

Great Barrington Zoning Board of Appeals

Approved minutes of April 5, 2011, meeting.

Attending were Ron Majdalany, Carolyn Ivory, David Thorne, Kathy Kotleski and Madonna Bachman Meagher and alternates Don Hagberg and Michael Wise.

A joint public hearing, continued from March 29, 2011, opened at 7:30 p.m. at Town Hall on the special permit application of **New Cingular Wireless PCS, LLC by AT&T Mobility Corp. Its Manager**, to replace telecommunications antennas atop Fairview Hospital, 29 Lewis Ave., and on a petition for a use variance from the same applicant for the same purpose at the same location.

The board was in receipt of a memorandum from Patricia A. Cantor, Kopelman and Paige, in response to its two questions of the last meeting. Ms. Cantor said yes to the board's ability to determine the original antennas were a "telephone exchange," per the 1990 bylaw in force, and yes to the board's ability to grant a use variance based on the federal Telecommunications Act.

Great Barrington resident Kathleen Favaloro spoke to the availability of better sites than Fairview Hospital; to the many antennas on top of the hospital and their cumulative effect; and to a "greedy company" having its way. She read a letter that had appeared in The Berkshire Eagle on April 5 on the same subject. Resident Vivian Orłowski spoke against the applications and urged a delay to seek more information. Chairman Majdalany said the applications are to replace existing antennas, not place new ones. Ms. Ivory said there are AT&T, Verizon, police, fire and ambulance antennas on the hospital and WBCR-LP's radio antenna. Mr. Thorne said no company is bullying the board, and the board has legal obligations. Ms. Favaloro said antennas should be spread around town to "equalize coverage."

Mr. Wise said that, on the issue of "telephone exchange," the board would be on thin ground in making a finding that the first whip antennas at Fairview were an exchange. Mr. Hagberg said the current definition of telephone exchange fits the case. The wording in 1990, however, was less precise, Dr. Majdalany said. Mr. Wise said the discrimination issue is very persuasive, though he was disappointed town counsel didn't provide point-on case law on the issue of "competitive neutrality." The board would have a hard time defending against a discrimination claim (because there are Verizon and other antennas in place), Mr. Wise said.

Two other speakers urged denial of the applications. When some said there was little notice of the hearing, Eileen Mooney asked if abutters were notified and was told yes. Ms. Meagher asked if a consultant could be hired, but Dr. Majdalany said the board has no ability under the Telecommunications Act to weigh radio frequency or health issues in making a determination. Edward D. Pare, representing AT&T, said the company is obliged, once equipment is installed, to provide periodic readings to the town's building inspector. On a motion by Mr. Thorne, seconded by Ms. Kotleski, the hearing closed at 8:03 p.m.

The chairman suggested the board look first at the special permit requirements, then at the use variance. Mr. Wise reiterated his reluctance to say the installation was a telephone exchange when installed. To do so would also reverse a board decision in 2003, in an earlier Verizon application. Mr. Thorne said he didn't believe antennas needed a permit in 1990, and they were probably just put up. Dr. Majdalany said that the ZBA, to approve a special permit for expansion of a pre-existing, non-conforming structure first needs to determine it is in legal use. The absence of a permit means the board either makes up a history or presumes it was ok at the time, and that is dicey. After further discussion, Ms. Ivory moved to deny the special permit application to expand or alter a non-conforming structure as it was not in lawful existence. Ms. Meagher seconded. The vote was 5-0 of regular members. The board found that it may only consider special permit applications to expand or alter nonconforming structures or uses lawfully in existence and the existing use has not been shown to have been legally permitted and is not lawfully in existence.

Ms. Ivory moved, and Ms. Meagher seconded, a motion that the ZBA does not have the authority under town bylaws to grant a use variance. The vote was 5-0.

Mr. Thorne moved, and Ms. Ivory seconded, a motion that the ZBA grant a use variance under the authority of the federal Telecommunications Act as failure to do so could be considered competitively discriminatory under the Telecommunications Act.

In discussion, Ms. Meagher asked for further technical information. Mr. Thorne said there is no way the Fairview Hospital site is going to be limited to a single carrier. Mr. Wise pointed out the town bylaw encourages clustering. Mr. Wise said he is not pleased that the scenario has become one of what one carrier asks for and gets, another carrier must also get.

The vote was 4-1, with Ms. Meagher opposed, Dr. Majdalany, Ms. Ivory, Ms. Kotleski and Mr. Thorne were in favor. Conditions placed on the variance were: (1) Approval does not alleviate the need of the applicant to abide by building, health and other applicable town and state codes and (2) when the new antennas are installed, the existing antennas must be removed in a timely fashion. Ms. Ivory is to write the decision, Mr. Wise to assist.

The board on a motion by Ms. Ivory, seconded by Mr. Thorne, voted unanimously to adopt the minutes of March 29, 2010, with corrections suggested by Mr. Wise and Ms. Ivory.

The meeting adjourned at 8:30 p.m.

Respectfully submitted,

Bernard A. Drew, secretary