

Minutes for the Ticonderoga Zoning Board of Appeals held on June 4, 2015 in the Community Building commencing at 6:00 p.m. regarding a Cell Tower

Present: Chairman Eric Stoddard, Joyce Barry, Erik Leerkes, Andy Belkevich, Town Attorney Matt Fuller, Tonya M. Thompson

Absent: Doug McTyier

Others: Zoning Officer Bill Ball, Danielle Drinkwine-Holman, Stu Baker, Grey Densmore, Chris Howell, Jillian Fancher, Chattie Van Wert, Dick LaVallie, Nixon Peabody LLP Attorney Robert Brenner

Mr. Stoddard called the meeting to order at 6:00 p.m. and opened with the Reciting of the Pledge of Allegiance. (The board introduced themselves)

Public Hearing Announcement

PLEASE TAKE NOTICE that the Zoning Board of Appeals of the Town of Ticonderoga will hold a Public Hearing and meeting on June 4th, 2015 commencing at 6:00 p.m. at the Ticonderoga Community Building's Conference Room, located in the Basement at 132 Montcalm Street, Ticonderoga, NY, regarding an Application for an Appeal submitted by Stuart Baker on the Zoning Officer's opinion concerning a Wireless telecommunications facility at 228 NYS Route 9N in Ticonderoga, NY along with an Application for a Use Variance from NY RSA 2 Cellular Partnership d/b/a Verizon Wireless for a Wireless Telecommunications Facility and related improvements at 228 NYS Route 9N, #160.1-3-18, Ticonderoga, NY 12883. All parties interested may be heard at such time.

Mailings went out - no responses - two returned from Valley View Cemetery.

Appeal of Administration Decision - Regarding NY RSA 2 Cellular Partnership d/b/a Verizon Wireless - 99' wireless telecommunication Facility

Mr. Baker explained that his appeal is of the Administrative Decision made by the Code Enforcement Officer. (See Below for excerpts from Mr. Baker's Letter regarding the same - entire application will be on file)

On April 20, 2015, the Town of Ticonderoga Code Enforcement Officer (CEO) issued a written determination regarding an application for a "wireless telecommunications facility" (hereinafter "the use) that states the following:

1. The use is allowed in the Rural Residential zoning district.
2. That the project is not prohibited by any local law or ordinance, and
3. That the use only requires Site Plan Review approval from the Planning Board prior to the issuance of a building permit.

Mr. Baker went on to explain why he believed that this determination was erred on all three of these points.

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1. The use "wireless telecommunications facility" is not a defined term in Article II, Section 2.20 (Definitions) of the Zoning Ordinance. The use is also not listed in Schedule I Town of Ticonderoga Zoning Schedule of Use Controls (April 1998) as either a Permitted Principal Use, Permitted Accessory Use or Special Use in any zoning district in the Town.
2. Article 4.21 of the Town of Ticonderoga Zoning Ordinance (as Amended through March 10, 2011) clearly states that "No building, structure or sign shall be erected, moved, altered, rebuilt or enlarged, nor shall any land, water or structure be used, designed or arranged to be used for any purpose except in conformity with this Ordinance, and with the schedules constituting the Article, for the district on which such structure or land or water is located." Since the use is neither defined in the ordinance nor listed in Schedule 1, it clearly does not conform to the Ordinance, and thus is prohibited.
3. As a prohibited use, it must first apply for and receive a Use Variance from the Zoning Board of Appeals (ZBA) prior to site plan review by the Planning Board. Well-established statutory and case law in New York State requires that the Planning Board may not review and approve any use that does not conform with the area and use requirements of the local zoning ordinance.

Mr. Baker added another form (see below) that was sent by the Code Enforcement Officer in September of 2013 on this very same project; note on the form that at that time the CEO said the use was not allowed in the district. So the opinion over a less than two (2) year period changed. The Appeal is based on the current, written determination submitted this April. He asks that the Board reverse the determination of the CEO dated April 20, 2015 and instruct him to require the applicant to file a Use Variance as a necessary pre-requisite to Site Plan Review by the Planning Board. He does understand that the agent for the applicant has done that.

LOCAL GOVERNMENT NOTICE FORM

If your local town or village has zoning or other regulations which apply to your project, the Adirondack Park Agency will be unable to issue a permit if the town or village has either (a) refused to grant a necessary permit or (b) the project would be a prohibited use in that jurisdiction.

Accordingly, the Adirondack Park Agency will not complete your permit application until you describe your project to municipal officials and have the form below completed by a local official and returned to the Agency.

RECEIVED
 05-23-2015
 ADIRONDACK PARK AGENCY

TO: Adirondack Park Agency
 FROM: Town of Ticonderoga

To be completed by the applicant:
 Applicant Name: New York RSA 2 Cellular Partnership d/b/a Verizon Wireless
 Landowner Name: Graydon Denmore, Warren Denmore, Alan Denmore and Margaret Armstrong
 APA Project Number (if available): _____
 Project site location: Town/Village: Ticonderoga Tax Map Number: 160.1-3-18.000

Project type/description: Wireless Telecommunications Facility - Verizon Wireless "Ticonderoga West" site
if the project involves subdivision, please provide the appropriate local official a copy of the proposed plan as part of the project description with the plan title and date recorded in the space provided above.

To be completed by the Town/Village: Does the Town/Village have land use controls? Yes No
 If Town/Village has zoning, provide Zoning District Name(s): RURAL RESIDENTIAL

Is this "use" allowed in the zoning district(s)? Yes No
 Is the project prohibited by any local law or ordinance? Yes No
 Is a municipal permit, variance or other approval required for this project? Permit Variance
 Other (Specify: Site Plan Approval)

Has the municipality issued any decision on this project? Yes No
 Provide explanation for any decisions on this project or inconsistencies the project may have with local laws or any comments you wish to provide to the Agency about the project: _____

Provide daytime telephone number if official signing this form wishes to discuss this project with Agency staff: (518) 586-4851

Signature of Zoning Official or Planning Board Chair (or Mayor/Supervisor if no such official exists):
William Ball ZONING ADMIN.
 Name and Title (Print) Date: 4-19-13

*Return this form to the: Adirondack Park Agency, P.O. Box 99, Ray Brook, NY 12977
 Or fax: 518-691-3928*

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Accordingly, the Adirondack Park Agency will not complete your permit application until you describe your project to municipal officials and have the form below completed by a local official and returned to the Agency.

TO: Adirondack Park Agency

FROM: Town of Ticonderoga

To be completed by the applicant:

Applicant Name: New York RSA 2 Cellular Partnership d/b/a Verizon Wireless

Landowner Name: Graydon Densmore, Warren Densmore, Alan Densmore and Margaret Armstrong

APA Project Number (if available): ---

Project site location: Town/Village: Ticonderoga Tax Map Number: 160.1-3-18.000

Project type/description: Wireless Telecommunications Facility - Verizon Wireless' "Ticonderoga West" site

If the project involves subdivision, please provide the appropriate local official a copy of the proposed plat as part of the project description with the plan title and date recorded in the space provided above.

To be completed by the Town/Village: Does the Town/Village have land use controls? Yes No

If Town/Village has zoning, provide Zoning District Name(s): Rural Residential

Is this "use" allowed in the zoning district(s)? Yes No

Is the project prohibited by any local law or ordinance? Yes No

Is a municipal permit required or other approval required for this project? Permit Yes No

Other (Site Plan Approval)
Planning Board

Has the municipality issued any decision on this project? Yes No

Provide explanation for any decisions on this project or inconsistencies the project may have with local laws or any comments you wish to provide to the Agency about the project: _____

Provide daytime telephone number if official signing this form wishes to discuss this project with Agency staff: (518) 585-~~2221~~ 4251

Signature of Zoning Official or Planning Board Chair (or Mayor/Supervisor if no such official exists)

William Ball, Zoning Administrator

Name and Title (Print)

6-20-15

Date

Return this form to the: Adirondack Park Agency, PO Box 99, Ray Brook, NY 12977

Or fax: 518-891-3938

Mrs. Barry inquired if both were for the same locations?

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Mr. Baker agreed that they are both for the same property. The 2013 letter was when the applicant first began to work with the Adirondack Park Agency on this project. He will emphasize that his appeal is totally on the administrative procedure here, he offers no opinion in any of his application materials nor does he intend to offer any verbally before this board this evening on the merits of the project itself. That is not his concern at this time, and as a sitting planning board member he needs to remain objective in hopes that the project will get before the planning board.

Mr. Belkevich re-affirmed that Mr. Baker is only here contesting the procedure that the officer used.

Mr. Baker agreed.

Mr. Belkevich asked the Town Attorney if he had reviewed the procedure that Mr. Ball had used.

Mr. Fuller noted that procedural wise he is fine, Mr. Baker is challenging not necessarily the procedure, but whether or not it needs a Use Variance.

Mr. Baker agreed, it is the written determination that he is appealing.

Mr. Belkevich inquired Mr. Fuller's opinion on it, does it need a use variance.

Mr. Fuller explained that he can't decide that for this board.

Mr. Leerkes asked Mr. Ball why he did change his opinion?

Mr. Ball began explaining that in 2013 he had just gotten this position and prior to Wayne Wagner's (prior CEO) departure from the Town, he had handled all the Zoning Administration. He did look at this and decided that the cell tower was not on there, but going to several classes for zoning and planning and talking to the Department of State's Lawyers they have said that this is an essential public service. If you see on the Rural Residential it is allowed. He changed his determination in 2015 in light of this.

Mr. Baker would like to point out to the board that on the written determination of April 2015 the use is not labeled as an essential public service, it is labeled as a wireless telecommunications facility.

Mr. Ball stated that it does not have to be.

Mr. Leerkes agreed that you can run a power line and that is an essential public service too, it doesn't specifically have to say that.

Mr. Ball explained that these applications come in to him before any paperwork is submitted. This has to be in place before they can submit any paperwork whatsoever, basically they come onto his desk and he makes a decision and faxes it directly to the

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APA. Two years down the road, hopefully he is a little smarter and a little more informed and he believes that he made an informed decision and he is willing to stick by that.

Mr. Baker would like to point out to the board that nowhere in the application submitted by the agent for the project, who is an attorney, is the term essential public service used to describe the use. Consistent use is wireless telecommunications facility.

Mr. Fuller inquired if Mr. Baker would agree that that is not necessarily findings of the Town, the Town can interpretate an application regardless, how it wants to. It is not up to the applicant to.

Mr. Baker agrees but the written determination used the term wireless telecommunications facility.

Mr. Fuller believes that Mr. Ball clarified it here as to how he got to that term. The decision that needs to go before the board is along those lines. Is Mr. Ball correct - was his interpretation of an essential public service as he has laid out to you correct or does the matter require a use variance? If he is incorrect it would require a use variance.

Mrs. Barry feels that Mr. Ball is correct.

Mrs. Van Wert asked if telephone (land lines) considered essential public services? (Yes) So she does not have a land line, probably most people don't have a land line; she thinks this is comparable to a land line in that it is an essential public service. She doesn't really care how you get to it, she just hopes that the cell tower gets in front of the Planning Board and gets approved. She believes that it is an essential public service and would agree with Mr. Ball on that.

Mr. Leerkes inquired from Mr. Fuller, looking at this list no matter what the zoning there is obviously no mention of a cell tower. If we call it an essential public service, what stops a cell tower from going in the middle of a bunch of houses. What is to protect us. Are we setting a precedent with this.

Mr. Fuller explained that if you look at the zoning list essential public service does show up in every district so it would be allowed where any public service is allowed. However, you would still need to go in front of the planning board because it does require site plan review and remember too that cell towers are subject to a lesser standard when it comes to site plan and things like that.

Mr. Leerkes explained that this is his only concern, we need to think of the future.

Mr. Fuller feels that it wouldn't necessarily be an 'us' question here interpreting a statute it would be a site plan question. In interpreting a definition, we don't get into where that definition applies in terms of where it would be allowed. Our role here is who is right - Mr. Baker or Mr. Ball; that is the question that needs to be answered tonight. This

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would still need to go to site plan. The decision of where something goes is a town board decision - they would zone it in terms of where a facility would be located.

Mrs. Van Wert hadn't thought about this, we could have someone want to put one up in a very undesirable place. If you didn't call it an essential service and you decided to give it a use variance; does that have the same implication of allowing cell towers just anywhere someone wants to put one.

Mr. Leerkes explained that each use variance is treated individually.

Mrs. Van Wert noted that it would still need to go to site plan review. (yes) It will not open it up, you will have more control.

Mr. Fuller would not necessarily use definitions to control where you would want to put something.

Mr. Leerkes noted that there is very little control over this.

Mr. Fuller agreed that there is a far lesser standard, even under a use variance the standard is very low for a cell tower.

Mr. Ball explained that we have more discretion on privately held towers, than certified towers like Verizon and AT&T. The certified tower only has to prove two things, that it is in a place that will give them the optimal coverage and it is a public service.

Mr. Leerkes added that each cell tower would not make it a necessary use. They are not all the same. Just being a cell tower does not make you necessary, you have to improve coverage.

Nixon Peabody LLP's Attorney Robert Brenner is here representing Verizon. He understands that before you this evening is first the interpretation issue and second the use variance issue. He had heard the previous discussion about essential service, and would like to draw the board's attention to a map of the site. This report is prepared by a radio frequency engineer who works for Verizon on cell towers in this part of upstate New York and this report takes you through, in narrative form, the existing coverage that is in the Adirondack Park and in this area as well. It discusses the need for additional facilities in the Adirondack Park and where those gaps in service are. This report specifically outlines that there is a gap in service in the vicinity of the proposed site location. Once that is identified the company then looks at what's called its search area to identify parcels that are within that search area for a proposed new tower. In here a fairly narrow search area was identified which is very typical based on topography and things like that it has to be in a very precise location. In this instance, in our search area there were only actually two tax parcels. There is the one that they are proposing the project on and then there is one that is adjacent. The reason why we did select the parcel that we are going with is there is wetlands on the adjacent parcel. The APA regulations as well as State and Federal regulations require you consider alternatives to the extent that you

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have in order to not disturb the wetland. With the two candidates that we had, we selected the one that did not have the wetland. (The board reviewed a series of maps showing the existing site along with showing the proposed site to fill in gaps in this area) What the company does is build out its network in a honeycomb grid style, so they need to build a series of towers to overlap in order to build up the network. This is a small step into building up the rest of the network in the Adirondack Park.

Mrs. Barry inquired how much territory that one cell tower would cover.

Mr. Brenner stated that it depends on topography, it depends on foliage and it also (not in this case) ground clutter, buildings and such like that in other types of communities. It can also depend on the demand of a particular cell site. There are a lot of factors that go into how far the signal can propagate. A cell tower of this height can generally transmit a signal of a few miles. Some of the other facilities that we work on can only transmit 1,500 or 2,000 feet. This is intended to be what the company calls a macro cell solution and those types of sites are intended to build out the companies network so you have seamless coverage every where, whereas other types of solutions are intended to provide additional capacity where there may be existing coverage but there is a high level of users for demand. For example, we would use an additional capacity site in such areas as Lake George Village who already have coverage, but in the summer months there is so much more demand they need additional capacity. This facility is really a coverage facility to build up networks so folks have access to telephones in certain areas of the town, emergency responders have access to telephone to the extent they need and business folks that are using the roads in the area as well. The other thing that he would like to point out is the applicable legal standards that are applied to public utilities; the New York Court of Appeals has determined that wireless telecommunication providers are to be considered public utilities under the law, since we can identify that we have a gap in service or need and since we can prove that our proposed facility helps satisfy that need, we are therefore entitled to relaxed zoning standards under NY Law; so the traditional five (5) factor use variance test wouldn't apply to an application of this type. When granting a use variance you would consider those two factors, have they demonstrated that there is a gap in coverage and have they shown a mapping that demonstrates that the proposed facility will fill in that gap.

Mr. Fuller explained that the board was discussing whether or not the wireless communication facility fits under the towns essential public services designation in the zoning schedule. It is not necessarily defined in the zoning for essential public services which takes it back to basically an interpretation of what is included there. So in the rural residential, the medium residential and some other districts, essential public services is a permitted principal use. The topic that was being taken up was whether a wireless communication facility falls under essential public service. Procedurally for the board, you are dealing with the first part of whether or not it is a essential public service - that would dictate the decision on Mr. Baker's appeal. If it is not an essential public service, it would need a use variance so you would go to use variance review of the application. If it is an essential public service, you would not get to the use variance.

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Mrs. Barry understands that we are in a dead spot, personally she knows that you cannot get service on Lake George.

Mr. Fuller again reminded that utilities do fall under that relaxed standard.

Public Hearing closed at 6:32 p.m. and regular meeting opened at 6:32 p.m.

Mr. Stoddard asked the boards input.

Mr. Leerkes believes that this is an essential public service.

Mrs. Barry also believes that this is an essential public service.

Mr. Belkevich agreed that it is an essential public service.

Mr. Fuller is understanding that the majority of the members feel that this is an essential public service. You can now propose a resolution to affirm the decision of Zoning Officer Bill Ball that the wireless communications facility is an allowed use in that district as an essential public service.

Resolution #9-2015 brought by Joyce Barry, seconded by Erik Leerkes affirming the decision of Zoning Officer Bill Ball, that the wireless communications facility is an allowed use in that district as an essential public service. **All in Favor 4 - Aye, 0 - Nay. Carried.**

Mr. Fuller explained that the resolution now renders moot the need for the use variance application.

Resolution #10-2015 brought by Erik Leerkes, seconded by Eric Stoddard to close the meeting at 6:35 p.m.

Respectfully submitted, Tonya M. Thompson