

ZONING BOARD OF APPEALS

November 20, 2007

Present: Michael Dudick, Chairman (arrived 7:16 PM), Dale Gleason, Gilbert Kortz, Joel Koval, Christopher Lemire (arrived 7:11 PM for Eric Ophardt), Jessica McCarthy, Robert Ritter

Absent: Eric Ophardt

Also Present: Louis Renzi, Esq. for Joel Peller, ZBA Counsel
Steve Myers, Director, Building & Zoning

Mr. Renzi announced that he received a telephone call from Mr. Dudick and he will be arriving late. Mr. Ritter, acting Chairman, called the meeting to order at 7:04 PM.

OLD BUSINESS

1. An application from **Independent Towers, LLC Et Al**, requesting a Use Variance from Section 208-95B(2)(c)(1) for the construction of a new cell tower in an R-1 (Residential) zone. The property is located at 753 Grooms Road, Rexford. Permit #80650

Jacqueline Phillips Murray, attorney for Independent Towers, explained that they are here tonight in furtherance of their application for a use variance to install a 120 ft. telecommunications facility at 753 Grooms Road. The facility is proposed to support antennas of Sprint/Nextel. They have provided to the Town RF propagation plots as well as actual drive test data documenting its lack of service in the area and the way in which the proposed facility will remedy the lack of service in the area. They have also supplied the Town with propagation analysis of numerous alternative sites as well as two publicly noticed balloon tests, the first of which occurred on July 21st from 7 AM-4 PM and from that balloon test photographs were taken and photographic simulations were rendered thereafter there was a request at the October 16, 2007 meeting that they also analyze the potential for adverse visibility during leaf-off conditions. In accordance with that request they did conduct a publicly noticed balloon test on

November 17th from 7 AM- 4PM to afford as many people the opportunity to try to see the balloon in the leaf-off conditions.

Mr. Renzi asked how the notification was given. Ms. Murray replied via the mail to all the citizens that were required to be notified originally of this application and also the date and time was agreed to during the October 16th meeting. The only new data derived since the last meeting is the result of the balloon test. She also noted that they did give an explanation of the new data that was created since the application was submitted and the July 21st balloon test thru the October 16th meeting which is really when most of the supplemental data was created pursuant to the request of the board, the public, and the board's consultant, the Center for Municipal Solutions, Mr. Comi.

Mr. Ritter asked for an explanation of the latest balloon test. Ms. Murray presented photographs of the sites that were previously analyzed from the July 21st balloon test to show that the balloon was either not visible; it was not visible from Grooms Corners in either leaf-on or leaf-off season and generally speaking the visibility of the facility was the same during leaf-on versus leaf-off season with the exception of a few viewpoints noted where the balloon could be viewed at a distance through the trees, approximately 900 ft. away. It did not exceed the height of the tree canopy so it is something that could potentially be viewed at a great distance through the trees from a few locations.

Mr. Renzi asked for clarification on the date of the photographs. Ms. Murray explained that they are from the current balloon test on November 17th.

Mr. Renzi noted that Mr. Lemire has arrived and will be sitting for Mr. Ophardt.

Mr. Dudick arrived at 7:16 PM and took over as chair for the meeting. Ms. Murray gave a brief recap of her earlier presentation this evening.

Ms. Murray referred to the photographs she presented to the board from several of the viewpoints analyzed during the leaf-on season from the July 21st balloon test and noted that even in the leaf-off season the blimps were not visible from Grooms Corners and listed the sites where the photographs were taken from and explained that the locations are the same for both balloon tests and there is no or a very limited visibility from the sites.

Mr. Dudick made the photographs available to the public. He explained that there is a submission from Mr. Comi, the professional hired by the Clifton Park Town Board. He explained that Mr. Comi reviewed the material submitted by the applicant and reviewed the balloon test and asked for his comments.

Mr. Comi summarized his conclusions and submitted two photographs from two of the same sites as submitted by the applicant. He referred to one photo that is approximately 50 ft. inside the Wishing Well subdivision by the water right-of-way and circled the balloon relevant to

that position and noted that within the subdivision from public property the balloon could not be seen. He noted that it does not mean that it may not be seen from a second floor of someone's house. He is convinced it is not visible above the trees in the entire subdivision simply by where it is and the distance away. The visibility from nearby within 1,000± is obviously the property owner, one house across the street that is next to the new fire station, and five homes on the north side of Grooms Road, all of which will have the same kind of visibility through the trees, not over the trees, but through the trees to varying degrees within any reasonable distance of the site based on the leaf-off condition.

Mr. Comi noted that it is obvious from the subdivision the visual impact is only through the trees and minimal only at that.

Mr. Dudick asked for his conclusion with regard to the application. Mr. Comi responded in terms of a base summary, he looked at the data; there is a significant gap in coverage.

Mr. Kortz asked for a definition of gap in coverage. Mr. Comi explained from the standpoint of significant gap it means that there is not the ability for in-building, and in some cases in-vehicle, reliable coverage in a significant area and the significant area here is anywhere from one-half mile to one mile in that general area. It is significant. He also went through and looked at all other possible tall structures in the area and essentially there aren't any, he looked at all other property that met the one consideration, i.e. the 500 ft. setback from residential property and essentially, except for the property right behind it, this is the only property in this area to the best of his knowledge that meets that requirement. From that standpoint the data demonstrates the need for the facility and at the height they are asking for. He explained that at the last meeting he requested that the structure be brought down to 117 ft. with nothing above 120 ft. and they agreed to that. He noted that he received notice that Verizon is not a part of this application. From his standpoint the applicant has provided the ZBA with significant information to determine that the need for the facility has been justified as required by federal and local laws.

Mr. Comi asked for confirmation that if this application is approved by the ZBA the applicant still has to go to the Planning Board because there are issues in terms of items that he would make in terms of specific issues with the Planning Board that don't have to do with the variance or the height but has to do with other small things like bonds that he would make sure would be part of that process. Mr. Dudick confirmed that statement. Mr. Renzi stated that the variance application is a condition precedent to all the other stuff.

Mr. Ritter expressed his concern with the on going issue of data and the need to demonstrate data. He would still like a clearer picture on data as it relates to the communications act. He is concerned with data because one of the providers being proposed has no voice communications whatsoever, just data. He asked Mr. Comi if in his report where he states that they successfully meet the requirements is he only specifically referencing data?

Mr. Comi explained that Sprint/Nextel provides both services and the height justification that is there is based on Sprint/Nextel not Clear Wire.

Mr. Ritter asked if it is for voice or data or both. Mr. Comi replied both. There is no difference in the height, there is no requirement difference, there's no signal strength difference, and there is a reliability difference in his opinion that unlike a voice conversation on a cell phone, if you're transmitting data and you happen to lose a packet it is much more difficult to reconstruct the data therefore the reliability of the service in terms of its constant signal strength is more critical with data, but in terms of Sprint/Nextel they do provide data. He noted that in some parts of the country on a Sprint/Nextel phone you can watch TV on it and that is quite a significant flow of data to provide a constant stream of video. He also clarified that the applicant indicated that they are only providing Sprint service, this application does not provide for the Nextel service.

Mr. Dudick asked what the significance is in only making the application in regard to Sprint and not Nextel. Mr. Comi stated that they have determined that all they are looking for at the present time is Sprint service at this location.

Mr. Dudick asked if that would have any affect as far as the height. Mr. Comi responded no.

Mr. Lemire referred to case law that suggests that as a board we need to think of this application differently than we would a normal application because of the definition of a public utility. He asked in the context of the case law what is the effect of Sprint/Nextel being a co-applicant with Clear wire and do we need to look at each applicant differently under the standards in the case law. Mr. Comi responded no for two reasons; 1) Clear Wire does not come under the Telecommunications Act at all. Mr. Lemire then asked if that is true, don't we need to look at the Clear Wire portion of the application under the Otto factors.

Mr. Kortz asked isn't the application is for the tower. Mr. Comi explained the height of what is being proposed at that location is justified by Sprint/Nextel even if Clear Wire was not part of the application, therefore from a variance standpoint that's the justification; putting Clear Wire on a tower that is already there, ten feet lower, from every portion of the regulations and ordinances makes sense, they happen to be co-applicant.

Mr. Lemire then asked what was the relevance about the fact that Verizon was or was not going to be a part of this application. How would that change, if there is a tower there and Verizon wants to co-locate like Clear Wire why would we care. Mr. Comi explained because Clear Wire has no service in this community whatsoever, they obviously have a gap in their service. Mr. Lemire noted that they are not a public utility so we don't care about the standard. Mr. Comi explained that there really is no standard whatsoever for them but when it comes to Verizon, who is not an applicant here, but was an applicant in other applications that he was involved in and they were withdrawn, he had some questions relevant to what had been provided relevant to justify Verizon being on this site at all.

Mr. Kortz asked that if this goes through based on Sprint/Nextel's need and Verizon wants to co-locate later on without changing the tower at all would they need a variance because the tower is already there. Mr. Comi explained it is no longer a variance but it is part of the permitting process in this community.

Mr. Dudick clarified that Clear Wire co-locating on this site is just a point of interest not a point of required notification. The top of the tower, which is Sprint/Nextel, has to be justified.

Mr. Comi explained that Sprint can only provide Sprint service if this is approved, if they decide they want Sprint/Nextel they will have to change the antennas from single mode to dual mode and that normally would require them to go back to the Planning Board.

Ms. Murray referred to Section 208-95B (2) (c) of the zoning law governing telecommunications towers. It prohibits new towers from being in an R-1 residential zone. The company that is necessitating the new tower is Sprint/Nextel and their need to be at 120 ft. After they sought to put in a new tower at this site others have expressed interest, such as Clear Wire, in co-locating but really the company and tower project comes down to Sprint/Nextel's need for a new tower in the area.

Mr. Dudick explained that the discussions at the last meeting regarding Verizon were only discussions because they had not decided if they were or were not going to become part of this application.

Mr. Lemire asked which standard do we review the application under, do we review it under the Otto standard which seems to be the case for Clear Wire or do we not care what the Otto standards are because the tower is being built primarily for the antenna for the use of a public utility. There are two different legal standards. What is the effect of them being co-applicants, which standard of review should we review this variance under because the standards are different. If it was just Clear Wire it would not be considered a public utility and would be reviewed under the Otto standards for a use variance.

Mr. Dudick asked if the applicant is Sprint/Nextel and Clear Wire or is the applicant the cell tower company, Independent Towers, LLC. Ms. Murray answered they are all co-applicants. She clarified that when you look at the case of Cellular Telephone Company vs. Rosenberg what the court is very clear about is that they are dealing with public utility buildings and what defines a public utility building is whether or not a public utility needs the structure to provide safe and adequate service to the public, and in this case the public utility that has demonstrated a need for a public utility building to be 120 ft. in height at this particular site is Sprint/Nextel and Sprint/Nextel also falls within the definition of a "public utility" because it is an FCC provider of wireless telecommunications services. Ms. Murray further clarified the reason why the Court looks at whether or not the structure itself, the public utility building is being used for a "public utility", is because there is other case law that states zoning and planning cannot make a decision based upon the identity or the land user but only based on the identity of the land use. So this

board is looking at whether or not the proposed land use is a public utility land use to justify the height of the facility and that has been demonstrated.

Mr. Kortz explained that judging under the telecommunications standards is required because of Sprint voice not Sprint data.

Ms. Murray disagreed with that in the sense that the data services fall within the definition under the Telecommunications Act of 1996 of "mobile services", but she would agree in this case because the need for voice services is also present.

Mr. Kortz referred to the two standards that must be used in this case: 1) the variance is necessary to render safe and adequate service and 2) there is a compelling reason for needing the variance and asked Mr. Comi in his definition of judging safe and adequate service you referred to in-home and being spotty reception within vehicles he asked, would that be true if only judging voice. Mr. Comi responded yes the service requirement as far as signal strength in his opinion, whether you're talking voice or data is exactly the same. If on the outskirts of the cell site where the signal strength goes down before you hand off to the next one if you drop that signal and you are on a voice call you can almost immediately dial again and resume your conversation. In terms of the service standard in both cases, whether voice or data, they have a significant gap in their coverage at the present time in that area. Sprint is justified by needing the service at that height. Clear Wire was totally peripheral. Ms. Murray noted that Clear Wire is not the main anchor of this facility they are a co-locator.

Mr. Comi explained that the significant gap and the safe and adequate issue does include reasonable in-home service. He explained that he went out and looked specifically for other tall structures, is there any other way in this general area to provide service, is there any other area that meets the 500 ft. requirement, and he also believes it is significant based on what was seen relevant to the last balloon test with the leaves off relevant to where this can and cannot be seen in terms of impact.

Mr. Dudick stated that he arrived late to the meeting and announced that Mr. Lemire is sitting in for Mr. Ophardt tonight.

Mr. Ritter asked if Mr. Comi is saying that if Nextel asks six months from now to co-locate at this site will it be solely a planning issue. Mr. Comi responded yes, they would still have to go back to planning; there is no zoning issue once the tower is there.

Mr. Kortz verified that the tower will be at a height of 120 ft.

Ms. Murray stated that they have submitted data that they believe demonstrates a need for this facility and compelling reasons in accordance with the Rosenberg standard including a visual analysis consisting of two publicly noticed balloon tests as well as a view shed analysis as well as a very exhaustive review of alternate sites including existing structures and raw lands and

consistent with the town's expert's opinion there are no alternatives in the area that would be less intrusive than the proposed facility and review of the visual analysis demonstrates that this facility has the least potential for visibility let alone visual impact, let alone potentially adverse visual impact given that it is in the middle of a 127 acre parcel with many trees to limit and buffer the views. She submits to the board that they have met their burden under the Rosenberg standard by showing the need and compelling reasons for the facility to warrant installation of this facility. They ask the board for approval.

Mr. Dudick asked if the balloon was placed off to the side or close to the trees as suggested at the last meeting. Mr. Stevens responded it was located approximately 20 feet from the wood line at Mr. Comi's suggestion. During the first test it was moved to the same location after approximately two hours.

Mr. Renzi asked for confirmation that the balloons were tethered in the same place where the tower will be. Mr. Stevens responded yes.

Carol Stock, 29 Wishing Well Lane, expressed her concern for the community and the whole area. She referred to the number of cell phone towers that have been provided in the community. She asked how many do we really need. She feels there are other areas where a cell phone tower could be put if it is determined that it is really needed. She referred to the fire station and asked if anyone has determined if it could be put there.

Mr. Renzi explained that from a zoning perspective it is entirely possible that a fire station could be located in an R-1 zone because it is one of the municipal exceptions.

Ms. Stock also stated that even if it is in a residential zone a variance could be asked for to put it on the fire house. She also stated that this is open land and she would rather see it located on the fire house. She asked about several other sites in the area and if they were considered.

Mr. Koval explained that the areas she referred to have been looked at but are outside the area where the coverage is needed.

Ms. Stock asked about the power lines. Mr. Koval responded that they have also been looked at and they do not meet the standard that is needed to provide the coverage.

Ms. Stock asked when it is going to end. She does not feel it is necessary. Mr. Kortz explained that hopefully they can locate on an existing tower and this has been studied thoroughly and the board is obligated to judge this application as a public utility.

Ms. Stock stated that it is also in the zoning laws that a tower is prohibited in an R-1 and R-3 zone. Mr. Dudick explained that is why they have come before this board for a variance.

Ms. Stock stated that we are looking at one carrier and how many people are you trying to improve service for. There are not that many people that live in that area and she feels that a 120 ft. tower is not justified.

Mr. Kortz agreed but explained it not only for people who live in the area but for people who are driving through.

Mr. Koval explained that the expert engineer was hired to evaluate the service and has made the determination that it is needed based on the requirements of the cell phone company and what the law says we have to provide.

Mr. Dudick noted that Mr. Comi made a point that the applicant does this for money and they would not build a tower where there is no financial benefit. He explained that the board tries to grant as few as possible.

Mr. Koval asked Mr. Comi what the range is from a tower for a signal. Mr. Comi responded for PCS service, which Sprint is, it's approximately in the range of a mile and a half to two miles at the most. The other issue based on the towns growth and population will see a whole other realm of splitting realms for capacity reasons. This was coverage, the next issue is running out of frequencies and things will have to be placed in between even where there is coverage. The cell phone will not go any further on a flat tabletop. He is here because the community has become much more aggressive and he is here looking at these in a much stronger protective nature. He is here to protect the community. Mr. Comi explained that it is adequate coverage for each and every carrier that must be addressed.

Jean Stromayer, 34 Wishing Well, stated that she will not see this tower from her house but she has seen many towers while driving around and they are incredibly ugly. She noted that this tower is taller than the trees and will be seen from Grooms Road and will be an eye sore to everyone who passes by. She would like to preserve the country area.

Mr. Koval noted that the owner of the property is willing to have the cell phone tower on his property and is going through the legal method of obtaining that, if everyone wants to preserve the open area they should buy it and pay the taxes. The owner has the right to do what he wants to on his land.

Vincent Kumjian, 10 Wishing Well Lane. retired minister, stated that he looked into the need for another tower in the area. He questioned several business people who travel through the area and asked if they had a problem with service in this area and no one had a problem with their service. He asked if there is a need for another cell tower in the area.

Mr. Koval responded we do not know who provides their cell service and the point is that the requirement on the board is that due to the telecommunications act any company that does

not have sufficient coverage; the board is required to allow that tower if it can be determined that there is not sufficient coverage for that particular provider. The board's expert goes out and determines if the signal is strong enough to provide coverage in all these locations.

Mr. Kumjian stated he asked six different users of the frequency if they had enough coverage in the area and they said yes.

Mr. Koval explained that the board does not know who their provider is and if Sprint does not have adequate coverage the board still has to grant the variance.

Mr. Dudick asked Ms. Murray if she had any further comments. Ms. Murray thanked everyone for their comments and thanked the board for their interest and asked if there were any questions from the board.

There was no further public comment. Mr. Dudick made a motion to close the public hearing, Ms. Gleason seconded, approval unanimous.

Mr. Ritter had a question in relation to the ground structure. He asked if they have designed what the outdoor storage facility will look like. He referred to a prior application from Nextel where they did not follow through with their plan.

Mr. Dudick stated that after the merger of Sprint with Nextel, Sprint/Nextel cleaned up those areas.

Mr. Ritter responded that he is aware of that but he is just asking in relation to this application he is curious as to what they propose. Mr. Ritter withdrew the question and left the meeting at 8:16 PM.

Mr. Kortz asked if this is approved should it be contingent upon it being constructed at the location of the balloon test showing a minimal amount of visual impact.

Mr. Renzi responded that it is on the record. He reminded the board that there has been substantial testimony and submissions on both sides of the argument and it is the boards call as to which direction they want to vote. Mr. Comi, the town's expert, has submitted a report to the board and it has been reviewed. There has been testimony from the public and in some ways they disagree with him and the applicant. The board has to make its own decision based on the totality of the information at its disposal at this time. There is no one thing that compels the board to vote one way or another.

Mr. Kortz noted for the record that he has struggled with this. The standard that the board has to judge by, is there safe and adequate coverage, which was discussed at length, what that means i.e. is there a need that has been proven and due diligence shown that demonstrates that there is need here based on the current standards of today and that the applicant has done their due diligence

to find a place where there will be minimal impact on the area. He would vote yes based on the standards that the board has to go by.

Ms. McCarthy made a motion to approve this variance as submitted. Ms. Gleason seconded.

Mr. Renzi asked if the application is amended to 117 feet with nothing taller than 120 feet. Ms. Murray explained that the monopole will be 120 feet, the top of the antennas will be at 120 feet, and the centerline of the antennas will be at 117 feet so that no portion of the facility will be above 120 feet.

Mr. Comi stated that it is the result of a discussion at the previous meeting and will be at the location of the balloon test on November 17, 2007.

Mr. Dudick called for a vote on the motion. Ayes: Dudick, Gleason, Kortz, Koval, McCarthy, Lemire. Noes: None.

Mr. Dudick announced that there are some terms on the board ending and asked if anyone has interest in being reappointed.

Mr. Dudick noted that the other two items on the agenda have been withdrawn.

Mr. Dudick noted that there date of the minutes should be October 16, not October 2, 2007. Mr. Dudick made a motion to approve the minutes as amended with the date, correction, Ms. McCarthy seconded. Ayes: Dudick, Kortz, McCarthy, Gleason. Koval. Noes: None. Abstained. Lemire

Mr. Dudick made a motion to adjourn the meeting at 8:25 PM, Mr. Lemire seconded, approval unanimous.

Respectfully Submitted,

Judy Lamb
Secretary

Cc: Town Clerk, Town Board, Zoning Board Members, Joel Peller, Counsel, Steve Myers, Department of Building and Development, Planning Board, ECC, Assessor, Highway