

BANNER ELK BOARD OF ADJUSTMENT  
MONDAY, 03/16/2015  
MINUTES

Members Present: Jimmy Ollis, Joe H. Perry, Deka Tate, Fred Schmitt, Ted Silver and Alternate Art Neuberger

Staff Present: Cheryl Buchanan, Town Attorney Stacy Eggers IV, Esq., Town Manager Rick Owen

Others Present: Marianne Aguirre, Carroll and Linda Berkley, Michael Berkowitz, Allen and Rebecca Bolick, Bobby Duke, Suzette Fronk, Sharon Geatz, Pat Glenny, Jeffery Graham, Roderick Hall, Mike and Jeannie Halus, Denny and Pat Keeny, Tom and Joann McMurray, Attorney Nathan Miller, Stephanie Paglen, Attorney Dave Pokela, Duane Schell, Jack and Ruth Sparks, Bill and Nancy Stevenson, Don Thompson, Robert Tufts, Charlie B and Penny VonCanon, Brian Whitfield

Chairman Fred Schmitt called the meeting to order at 6:00 pm. Chairman Schmitt asked everyone present to stand and join in the pledge of allegiance to the flag.

Consideration of the November 2014 Minutes

With no changes noted, Deka Tate moved to approve the minutes as submitted. Joe H. Perry seconded. The vote was:

Jimmy Ollis - Aye

Joe H. Perry - Aye

Ted Silver - Aye

Deka Tate - Aye

Fred Schmitt - Aye. The motion carried unanimously.

Chairman Schmitt opened the meeting and then stated that he was turning the chair over to Joe H. Perry, the former Chairman during this case. Mr. Schmitt was not present during this case.

**American Towers LLC Variance Request**

Mr. Neuberger was seated for the hearing of this particular case in place of Mr. John Wilson, who resigned in October 2014.

Town Attorney Four Eggers asked that the Variance request be addressed first as they are procedurally heard before a conditional use permit. Attorney

Eggers went on to explain that a legal matter had arisen. It is Attorney Egger's legal opinion that the variance request cannot be entertained for the case we are hearing today because of changes made to the ordinance after it was initially heard. These amendments would be pertinent to any new applications made to the Board and the matter of the first request for a conditional use permit has not been concluded, still being heard under the old ordinance. Attorney Eggers stated that he had prepared a new order and finding of facts and conclusions of law related to this matter.

Attorney Dave Pokela handed out a set of e-mails exchanged between himself and Attorney Eggers discussing their different views on the validity of the variance request. Attorney Eggers stated that he would like to mark this as Applicant's Exhibit #1 (Please see attached.) Mr. Pokela gave a brief description of what was in the packet of e-mails. Mr. Pokela said the issue is that the case is under appeal and that some error was discovered and it was sent back to the Board of Adjustment (BOA or Board) by Judge Thomas Davis.

Attorney Pokela argued that his client should have a vested right. Attorney Pokela asked the Board to consider which ordinance he is working under and then cited two case laws in North Carolina that he felt supported his case. According to Mr. Pokela, the Supreme Court has said that it's not a matter of vested right, but a matter of fairness. Mr. Pokela stated that he feels the ordinance's restrictions places an undue hardship on the property and the owners in relation to fairness.

Attorney Nathan Miller began his introductory argument by stating that although he and Mr. Pokela are probably biased, Attorney Eggers is not. He does not work for a client, he works for the Town and has done his research. Mr. Miller reviewed the two case laws referenced by Mr. Pokela and says he believes the issues for those cases are not the same as those for this case. Mr. Miller reviewed the items remanded by Judge Thomas and the reasons why he does not support the request for a variance at this hearing. Mr. Miller recommended that if American Towers wants to request a variance, they should withdraw their CUP and resubmit all under the new ordinance.

Attorney Eggers reiterated that neither one of the case laws cited by Mr. Pokela addressed a Variance request or are they directly on point. Attorney Eggers said that his order is a point of law as well as his conversation with Rich Drucker of the Institute of Government. Attorney Eggers said that ultimately it is the Board's decision but that he proposes they move to adopt his prepared order and deny the request for a variance.

Mr. Pokela gave a rebuttal statement on whether they have a vested right since they have not received a final approval.

Ted Silver asked if the cases that were referenced had been jeopardized and are there any cases citing these two cases in affirmation or descent on any other basis. Mr. Pokela answered that the two cases are good law and the Robbins' case has been cited by three other cases. The Curry Beach case has been cited once as well. Ted Silver asked if there was a change in the ordinance during either one of those cases and Mr. Pokela replied that they both applied to old ordinances.

Deka Tate asked why the Board was not reviewing the three items remanded back to the Board by Judge Davis. Mr. Pokela said that in essence they were. One of the items was Section 305, minimum width and the Board needs to decide if it will be held to the strictest interpretation or if it could be varied.

Art Neuberger moved to adopt the motion to dismiss the request for a variance and to approve the order and finding of fact and the conclusion of law submitted by Attorney Eggers. Jimmy Ollis seconded the motion. The vote was:

Jimmy Ollis - Aye

Joe H. Perry - Aye

Ted Silver - Aye

Deka Tate - Aye

Art Neuberger - Aye. The motion carried unanimously.

**American Towers Conditional Use Permit/Civil Suite and Remand Order by Judge Thomas Davis**

Town Attorney Stacy Eggers reviewed the matter of the order to remand the three items listed by Judge Thomas Davis. Those giving testimony were sworn in. (See attached witness sheet)

David Pokela began his presentation by handed out a packet of information for this portion of the hearing. Nathan Miller objected to the packet as he had not had a chance to review it and its authenticity. Attorney Eggers advised the Board that they have received information that has been objected to and until it has been authenticated they should not consider it as substantial material. Mr. Pokela chose to begin with number two, the matter of the fall zone and the lease agreement. Mr. Pokela stated that behind Tab 1A, there is a copy of a new lease agreement that shows an amended agreement along with a map illustrating the whole area that will be covered by the fall zone. Attorney Eggers asked if Mr. Miller had an objection to this material. Mr. Miller replied no.

Next Mr. Pokela referred to whether the tower would be located on the major mountain ridge, (Tab 2 B). Mr. Pokela commented that Ms. Buchanan's maps, included in his handout, illustrate that the lowest valley floor was the Elk River

Airstrip at 3400 feet and the proposed site for the cell tower is roughly at 3520 feet, 120 feet above the lowest valley floor elevation. Mr. Pokela asked Ms. Buchanan if she had prepared these maps. Her answer was yes. Mr. Pokela asked if she felt that the site was on a major mountain ridge; to which she replied no.

As to the third matter, Mr. Pokela testified that he was unable to obtain an additional easement and that was the reason for asking for a variance as related to the old ordinance. Exhibits #3 A through Z with the exception of M, N, and P which were not approved by Mr. Miller. Mr. Miller said he would like to have been able to question Clark Lindstrom; who is not present and cannot testify and that is why M, N, and P are being extracted from the record. Mr. Pokela noted that Mr. Berkowitz is present and could testify to Section P, but it was to be in support of a variance.

Mr. Pokela was granted a summation of his presentation to which he proceeded. His argument was that the property in question suffers a hardship due to its being landlocked. The fact that the lack of 5 feet to have sufficient access for an uninhabited building appears to make matters worse. Mr. Pokela used the example that a single family home could be built and there are no concerns that the 20 feet of right-of-way that exists is not sufficient for emergency vehicle traffic, but an uninhabited structure would not have enough access in case of an emergency. Mr. Pokela testified that the 20 foot right-of-way was there when the Hall's bought the property. Mr. Pokela also argued that the cell tower was in harmony with the spirit of the ordinance and that area, and that the additional tower would provide additional security for 911 calls.

In Nathan Miller's presentation, he asked Mr. Pokela about the memorandum of lease and if there will be a fence around the protected area involved. Mr. Pokela said it would not be fenced. Mr. Miller asked if this document had been recorded. Mr. Pokela said he did not know of any reason to, that until he had a firm ruling there was no reason to record it. Mr. Miller asked what was meant by a non-exclusive lease. Mr. Pokela stated that the intent is to keep any buildings out of the fall zone.

Attorney Eggers asked if Mr. Pokela had any additional evidence. Mr. Pokela said no, just what had been accepted earlier. Mr. Miller said that he was ok with the introduction of 1A, 2A-C, and 3D of the information provided by Mr. Pokela. Mr. Miller stated that he would request on behalf of the Intervener, that the Board deliver a direct verdict to deny the CUP as all the items remanded by Judge Thomas Davis have not been met.

Attorney Eggers informed the Board that he would not recommend a motion for a direct verdict as there may be members of the audience that would like to give testimony and it would be best if the Board had a full record before voting.

Mr. Eggers suggested that a motion to deny without prejudice would be in order. Ted Silver moved to deny the direct verdict without prejudice. Deka Tate seconded. The vote was:

Jimmy Ollis - Aye  
Joe H. Perry - Aye  
Ted Silver - Aye  
Deka Tate - Aye  
Art Neuberger - Aye. The motion carried unanimously.

Attorney Miller then asked Mrs. Buchanan, as the Director of the Planning Department, if she is involved or has she in the past consulted with Town Council on various zoning ordinances. Ms. Buchanan described the process for amending the zoning ordinance. Mr. Miller stated that somehow words make it to the page and who does that. Ms. Buchanan testified that she drafts any new wording or changes to the ordinances with the help of the Planning Board. Mr. Miller then asked how long Ms. Buchanan had been working for the Town of Banner Elk. Ms. Buchanan's answer was 15 years. Mr. Miller said that was about the time the first Telecommunications Ordinance was written and did she have any connection with that. Ms. Buchanan replied that she was employed by the Town then but worked in a different department. She stated that she had only been in the Planning Department for 6 or 7 years. Mr. Miller said he was still going to ask his question and get her interpretation of what the old ordinance said. Mr. Miller referred to Section 5 (D) (10) of the Telecommunications Ordinance and asked Ms. Buchanan to read it out loud. Mrs. Buchanan read:

*"The applicant must present evidence of fee simple ownership or a recorded leasehold interest from the record owners of all property within a radius equal to the height of the tower. Any lease agreement must allow the leaseholder to enter into leases with other providers. Any lease agreement must specify that if the applicant provider fails to remove the tower upon 180 days of its discontinued use, the responsibility for removal shall fall upon the landowner."*

After her reading, Mr. Miller asked if she was aware what the Town expected by fee simple ownership or leasehold interest. Mr. Pokela objected stating that any member of Council or Staff asking to give an opinion was not acceptable that it was for the Court or the Board to decide the intent of an ordinance that was written. Mr. Miller said he was trying to find out what the Town requires for a non-exclusive lease or should it be an exclusive lease. Attorney Eggers advised the Board that interpretation is a matter for the Board and that the objection should be sustained.

Mr. Miller said he would restate his question. He then asked Mrs. Buchanan if, in her opinion as Planning Director, would a non-exclusive leasehold for 100 feet, to cover the entire fall zone, meet the intent of the ordinance. Mr. Pokela

objected. Attorney Eggers advised that the way the question was phrased, he would recommend the objection be sustained.

Mr. Miller asked Ms. Buchanan if, in her opinion as the Zoning Administrator, did this non-exclusive leasehold comply with the ordinance. Mr. Pokela objected again. Attorney Eggers said he believes the Zoning Administrator may have a position as to whether something complies with the Zoning Ordinance and that this objection be sustained. Mr. Pokela asked that the question be repeated. Mr. Miller asked Ms. Buchanan if she could give her opinion as to whether the new leasehold agreement complies with Section 5 (D) (10) of the Telecommunications Ordinance and if a fence is required to maintain control. Mr. Pokela objected that this proceeding is becoming like a court room and that the question needs to refer back to Judge Davis' ruling that the applicant must provide evidence of fee simple ownership or a recorded leasehold interest from the record of owners within a radius equal to the height of the tower. Attorney Eggers said he would give Mr. Pokela a chance to cross examine Ms. Buchanan and that he would recommend the objection be overruled. Ms. Buchanan stated that the ordinance requires a fee simple ownership or a recorded leasehold interest but says nothing about fencing. Mr. Miller asked if this document was recorded. Ms. Buchanan answered that it was not as of today's date. Mr. Miller said he was finished with the witness.

Mr. Pokela asked Ms. Buchanan if this document was in a form that could be recorded. Her reply was yes. Mr. Pokela then asked if American Towers had demonstrated control of the fall zone area per the ordinance. Ms. Buchanan said that she believed it had and would require the document be recorded before a permit was issued.

Ted Silver asked if this particular condition of whether the document is recorded or not could be made a condition of the permit. Ms. Buchanan testified that she was not sure as to the procedure at this point and whether they could go back and begin adding additional conditions and that, in her opinion they have satisfied what Judge Davis has asked for in controlling the fall zone area. Attorney Eggers said that his legal instruction would be that the Board could apply additional conditions as a matter of safety and welfare for the public but could not use it as a substitute for what the Judge ordered. Attorney Eggers asked if either attorney had objection to that legal instruction. Mr. Pokela stated that he did not consent to it. Attorney Eggers stated that this can be addressed in the findings of fact to which Mr. Pokela objected. Mr. Miller did not.

Mr. Miller raised the objection that he had not had opportunity to examine the issue of whether American Towers could claim hardship in this case. Attorney Eggers stated that this would require a full hearing, to which they are not having since the variance has been denied, but that Mr. Miller's objection would be noted for the record.

Attorney Eggers advised that since this is a quasi-judicial proceeding, any members of the audience that wish to testify before the Board could; providing that their testimony would be limited to the three items in Judge Davis' order.

Michael Halus came forward and was sworn in. Mr. Halus presented a petition against the cell tower variance that consisted of 13 pages with 54 signatures. Mr. Halus stated that the Town has a Mission Statement and a Vision Statement that supports people coming to this area to live. Art Neuberger asked what the problem was with the lack of 5 feet for the r-o-w. Mr. Halus said he could not speak for the other 53 petitioners. Attorney Eggers noted this submittal as Public Exhibit #1.

Carroll Berkley came forward and was sworn in. Mr. Berkley stated that he was opposed to the 25 foot right-of-way variance request, that he had worked in telecommunications for 40 years and had safety issues with the structure not being inhabited and emergency vehicles responding to the subject property in an emergency situation. Ted Silver asked Mr. Berkley if one single family house were built on the property, as allowed by the ordinance and it required a variance, would he be opposed to the property being granted a variance. Mr. Berkley said this was an inappropriate question and refused to answer at this time.

Jeff Graham was present representing Appalachian State University Foundation for the Carrender Trust, one of the five charities named as a beneficiary of the property. Mr. Graham said that there was an offer for the additional 5 feet but it was denied due to fear of diminution of the value of the property. Mr. Graham stated that he wanted to get this on the record.

No rebuttal testimonies were offered.

Mr. Miller's closing argument was that they were sent back on three issues. First was the major mountain ridge. Mr. Miller conceded that there was sufficient evidence to prove that the site was not on a major mountain ridge. Second, the fall zone needs to be controlled either by fee simple ownership or sufficient leasehold. Mr. Miller reiterated that they have a lease but in Section 5 (d) (10) of the Telecommunications Tower Ordinance, what they have does not cannot give them sufficient control of that area to protect the public. Mr. Miller contends they have not met this requirement and are out of compliance because the instrument has not been recorded. And last, there is insufficient right-of-way to access the property. Mr. Miller moved to have the permit for a conditional use denied due to insufficient right-of-way and lack of compliance with Section 5 (d) (10) of the Telecommunications Ordinance.

Mr. Pokela reread the three issues remanded by Judge Davis. Mr. Pokela agreed that the major mountain ridge issue had been resolved. Mr. Pokela said

that if this matter is ever resolved, he would most certainly record the leasehold that gives them control through the barring of any building or structure being built within the fall zone. Mr. Pokela conceded that the right-of-way is deficient of the required five (5) feet and will let the Board vote on that.

Attorney Eggers stated that the evidentiary portion of the meeting is closed and that the Board would now enter into the deliberation portion of the meeting. Attorney Eggers asked the Board to vote on each of the three items citing reference to the ordinance and testimony as to the reasoning for the finding of fact, outlining each fact that will be considered. Dave Pokela objected to the framing of the issue with respect to the leasehold interest. He thinks it deviates from the Judge's order. Attorney Eggers instructed that the Board follow the order by Judge Davis. Mr. Pokela registered another objection to the way in which Mr. Eggers is framing the issue to the Board. Mr. Eggers noted the objection for the record.

Ted Silver moved that the Zoning Administrator has proved that the proposed site is not on a major mountain ridge as per order # 4 by Judge Davis. Deka Tate seconded the motion. The vote was:

Jimmy Ollis - Aye  
Joe H. Perry - Aye  
Ted Silver - Aye  
Deka Tate - Aye  
Art Neuberger - Aye. The motion carried unanimously.

Ted Silver moved that to paragraph # 3 of Judge Davis' order in relation to the leasehold and Section 5 (d) (10) of the Telecommunications Ordinance, that paragraph 6 also allows for the Board to consider such further and other proceedings as it may determine appropriate and not inconsistent herewith, that if the leasehold agreement was recorded after approval, that would be acceptable. Mr. Silver stated that he agrees that the admitted lease meets the requirements and is a valid lease between the parties. Jimmy Ollis seconded the motion. The vote was:

Jimmy Ollis - Aye  
Joe H. Perry - Aye  
Ted Silver - Aye  
Deka Tate - Aye  
Art Neuberger - Aye. The motion carried unanimously.

Ted Silver moved that there was insufficient evidence to prove that American Towers, LLC had obtained the 25 foot right-of-way over the Carrender property. Deka Tate seconded the motion. The vote was:

Jimmy Ollis - Aye  
Joe H. Perry - Aye  
Ted Silver - Aye  
Deka Tate - Aye  
Art Neuberger - Aye. The motion carried unanimously.

Ted Silver moved that the conditional use permit was denied due to lack of evidence presented to the Board. Art Neuberger seconded. The vote was:

Jimmy Ollis - Aye  
Joe H. Perry - Aye  
Ted Silver - Aye  
Deka Tate - Aye  
Art Neuberger - Aye.

With no further business, Joe H. Perry moved to adjourn. Ted Silver seconded. The vote was:

Jimmy Ollis - Aye  
Joe H. Perry - Aye  
Ted Silver - Aye  
Deka Tate - Aye  
Art Neuberger - Aye. The meeting adjourned at 8:50 pm.

Respectfully submitted,

Cheryl Buchanan,  
Zoning Administrator, Town of Banner Elk