

UNAPPROVED

Town of East Kingston, New Hampshire
Zoning Board of Adjustment Meeting Minutes

November 13, 2007

7:00 PM

AGENDA

7:00 PM A request for rehearing filed on behalf of Industrial Tower and Wireless LLC, Applicant; Cingular Wireless, Co-Applicant; and Jeffrey and Susan Marston, 88 Giles Road, East Kingston, NH with respect to the ZBA's September 27, 2007 decision to deny a variance to Industrial Tower and Wireless, LLC and Co-Applicant Cingular Wireless from Article XV, Section D.2. – USE DISTRICTS for construction of a 160' monopole and equipment area in a Residential Zone. This hearing is not open for public comment and no testimony or written comments will be accepted, but the public may attend.

Members Attending: Vice Chairman David A. Ciardelli, Norman Freeman, Paul Falman, Peter Riley
Alternate Members: Catherine Belcher, Tim Allen
Others Attending: John Champ, Site Acquisition Specialist for Industrial Tower and Wireless;
Jeffrey Marston

Mr. Ciardelli opened the meeting of the East Kingston Zoning Board of Adjustment (ZBA) at the East Kingston Town Hall on November 13, 2007, at 7:00 PM. Mr. Ciardelli stated that Mr. Freeman, Mr. Falman, Mr. Riley, Mrs. Belcher and himself would be voting members for this evening's meeting.

Mr. Ciardelli ascertained that Board members had received a copy of the Applicant's and Owner's Request for Rehearing and had read and understood the document. Board members assured Mr. Ciardelli they had reviewed the document.

Mr. Ciardelli stated that the following was the Board's charter tonight and quoted from the ZBA Handbook.

"A person has a right to apply for a rehearing and the board has the authority to grant it. However, the board is not required to grant the rehearing and should use its judgment in deciding whether justice will be served by doing so. In trying to be fair to a person asking for a rehearing, the board may be unfair to others who will be forced to defend their interests for a second time.

It is assumed that every case will be discussed, originally, only after careful consideration of all the evidence on hand and on the best possible judgment of the individual members. Therefore, no purpose is served by granting a rehearing unless the petitioner claims a technical error has been made to his detriment or he can produce new evidence that was not available to him at the time of the first hearing. The evidence might reflect a change in conditions that took place since the first hearing or information that was unobtainable because of the absence of key people, or for other valid reasons. The Board, and those in opposition to the appeal should not be penalized because the petitioner has not adequately prepared his original case and did not take the trouble to determine sufficient grounds and provide facts to support them.

The coming to light of new evidence is not a requirement for the granting of a rehearing. The reasons for granting a rehearing should be compelling ones; the board has no right to reopen a case based on the same set of facts unless it is convinced that an injustice would otherwise be created but a rehearing should be seriously considered if the moving party is persuasive that the board has made a mistake. Don't reject a motion for rehearing out of hand merely because there is no new evidence. To routinely grant all rehearing requests would mean that the first hearing of any case would lose all importance and no decision of the board would be final until two hearings had been held. The rehearing process is designed to afford local zoning boards of adjustment an opportunity to correct their own mistakes before appeals are filed with the court. It is geared to the proposition that the Board shall have a first opportunity to correct any action taken, if correction is necessary, before an appeal to the board is filed."

Mr. Ciardelli stated he did not see any new information offered in the appeal, although there were a few points alleging that the Board had made a mistake.

Mr. Riley offered that he had read in an issue of the *Bar News* that in a similar case in Atkinson, they had affirmed the decision of the ZBA.

Mr. Ciardelli reiterated that criteria 3a and 5 *had not been satisfied*, and that all the other criterion had been satisfied.

Mr. Ciardelli stated that the applicant's appeal points that took exception with the Board's voting were points #26, 27, 28 and 28 (which were criteria 3a) and #30 (criteria 3b).

Mrs. Belcher noted that appeal point #32 referred to the decision in the September 27th minutes for criteria 3b. This decision had been reviewed and corrected in the approved minutes. With the correction to the minutes, the appeal's charge that the discussion was contradictory to the decision was a moot point as the discussion and decision now agreed in the final minutes.

Mr. Ciardelli reviewed that in the appeal, the applicant questioned that some of Mr. Falman's discussions did not fit in with the reasoning of the vote for that criteria. Mr. Falman noted that appeal #32 referred to criteria 3b. This criterion had been corrected in the approved minutes so the appeal point was negated; the discussion and the decision for this criterion were now in agreement. Mr. Falman also pointed out that the original minutes for criterion 3b stated 3 does exist and 2 does not exist. The unapproved minutes were reversed. It was corrected to read that 3 does not exist and 2 it does exist.

Mr. Ciardelli confirmed that the Board had reviewed the minutes so they would reflect correctly what the voting and decisions were. The focus of this meeting was not to try to analyze how the applicant came up with their statements in the appeal. They should focus their attention on criteria 3a and 5, as the appeal stated the Board had made an error on those points, and ascertain whether or not they were satisfied with their decision on those criteria.

Mr. Ciardelli stated that appeal point 26 thought Mr. Falman's reasoning on criteria 3a was in error.

Mr. Falman answered that appeal point #26 declared that he had "indicated that he was concerned that the tower reduced in height to 140 feet would not provide adequate coverage in the future, and that he had used this reason to conclude that a denial of the variance would not interfere with the reasonable use of the property" Mr. Falman stated that although he did make the statements referred to in the appeal regarding the height of the tower, his main concern about this criteria not being satisfied had to do with the fact that the landowner did not agree to moving the location to where the RF Engineer hired by the Town had suggested. In his mind not moving to the suggested location did not minimize the visual impact.

Mr. Ciardelli asked if Mr. Falman felt he voted correctly and that the minutes reflected correctly what he had voted on this criterion. Mr. Falman's answer was yes to both his vote and what the corrected minutes reflected.

Mr. Ciardelli stated that appeal point #44 targeted Mrs. Belcher's statement on Criteria #5 that "the Board cannot change the ordinance."

Mrs. Belcher stated that she had changed her original decision after hearing the reasoning and arguments from the other Board members, and opined that Mr. Ciardelli's argument in reference to the spirit of the ordinance was compelling, as the spirit of the ordinance is the goal of the ordinance. The handbook states the spirit of the ordinance is to *promote the health, safety, or general welfare of the community*. The Telecommunications Ordinance states one of the purposes and goals of that ordinance is to *reduce adverse impacts such facilities may create, including ...impacts on aesthetics, environmentally sensitive areas, historically significant locations, and prosperity through protection of property values*.

After deliberation with Counsel, Mrs. Belcher realized she was not comfortable she had based her decision on the Handbook statement that *the Board cannot change the ordinance*. She believes she erred in her assessment on that criterion and feels she could not defend that argument if posed the question in court, and now wants to revert back to her original decision that the use *would not* be contrary to the spirit and intent of the ordinance. She acknowledged that her change of decision on that criterion would not change the outcome, as all criteria had to be met and criteria 3a had failed to be met in the eyes of the Board.

Mr. Ciardelli imparted an analogy to the Board regarding liver and onions; if you had to disguise the taste of the liver with the onions, it most likely did not taste good to begin with. And if you had to disguise a cell tower with stealth applications, it shows it to be obtrusive to begin with and you are trying to make it less obtrusive.

Mr. Ciardelli pointed out that at the hearing, he had had Mr. Falman read the spirit of the ordinance section of the Handbook to the Board so they could better understand the meaning and intent of that criterion.

Mr. Ciardelli asked Mr. Falman if he felt that he still stood by his decision on criteria 3a, and Mr. Falman stated he felt he was being singled out, as the other Board members were not being asked the same questions. He reiterated that since the landowner did not agree with the Town's RF Engineer to move the location to the suggested new location, the criterion was not met.

Mr. Riley was asked if he was certain about his decisions on all the criteria; he stated that he was consistent throughout the deliberations and would not change any of his votes.

Mr. Ciardelli also stated that he was confident he had voted correctly, and would not change any of his votes.

When asked, Mr. Freeman was confident he also had made the correct choices when he voted, and would not change any of his decisions.

Mrs. Belcher stated although she had changed her decision on criteria 5, she was confident in her decision for criteria 3a.

Mrs. Belcher stated that there would be no merit to granting the rehearing, as one criterion did not stand the test, so the variance would still be denied.

Mr. Allen offered that this hearing was to ascertain if anything would change the Board's decision. The decision for Criteria 3a is still against the variance, and the rehearing should be denied on that basis.

Mr. Ciardelli entertained a motion.

MOTION: Mr. Freeman **MOVED** to **DENY** the rehearing. Mr. Ciardelli seconded, and the motion carried unanimously.

The meeting was adjourned at 7:35 PM.

Respectfully submitted,

Barbara White

Barbara White
Recording Secretary

David Ciardelli
Vice Chairman

Minutes Approved on _____