

**TOWN OF EAST KINGSTON
ZONING BOARD OF ADJUSTMENT**

**Application of Industrial Tower and Wireless, LLC and
Co-Applicant Cingular Wireless**

Case No. MBL 16-4-01 (36 Giles Road, East Kingston)

Pursuant to the decision of the Federal District Court for the District of New Hampshire, the Town of East Kingston Zoning Board of Adjustment issues the following written decision regarding its decision to deny the variance application of Petitioner, Industrial Tower and Wireless, LLC.

I. BACKGROUND

Industrial Tower and Wireless, LLC (ITW) and Cingular Wireless applied to the Town of East Kingston Zoning Board of Adjustment (ZBA) for a use variance to construct a 180-foot (later reduced to a 160-foot) wireless telecommunications monopole tower, with other equipment, located at 36 Giles Road in East Kingston. This property is located in the Town's residential zone, is approximately 26 acres in size, and is owned by Jeffrey and Susan Martson.

The ZBA originally voted to grant ITW's variance request on May 25, 2006. This decision was later remanded due to a procedural error, and the ZBA again granted the application. The ZBA subsequently granted a motion for rehearing, filed by Kenridge Farm, an Intervenor in the current court case.

The ZBA subsequently held six public meetings in 2007 regarding ITW's application: April 26, May 31, June 29, July 24, August 23, and September 27. On May 5, at the request of the ZBA, ITW conducted a balloon test, in which it flew a red weather balloon at 170' from the proposed location of the tower. During this test, photographs

were taken from multiple locations in the surrounding area to determine the visibility of the tower. These photographs were made available at every subsequent ZBA hearing. Over the course of these hearings the ZBA and the public heard presentations from credentialed Radio Frequency Engineers and Real Estate representatives. These presentations gave ZBA members a wealth of data and differing perspectives enabling them to make an informed decision. Based upon the substantial amount of data and information provided and discussed over the course of these hearings, the ZBA eventually denied ITW's variance application. Following an unsuccessful motion for rehearing, ITW appealed the ZBA's decision to the federal court. While the ZBA did specify reasons for denying ITW's application in the meeting minutes, it did not issue a formal written decision with reasons pursuant to the Federal Telecommunication Act (TCA). As a result, the Court recently remanded the matter to the ZBA to allow it to issue a written decision.

II. ANALYSIS

ITW is not entitled to a use variance for its proposed telecommunications facility because it failed to establish that: 1) special conditions exist such that a literal enforcement of the provisions of the ordinance will result in unnecessary hardship; and 2) granting the variance would be consistent with the spirit of the ordinance.

A. Unnecessary Hardship

The ZBA does not find that ITW has satisfied its burden of proving that it will experience an unnecessary hardship if the variance is denied. Specifically, ITW has not shown that the zoning restriction interferes with the applicant's reasonable use of the property, considering the unique setting of the property in its environment.

ITW has presented only two locations, consistently on the ridge of the subject property for its proposed telecommunications tower, despite the fact that other feasible alternative locations were presented. Mark Hutchins, the independent Radio Frequency Engineer retained by the ZBA, submitted a report that concluded Cingular/AT&T had a gap in service in East Kingston, that this gap cannot be filled from towers in the Commercial and/or Light Industrial zones, and therefore "one or more *facilities* must be placed in residential/agricultural/forestry zones to adequately serve the town." Mr. Hutchins also concluded that the proposed tower would still provide "inadequate service of the southeast section of the Town." David Maxson, another radio frequency expert, summarized his written report, and stated that "there are alternatives to provide coverage for the Route 107/108 area, with all sorts of options in compliance with the ordinance such as rooftops, silos, flagpoles, on the fire house roof, etc."

One alternative location proposed by the ZBA was for ITW to move its tower to the west side of the proposed site, lowering the height so the top of the tower would be even with the existing tree canopy, and disguising it as a tree. The suggested relocation was adjacent to a powerline corridor, on a rugged slope, making it undesirable for residential purposes. This alternative site was off the ridgeline, "yielding some backdrop from the hill and overall lower height to mitigate visual impact." Mr. Hutchins supported this alternative, and further testified that ITW had not demonstrated that a 160' tower was needed given the hill location.

ITW rejected this alternative proposal because it would not provide coverage to its intended target area, which included the neighboring Town of Exeter. Don Cody, an ITW representative, explained

that they had negotiated with the property owner for the new location as requested by the Board. Placing the tower below the ridgeline would block the signal to a large part of ITW's target area, which is on the other side of the ridge line. If the target area is over the ridge, the tower needs to project over the ridgeline to be effective. ITW has already compromised to the Board by lowering the height of the tower and moving it from the original location.

Indeed, Mr. Maxson testified that "Exeter would get the most benefit" at the proposed location. While ITW may desire to provide coverage in a neighboring municipality, the ZBA cannot sacrifice the impact of this proposed use on East Kingston residents in order to accommodate Exeter. As was explained during the ZBA hearings, "the tower would serve the Town of East Kingston; it was not East Kingston's jurisdiction to solve other town's problems."

ITW also remained fixated on tall towers, and was not open to the possibility of utilizing other forms of technology. John Champ, ITW's site acquisition specialist, dismissed suggested alternative sites, including those raised by Mr. Maxson at prior meetings. In the process of dismissing these alternatives, however, Mr. Champ was considering only alternative locations for an extremely tall monopole tower – setbacks, visual impact, and 10,000 square foot compounds are not features of the type of stealth installation – such as an antenna concealed in a cupola – that Mr. Maxson had described. Mr. Hutchins explained in a letter to the ZBA that he questioned ITW's efforts to utilize existing structures throughout town to provide its telecommunications service, and referred the Board to the following quote from the Vermont Environmental Board concerning good faith efforts of collocation:

Once all technically feasible alternatives are ascertained ... a project application that is bound by the co-location provisions of the regional plan must conduct good-faith negotiations with the owner or operator of each and every existing facility to co-locate on one of those existing facilities.

Only after a search manifesting all due diligence to ascertain available alternative sites, and a good-faith negotiation with the singular objective of successful co-location, will the applicants have satisfied the burden that is assigned to them [under the regional plan]. The applicants may not simply telegraph their desire to be unsuccessful in the negotiation. Rather, an applicant must aim to succeed in the negotiation to secure [facility] space.

While ITW represented that it examined and ruled out all proposed alternatives, in part because landowners were unwilling to allow towers on their property, evidence was presented during the hearings that suggested some residents would be interested in allowing ITW to use their property for distributing telecommunications service through other means. Monique Waldron, the owner of Kenridge Farm, addressed the ZBA and questioned the efficacy and good faith of ITW's site search process, and explained that she personally met with at least three residents who expressed an interest in having an antenna located on existing structures such as barns.

In contrast to a tower, the ZBA asked ITW if it could build a structure such as a silo, or extend a silo that is already there, and asked Mr. Cody if they had ever asked anyone to build a silo on the property. Mr. Cody stated that they had not. Mr. Champ explained ITW's process for identifying suitable locations for tall towers as simply sending out letters to town residents, asking whether they would be interested in a "tower" on their property, and he eliminated any property that did not have sufficient setbacks for a 160-foot tower.

Finally, ITW dismissed the concept of using multiple sites for distributing telecommunications service because it would be too costly. The evidence shows, however, that the tower that ITW proposes is not a single-site solution, and that multiple sites will likely become necessary in the future.

ITW has not persuaded the ZBA that other proposed alternatives to the specific tower presented are not feasible, and would not achieve the same general coverage goals. ITW did not demonstrate that either its proposed tower, or the location on the subject property where the tower would be placed, was the only location suitable for meeting its coverage goals for purposes of unnecessary hardship. It is indeed the ZBA's belief that ITW's proposal is concerned more with meeting coverage goals in the neighboring Town of Exeter than the needs of East Kingston residents.

The ZBA concludes that ITW has failed to satisfy its burden of showing that the denial of its use variance will result in unnecessary hardship.

B. Spirit of the Ordinance

The ZBA also finds that granting ITW a variance for its proposed telecommunications tower would not be consistent with the spirit of the zoning ordinance.

The rural and scenic characteristics of the East Kingston area are paramount concerns underlying the Zoning Ordinance. Article III of the Town's telecommunications ordinance provides that "[f]or the purposes of regulating the use of land . . . , the Town of East Kingston shall be considered as one district of residential, agricultural or forestry use only. Business, commercial, and industrial uses are prohibited except as hereinafter provided." Article VIII(A) states that the "Town of East Kingston shall be mainly a district of farms and residences."

Article XV(B)(2) of the telecommunications ordinance specifies that it is a goal of the Ordinance to "[r]educe adverse impacts such facilities may create, including, but not limited to; impacts on aesthetics, environmentally sensitive areas, historically significant

locations, flight corridors, health and safety by injurious accidents to person and property, and prosperity through protection of property values.” Article XV(B)(4) establishes as a goal “[p]ermit[ing] the construction of new towers only where all other reasonable opportunities have been exhausted, and to encourage the users of towers and antennas to configure them in a way that minimizes the adverse visual impact of the towers and antennas.”

Correspondence between ITW’s consultant, Public Archaeology Laboratory (PAL), and the New Hampshire Division of Historical Resources (NHDHR), submitted to the ZBA, established that the proposed “[t]ower will be clearly visible and proximate from numerous vantage points on [the Kenridge Farm and Maurice Kimball House] proper[ies] and [will] impact the integrity of [the] historic agricultural setting of [these] proper[ies].” In the May 31, 2007 PAL Technical Memorandum, “[A] finding of Adverse Effect was assigned to these buildings where the constructed tower was highly visible, proximate, and would impair the integrity of a property’s setting.” In discussing the photographs taken of Kenridge Farm during a balloon test, Mr. Olausen, Executive Director, Public Archaeology Laboratory (PAL), states that the “[t]ower would have an adverse effect on the integrity of the setting of this historic agricultural farmstead.” In addition, the NHDHR stated in a letter dated June 19, 2007, to Mr. Olausen that the proposed tower would “create a significant intrusion on the rural scenic backdrop and important public views of two significant historic buildings.”

It is for these reasons, among others, that the ZBA encouraged ITW to consider options for relocating the proposed tower to another location on the property off the ridgeline, not to mention the possibility of utilizing other alternative structures or stealth

designs to achieve its coverage goals. Options that appear feasible, according to the evidence before the Board.

In light of the evidence, the ZBA concludes that ITW's proposed tower will alter the essential character of the locality and have an adverse impact on aesthetics, environmentally sensitive areas, and historically significant locations. As a result, the ZBA find that the proposed tower is not consistent with the spirit of the zoning ordinance.

III. CONCLUSION

For the reasons set forth above, the ZBA finds that ITW has failed to satisfy its burden of proving that it is entitled to a use variance to locate a telecommunications tower at the subject property.

Dated: April 23, 2009

**East Kingston Zoning Board of
Adjustment**

BY:


David E. Ciardelli, Acting Chairman