

North Smithfield Zoning Board of Review

Meeting Minutes of March 20, 2007

The North Smithfield Zoning Board of Review met on Tuesday, March 20, 2007, at 7:00 PM at Kendall Dean School, 83 Greene Street, Slatersville, RI 02876.

Call to Order: The Chair called the meeting to order at 7:00 pm.

I. Call of the Roll

Chair Stephen Kearns called the roll of the members. Present: Stephen Kearns, Vincent Marcantonio, William Juhr, Steven Scarpelli, Dean Naylor, Mario DiNunzio and Guy Denizard. Also present were the Assistant Solicitor, Robert Rossi, Esq.; Robert Benoit, Building and Zoning Official; and a court stenographer from Allied Court Reporters.

The Chair reviewed procedures of the board for all present.

II. Approval of Minutes and Decisions—November 14, 2006, January 2, 2007, February 20, 2007, March 6, 2007

The Chair stated that due to the change in members of the Zoning Board of Review at the end of 2006, some meeting minutes and decisions had not been officially approved. Only the Chair, Mr. Juhr, and Mr. Marcantonio will vote on approval of minutes and decisions

from November 2006, since all other members were not on the Zoning Board at the time of that meeting. Mr. Jühr made a motion to approve the November 14, 2006 decision, which granted a special use permit to the Blackstone Smithfield Corporation. Mr. Marcantonio seconded the motion, with all in favor. Mr. Marcantonio made a motion to approve the November 14, 2006 decision, which granted a dimensional variance to Woonsocket Neighborhood Development Corporation. Mr. Jühr seconded the motion, with all in favor. Mr. Jühr made a motion to approve the minutes of the November 14, 2006 meeting. Mr. Marcantonio seconded the motion, with all in favor.

Voting on the following minutes and decisions from 2007 were Mr. Kearns, Mr. Marcantonio, Mr. Jühr, Mr. Scarpelli, and Mr. Denizard. Mr. Scarpelli made a motion to approve the January 2, 2007 decision, which granted a special use permit to New England Self Storage. Mr. Marcantonio seconded the motion, with all in favor. Mr. Scarpelli made a motion to approve the minutes of the February 20, 2007 meeting. Mr. Denizard seconded the motion, with all in favor. Mr. Scarpelli made a motion to approve the minutes of the March 6, 2007 meeting. Mr. Marcantonio seconded the motion, with all in favor.

III. Application of Omnipoint Communications, Inc., requesting to install a wireless communication facility (cell tower), which requires a Special Use Permit under Section 5.4.7, subsection 19(A) & 19(B), Section 5.6.3.10, subsection 6, and a dimensional variance under Section 5.6.3.10, subsection 7 (A-1). Locus is 260 Pound Hill Road,

Plat 9, Lot 150.

The Chair stated that in considering the application, the Board is under federal jurisdiction as well as local. Mr. Rossi has advised the Board that federal law trumps local law, and the Board must rule in accordance with U.S. Code 47, 332, which states:

Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality

thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

Attorney Brian Grossman was present to represent the applicant, Omnipoint Communications, Inc. Mr. Grossman provided a brief overview of the applicant's request to construct a cell tower at 260 Pound Hill Road. He provided the Board with new plans, which he stated are almost identical to those originally distributed to the Board, but which provide detail of the proposed access road. Mr. Grossman explained that the Planning Board had requested this detail.

Mr. Jühr asked if the correct party is named as the applicant. He wanted clarification as to whether the property owner or the lessee should be the applicant, since the special use permit is granted to the property. Mr. Rossi stated that he would look into this and get a definitive answer. Mr. Grossman stated that he feels it is appropriate to name the lessee as the applicant.

Mr. Grossman stated that the proposed cell tower will be located in a residential zone and as planned would require variances with regard to setbacks and the height of the tower. He stated that the zone requires a 500-ft. setback. On the plans for the cell tower, the distances between the tower and the lot boundaries are 209' in the front yard, 155' at the rear yard, 143' on one side yard, and in excess of 500' on the other side. The height of the pole will be 150', which Mr. Grossman explained is necessary to provide coverage to areas within the identified gap areas and to function within FCC regulations, with regard to E911 service. Details of the application are presented in exhibit P1, "Application for Special Use Permit and Dimensional Variances for a Wireless Communication Facility" and exhibit P2, the updated plans which include access road detail. The applicant also submitted the following exhibits, which are maps showing coverage using existing structures in the area: P3, Gridcom pole #1, P4, Gridcom pole #2, and P5, Murray Hill Tower.

Mr. Grossman introduced Elijah Luutu, a radio frequency engineer.

Mr. Luutu was sworn in by the court stenographer. Mr. Luutu presented his resume to the Board to review in order to illustrate his qualification as an expert witness. Mr. Luutu stated that he assisted in identifying the proposed location of the Omnipoint tower, based on the identified gap in coverage area. The applicant has identified the area between routes 146 and 146A as an area with a significant gap in coverage. Mr. Luutu provided the Board with information regarding the existing sites as shown on P3, P4, and P5. These sites would all provide insufficient coverage in the identified gap area. The main coverage objective is the area along route 146. Mr. Juhr asked for clarification on the white areas of the map. Mr. Luutu explained that these areas have unreliable coverage. Mr. Luutu also clarified that the coverage identified on the map is for T-Mobile only and does not include other companies. Mr. Luutu also testified that the gap area at the northern part of the map “Existing Coverage in North Smithfield” will be covered by a proposed antenna at the Rhodes Avenue water tower. He explained that the coverage objective is to connect coverage in the gap area to the area covered by RI401, which is shown on the abovementioned map.

Mr. Scarpelli asked Mr. Luutu how he determines potential coverage. Mr. Luutu explained that he uses software which takes into account all factors of the tower and site, including height, terrain, and clutter (i.e. trees). Mr. Luutu explained that the coverage shown in P3, from the Gridcom Pole 1 leaves a gap and does not connect to RI401. The Gridcom Pole 2 (P4) coverage has a large gap to the south, and the

Murray Hill Tower (P5) provides good coverage to route 146, but is not adequate due to the large gap to route 146A. He explained that the Murray Hill Tower shows a greater area of coverage because it is located at a higher elevation and that signals travel better if they are higher than the trees.

Mr. Juhr questioned the location of the tower on the property and whether it could be located in an area that would require a smaller variance. Mr. Grossman stated that due to the shape of the property, there is no place on the land that would result in adequate setbacks. He also stated that the applicant is limited to what the property owner will allow. He stated that the applicant must make the best of what is available to them and that moving the tower is not reasonably feasible if the landlord doesn't make the area available. Mr. DiNunzio stated that the proposed tower will be located within 200' of 5 other properties and that the map shows significant land available on the property so that the tower does not have to be located so close to the neighbors. Mr. Juhr stated that the owner is getting the benefit of the tower, but is infringing upon neighbors. He feels that the person who is gaining the most is getting the least effect of the tower.

Mr. Marcantonio asked Mr. Luutu to mark the place of the proposed tower on the topographical map. Mr. Marcantonio then passed the map around for the other Board members to review. Mr. Naylor asked if a new structure could be built at one of the existing sites (P3, P4, P5). Mr. Luutu stated that they would not be able to build at existing

sites, they must use what is available, and even if they could build at those sites, there still would be inadequate coverage in the identified gap areas. Mr. Jühr stated that he believes that the coverage shown in P3 is better than the proposed cell tower. Mr. Luutu responded that the coverage provided by the site on P3 has no connection on 146 and provides less residential coverage in the areas of Homestead Avenue and Milton Avenue than the proposed tower. Mr. Marcantonio stated that he was looking at the topographical map to try to identify an area on the adjacent lot owned by the same owners that would be less infringing on neighbors. Mr. Luutu stated that in locating and building the tower, they must also consider construction issues such as access and utilities. The Chair asked whether any alternate locations on the property were considered. Mr. Grossman stated that he was not involved in the negotiations with the property owners; therefore he does not know what was considered.

Mr. Luutu stated that if the Gridcom 1 location was used, they would be leaving a gap that would not be able to be covered in the future. The gap coverage remaining would not be significant enough to warrant a new structure. The proposed tower is the best proposal in providing coverage in the identified gap area. Mr. Naylor asked if they considered working with other carriers. Mr. Luutu stated that the first step is always to look at existing structures for colocation with other carriers. There are no existing structures that can provide coverage in the identified gap area. Mr. Luutu also explained that some carriers use low frequencies that are technologically

incompatible and are therefore not available to them. He did state that colocation for other carriers would be available from the proposed tower.

The Chair asked if any members of the public wished to speak in favor of the application, but there were none. He then asked if any members of the public wished to speak against the application. Leo Fleury asked if he could question Mr. Luutu. Mr. Rossi stated that he did not feel it was appropriate to cross-examine the witness, but that if Mr. Fleury is sworn in, he could ask the Chair a question, which the Chair could then ask Mr. Luutu. Through this process, Mr. Fleury asked what criteria were used in selecting the site. Mr. Luutu told the Chair that a radius map is needed, then the applicant looks for an available location, then a willing landlord. The applicant then visits the area and assesses construction issues, including zoning regulations. Mr. Fleury asked if zoning was considered with regard to the location of this tower. Mr. Luutu told the Chair that zoning was considered, but he was not involved in that process since he is the radio frequency engineer, and other members of the company address zoning issues.

Attorney Aram Jarrett addressed the Board and stated that he is representing Richard Dowling, owner of adjacent property located on Plat 8, Lot 63. Mr. Jarrett presented exhibit A1, a map that identifies the Dowling property. Mr. Dowling was sworn in by the court stenographer. He testified that his property includes a dwelling and a

shed and that it is located approximately 143' from the proposed tower. Mr. Dowling testified that the general characteristics of the neighborhood include upscale homes and a close-knit neighborhood.

He stated that the proposed tower is located at a slightly higher elevation than most of the homes and that the tower will be viewable by most landowners in the area. He stated that the trees around the base of the tower will not provide screening in fall and winter months and that the tower will alter the general character of the neighborhood.

Mr. Jarrett then addressed the Board with legal issues concerning the application. Mr. Jarrett stated that as owners of the property, the applicant is Donald Geer and Debra McManus and they should have to come before the Board to show hardship. In applying for the variance, the applicant needs to show hardship. Mr. Jarrett stated that in this application, there is no evidence of hardship for the property owner; rather the hardship is for the telecommunications company. Mr. Jarrett also stated that the applicant must show that the proposed facility will not alter the general character of the neighborhood. Mr. Jarrett stated that the cell tower will become a focal point in the neighborhood, and will alter the character of the neighborhood, particularly in winter when there is no foliage. Mr. Jarrett also stated that the applicant has to show that they will not realize greater financial gain by the granting of the dimensional variance. Mr. Jarrett stated that the testimony provides no evidence that the owners are being denied beneficial use of the property. The

Chair pointed out that the owners realizing financial gain from the building of the cell tower is an assumption and there has been no evidence presented to support this. Mr. Jarrett stated that due to the lack of proof of hardship by the owners of the property, they are not entitled to a variance and requested that the Board deny the application for the variance.

David Russell Narodowy was sworn in by the court stenographer. Mr. Narodowy stated that he lives at 180 Pound Hill Road, which is very close to the proposed tower. He stated that while he will not be able to see the tower from his property, he empathizes with his neighbors. He also stated that the construction of the cell tower will not add to the property value in the area. Mr. Narodowy stated that he feels the property owners are gaining financially to the detriment of their neighbors. He questioned why the tower could not be located further back on the property and why the owners were not present at the meeting. Mr. Narodowy asked if the tower were approved, could the Board prevent further height being added in the future. The Chair stated that this could be included as a condition of approval.

Leo Fleury was sworn in by the court stenographer. He stated that the interpretation of the zoning ordinance is up to the Board. He pointed out that according to the ordinance cell towers are allowed in an REA zone as a principle use or an accessory use. On the property in question, the principle use is a horse farm; therefore a cell tower would not be an accessory use on this property. Mr. Fleury stated

that another accessory use would be permitted in a manufacturing zone and asked if a location in a manufacturing zone had been considered, as he believes that would be a better area to locate a cell tower.

Sheryl Skinner was sworn in by the court stenographer. She stated that she is an abutter to the property. She feels that construction of a cell tower will change the character of the neighborhood. Ms. Skinner stated that she is disappointed that the owners are not present at the meeting. Ms. Skinner asked about the access road and if it would include construction of a roadway. Mr. Grossman stated that there would be an improvement to the access, using an existing easement. The changes in the plans they submitted today concerning the access road include the addition of a fabric membrane to help facilitate drainage. Mr. Grossman stated that he does not know if this easement is public or private. Ms. Skinner had further questions about the difference in coverage between the proposed tower and a tower located at Gridcom 1 (P3). Mr. Grossman stated that this location would result in a great deal of redundant coverage and would not cover the identified gap area.

The Chair asked if a manufacturing zone was considered for location and asked what criteria is used to identify sites. Mr. Grossman stated that criteria are addressed in P1, tab 10, paragraph 2. Mr. Luutu stated that he is not involved in the zoning aspect of identifying sites, just the radio frequency aspects. Mr. Grossman stated that the maps

provided in P1, including P3, P4, & P5 are appropriate tools for decisions and are relied upon by courts. He added that there is no location on the property that would not require a setback variance. Mr. Naylor stated that in granting a variance, the Board aims to grant the minimum relief necessary and that the applicant is asking for a rather large variance. He asked if it was feasible to go back to the owner to try to find another site on the property to locate the tower. Mr. DiNunzio and Mr. Scarpelli asked about possible sites on Industrial Drive. Mr. Luutu stated that the area on Industrial Drive is further north and would not provide the coverage needed. Mr. Grossman said he could go back to the owner to try to explore another site on the property.

Paulette Janario was sworn in by the court stenographer. Ms. Janario stated that anywhere that the tower is located on the property would impact neighbors. She suggested locating the tower on Industrial Drive where it would not stand out as much from its surroundings.

Judy Dowling was sworn in by the court stenographer. She stated that the property is located in a rural area and that the corner of the property on which the tower would be located has a 450-year old oak tree and Historical Cemetery 6. The cemetery is the burial place of some members of the Aldrich and Mowry families.

Dean Narodowy was sworn in by the court stenographer. He lives at 151 Pound Hill Road. Mr. Narodowy also questioned whether the

tower could be located elsewhere on the property, away from neighbors. He asked that the applicant consider intangible costs of the project, such as the appeal of the neighborhood. He stated that while he understands that location of the tower is important with regard to filling the gap in coverage, he feels that the property owners are limiting where the tower could be located on their property, without regard to their neighbors. Mr. Narodowy asked if the tower could be located at Gridcom 1 (P3) and be engineered to direct the signal toward the gap area. Mr. Luutu stated that P3 shows the maximum potential for coverage from an antenna located at Gridcom 1.

The Chair stated that before making a decision, the Board would like some more information on two issues: 1) clarification of the owner/applicant issue raised by Mr. Jarrett and 2) possible alternate sites on the property.

Mr. Juhr asked if the property owner could be present at the next meeting. Mr. Rossi stated that the Board can make the request, but he does not know if they can be required to appear. Mr. Grossman agreed to ask the property owner to attend the next meeting, but stated that he cannot compel them to appear.

The Chair made a motion to continue the hearing until April 10, 2007 at 7:00 pm. Mr. Denizard seconded the motion, with all members voting in favor.

Mr. Scarpelli made a motion to adjourn at 10:00 p.m., seconded by Mr. Kearns, with all in favor.

**Respectfully submitted,
Angela Pugliese, Clerk**