given by Mr. Joseph regarding drive test. Attorney Schmidt said that there has been no testimony regarding service providers in this area. AT&T has failed to prove they can fill the gap in the least intrusive manner or that they made any good faith effort to investigate alternative technologies. In conclusion, Attorney Schmidt said that AT&T has failed to prove the need for a 180' cell tower and the board should deny this application. If the board decides to grant this application they should compel the applicant move the tower to another area move in the center of the property and I then foresee this tower never being built. Attorney Schmidt thanked the board for their time and consideration.

Attorney Fairweather gave her summation at this time on behalf of New Cingular Wireless (AT&T) Attorney Fairweather stated that this is a conditional permitted use in this zone and since we did not meet all the conditions this is why we are before the Zoning Board. Attorney Fairweather reviewed for the board the variances needed for this application. The ordinance states you have to have a gap. The applicant gave testimony that there is a gap in service. Attorney Fairweather said the applicant did many drive tests per testimony given by RF Engineer Joseph in 2011. Attorney Fairweather referred to comments made by Attorney Schmidt regarding negative 85, negative 75 and negative 105. It was stated that negative 85 is the standard used by all carriers. The ordinance states that the applicant has to make every effort to find an existing structure. Attorney Fairweather said they went over the coverage maps and existing structures in the area and none of them were high enough. Attorney Fairweather said they proposed a structure in another area of the Township before the Planning Board and they asked the applicant to look around for another site with less homes in the area. Attorney Fairweather said they cut the number of homes in half by going to this site on Wilde Lane. Attorney Fairweather stated they looked at alternative technologies, but micro cells and Das systems don't work here in a rural area.

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Also, it is not used by AT&T in New Jersey in rural areas. The area on the property which is already disturbed and the Highlands would prefer a existing disturbed area then to create a new area of disturbance which the Highlands would not approve. The ordinance also requires that we follow the priority schedule which New Cingular tried, the other site was higher on the priority but still at this site it is a Conditional Use. The ordinance doesn't allow for lighting only if the FCC requires it. Attorney Fairweather said that both RF experts agreed that there is a gap in service. Attorney Fairweather said their Planner testified that the application was not a deterrent to the zoning ordinance or the Master Plan. The Planner looked at the positive and negative criteria. The applicant meets the positive criteria because they are FCC licensed and because they have a gap. Without a negative criteria there is no demand on any public services. The site will be visited every 4-6 weeks or possibly every 8 weeks. Attorney Fairweather said the Planner said this is a perfect site with having 32 acres with the tower hardly being seen. There is over 400' between the neighbor and the tower. The Planner said this is a better site then the original one that was purposed. Attorney Fairweather said per the Planner that the positive criteria substantially outweighed the negative criteria. In conclusion, Attorney Fairweather said this is not an easy decision, all cell tower applications are touch applications and is not easy decision, but ask that the board come to a legally correct conclusion and approve this application. Attorney Fairweather thanked the board for all the time that has gone into hearing this application.

Chairman Terzuolo announced that the board will take a recess at this time at 8:30 p.m. When the board reconvened at 8:40 p.m. the board went into deliberations. Mr. Nagie said this is the hardest application he has dealt with since being appointed to the board. The area for the cell tower is not that visible and a small amount of the tower will be exposed. Mr. Nagie said he is not interested in having a mono-pole at 185' prefers a mono-pole at 180'. Mr. Nagie said the applicant should be granted the variances requested. Mr. Perry said he agrees with Mr. Nagie comments. Mr. Perry said he drove up to the site and felt this is the right location for the cell tower. Mr. Perry said he thought having the cell tower at this location would make it better than what it is and said if this will be better for the township then he is for it. Mr. MacQueen said they are able to build on existing coverage which is better then disturbing new ground and the Highlands prefers using existing coverage then to create new. There is already a driveway to the location on the property where the tower will be built. The ordinance speaks of a residential transportation zone which we require in our ordinance. Mr. MacQueen referred to A10 & A11, the overlay maps which shows where coverage is needed. Mr. MacQueen said he felt it will make a huge difference from the east and west which was shown on the overlay maps. Mr. MacQueen said they do drive tests all the time, because you see them out on the road along with the computer generated tests. Mr. MacQueen said along with a drive test a computer generated test is one of the best ways to find out if they are going to get better cell service. Mr. MacQueen said that this is one of the best locations for this tower in the area. There have been many cell companies that have tried to put towers in different locations along Route 513. Mr. MacQueen said putting towers on telephone poles or putting alternative systems on telephone poles does work. But with the hills in Lebanon Township the people texting along with all the other electronic stuff we have in our homes, I don't believe they are going to work. Mr. MacQueen said the fall down zone is totally within the property and the visual impact of the tower is going to be less than if it were in any other location. Mr. MacQueen went on to say that he did not think this proposal hurts our Master Plan at all, it is an allowed conditional use in this zone along being on our list of conditional areas where this tower can go.

Mr. Kozlowski said he did his own drive test along with Route 513 and there is a dead area. Mr. Kozlowski said he is convinced that what AT&T is proposing would correct the dead area otherwise they would not be proposing it. The main issue outstanding is the visual obstruction that it would cause. AT&T did a good job of putting other photographs of simulating what the cell tower would look like. Mr. Kozlowski said the location of the property is good and it already has a road going to it. Mr. Maurizio said he has a problem with the site that it should have been further up on the site. Mr. Maurizio felt that the proposed site should have been closer to the center of the property also he did not understand the issue with the Highlands, why couldn't they have done a land swap, restore present impervious coverage and take another spot. Mr. Abuchowski said the one issue he found astounding is that this is the most efficient and economic site and is somehow a negative. There have been comments that you can see the tower and we see towers all the time. Mr. Abuchowski noted that a cell tower is going up right behind the Municipal Building. At this site there is 400' of woods between people and the tower. Mr. Abuchowski said there is a limited number of properties where this tower can go and this is the best property in the area and said that he is in favor of the tower.

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Chairman Terzuolo said he concurs with the majority of the board being in favor of this application. Chairman Terzuolo noted there were concerns raised regarding property values but there was no testimony given by an appraiser to go through those property values and give this Board any kind of evidence, hard evidence as to what may occur or not occur if this tower is erected. It has been reiterated by Board Members that the property in question is large consisting of 30+ acres. Also, it will be located on existing impervious coverage and this is the best site we can come up with. Some of the reasons for a D Variance is the fact there is a gap in coverage for this area. Chairman Terzuolo reviewed for the board the letter from Attorney Gallina regarding the issues at hand. At this time, the board discussed the conditions. Mr. Abuchowski suggested not having a mono-pine but just a mono-pole instead. The board agreed. Mr. MacQueen asked that the board put a limit on the number of co-locators and having the mono-pole be a silver/gray in color. The board agreed to both. And last, asked that the Police Dept, Fire/Rescue Dept, County Emergency Management be able to use the cell tower. Board also agreed. At the conclusion of the board's discussion with the conditions, motion by Mr. MacQueen and seconded by Mr. Abuchowski to grant the D Variance to construct the tower at 180'.

ROLL CALL Yes: Mr. Kozlowski Mr. Abuchowski No: Mr. Maurizio
Mr. MacQueen Mr. Perry Absent: Mr. Eberle
Mr. Terzuolo Mr. Nagie Mr. Machauer

Motion by Mr. MacQueen and seconded by Mr. Abuchowski to grant a D Variance for two principal structures on a lot in a residential zone.

ROLL CALL Yes: Mr. Kozlowski Mr. Abuchowski No: Mr. Maurizio
Mr. MacQueen Mr. Perry Absent: Mr. Eberle
Mr. Terzuolo Mr. Nagie Mr. Machauer

Motion by Mr. MacQueen and seconded by Mr. Abuchowski to grant a variance with Conditional Use and Site Plan approval with the following conditions:

- a. Approval from all outside agencies having jurisdiction
- b. Color of the mono-pole will be a non-glare and Radio Frequency friendly color
- c. Applicant will consult with Board Engineer Risse in regard to the color
- d. The tower will be constructed to accommodate five (5) carriers
- e. The tower will be made available to Police, Fire/Rescue and other emergency agencies.
- f. Applicant will comply with the provisions of the Lebanon Township Ordinance regarding dismantling of the tower, should that become necessary.
- g. The applicant will provide updated access deeds to the property.
- h. The applicant will provide As Built drawings for the Board Engineer to review and approve.
- i. The fence not to exceed 8 feet.
- j. Payment of all necessary fees and escrows to be up to date and current.
- k. The applicant shall obtain permits within 18 months of approval of Resolution or request appropriate extension of time

ROLL CALL Yes: Mr. Kozlowski Mr. Abuchowski No: Mr. Maurizio
Mr. MacQueen Mr. Perry Absent: Mr. Eberle
Mr. Terzuolo Mr. Nagie Mr. Machauer

Attorney Gallina will prepare the resolution to be on the Agenda of June 27, 2012.

PRESENTATION OF BILLS:

- a. John Gallina, Esq. \$312.50 – Attend Bd Meeting 3/28/2012
\$281.25 - Escrow (Smith)
\$343.75 – Escrow (Davara Industrial Ctr.)
 - b. Court Stenographer \$200.00 - Attend Bd Meeting 4/25/2012
- Total: \$1,137.50**

Ms. Glashoff noted there was a Agenda Addendum with additional bills being added from Planner Bolan in the amount of **\$1,097.80** bringing the grand total to **\$2,235.30**. Unanimously approved.

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CORRESPONDENCE:

- a. New Jersey Planner
- b. Law Bulletin – April 2012
- c. Zoning Practice – April 2012
- d. Law of the Land Article
- e. DEP Article

Being no further business to come before the board, nor comments from the public, motion by Mr. Nagie and seconded it by Mr. Perry to adjourn the meeting at 9:16 p.m. Unanimously approved.

CHAIRMAN BRUCE TERZUOLO

GAIL W. GLASHOFF, BOARD SECRETARY