

**BRIDGTON BOARD OF APPEALS
MEETING**

Downstairs Meeting Room

**October 23, 2014
7:15p.m.**

The Bridgton Board of Appeals was called to order at 7:15p.m. by John Schuettinger, Chair. Those in attendance were: John Schuettinger, Chair; Sharon Smith Abbott, Vice Chair; Gregory Jones; Robert Mawhinney; Marita Wiser, Alternate. Absent were: Julie Whelchel, Alternate; Vacant Position Regular Member.

Also, present was legal representative for the Town of Bridgton, Richard Spencer, Drummond Woodsum, 84 Marginal Way, Suite 600, Portland, Maine 04101-2480.

Pledge of Allegiance

Appoint Alternate(s) to vote in place of any absent regular member(s), if necessary

Chair Schuettinger appointed Marita Wiser, Alternate, to act in the capacity of absent regular member.

Election of Officers

Member Wiser re-nominated John Schuettinger for the position of Chair. Vice Chair Smith Abbott 2nd. 5 Approve / 0 Oppose

Chair Schuettinger re-nominated Sharon Smith Abbott for the position of Vice Chair. Member Wiser 2nd. 5 Approve / 0 Oppose

Chair Schuettinger nominated Gregory Jones for the position of Secretary. Vice Chair Smith Abbott 2nd. 5 Approve / 0 Oppose

Approval of Minutes - June 26, 2014

Approval of Minutes - July 24, 2014

Vice Chair Smith Abbott moved to approve the minutes of June 26, 2014 and July 24, 2014. Member Jones said I will have to abstain because I was not present for the meeting of June 26th. Member Wiser said I was not present for the meeting of July 24th so maybe we could vote on them separately.

Approval of Minutes - June 26, 2014

Member Wiser moved to approve the minutes as submitted. Vice Chair Smith Abbott 2nd. 3 Approve / 0 Oppose / 2 Abstain (Robert Mawhinney, Greg Jones)

Vice Chair Smith Abbott moved to approve the minutes as submitted. Member Jones 2nd. 3 Approve / 0 Oppose / 2 Abstain (Marita Wiser and Robert Mawhinney)

Old Business - None

New Business

PUBLIC HEARING

Variance Appeal

Applicant/Owner: William C. and Beverley A. Warren

Location: Moose Pond/82 Cedar Drive; Map 60 Lot 10

Represented by William Warren

Mr. Warren said this is a variance appeal for a setback for the construction of a garage on Map 60 Lot 10 on Moose Pond. We have leased or owned this lot since 1960 to the present. In 1960 it was leased from the Town of Bridgton lot number 16D located on a 1947 map and in 1986 we purchased that lot and it was named lot 60-10 on an engineering plot of 1985.

Mr. Warren reviewed the application with the Board and the sketches showing distances from lot lines to the existing structures as well as where the proposed garage will be sited.

Mr. Warren said this lot has the least width of road and water frontage of the 8 continuous lots from lot 60-8 to 60-15. The greatest lot width is 120' and the next narrowest one is 97' with the remaining ranging from 101' - 110'. There is a handicap, from my terminology of 13' to 36', planning for an acceptable turning radius of 17' and with the depth of the garage at 28' results in a design distance of 55' and there is not but 29' remaining. With consideration of 10' setbacks on either boundary there is but 9' remaining for engineering for building site adjustment. So on the basis of this we are requesting a variance from the setback requirement of 10'. I have included in my application summaries to address the four criteria necessary for you to grant a variance.

Chair Schuettinger said what is the purpose of the right of way next to your lot? Mr. Warren said there is back land owned by the Town of Bridgton on the east side of Cedar Drive and it was my understanding that the right of ways were there for access if the Town of Bridgton ever decided to develop that area.

Member Wisner said the measurements for the garage, is that a standard sized garage? Mr. Warren said the cottage was designed with minimal storage space so I designed it so we would have storage space in the garage as well but 28x20 is not uncommon.

Chair Schuettinger said to Rob Baker, Code Enforcement Officer, does this garage have to be above the 100 year flood plain? Mr. Baker said yes. Mr. Warren said it would be at the height of the threshold of my cottage.

Vice Chair Smith Abbott said a reasonable rate of return is not just making money on the property but if the property can be sold. Mr. Warren said yes, if we put the buildings up for sale I am sure we would sell it. Vice Chair Smith Abbott said therefore you have not met that criteria. Chair Schuettinger said reasonable does not mean maximum. Mr. Warren said I would say a reasonable rate of return on that property I am not sure. I understand that you need to abide by the law but if the law were black and white we would not need an Appeals Board so there is some judgment that the Board can use.

Chair Schuettinger closed the Public Hearing at 7:41p.m. to begin Board deliberation.

Member Wisner said is there any past history to allow a reduced setback if the abutting property is not buildable? Chair Schuettinger said I don't know of any. In this particular situation the encroachment into the 10' setback is minimal but you can't issue a variance for one and not another.

Member Jones said I am not sure if he has met the reasonable return. Chair Schuettinger said most often that is considered if the lot is vacant or small but if there is already a house there and it is waterfront property it is certainly going to yield a reasonable return. In my opinion he is going to have a reasonable return with or without a garage.

Vice Chair Smith Abbott moved to deny the application for a variance because it does not meet the criteria, specifically that the land will not yield a reasonable return. Member Jones 2nd. 5 Approve / 0 Oppose

Mr. Baker said do they have to meet all four criteria for a variance? Attorney Spencer said if any single criteria is not met it can be denied, it has to be all four of the criteria.

John recessed the meeting for 10 minutes at 7:45p.m.
John reconvened the meeting at 7:55p.m.

PUBLIC HEARING

Administrative Appeal - Planning Board Decision

Applicant: Rev. Paul Veit

Property Owner - Susan Tuck, Thomas Sutherby, Damin Sutherby, John and Joanne Harmon

Project: Telecommunication Facility - New Cingular Wireless PCS, LLC (dba AT&T Mobility LLC) and American Towers LLC

Location: 214 Hio Ridge Road; Map 13 Lot 53B

Represented by Rev. Paul Veit

Attorney Spencer said I would like to outline the procedure of this appeal for clarity with what the role of the Board of Appeals is. Under the Town of Bridgton Ordinances there are two different types of

appeal, denovo which is where the Board reviews the application as if it were new. The Tower Ordinance makes it clear that an appeal where a Public Hearing has been held is purely appellant which means the review is based entirely on what was in the record before the Planning Board so there is not an opportunity to introduce any new evidence. The standard of review for the Appeals Board is whether the decision of the Planning Board was arbitrary or capricious based on law or finding of fact supported by substantial evidence in the record. That is the decision the Board has to make in order to reverse the decision of the Planning Board you would have to show that it was arbitrary or capricious or that they made an error of law or that they made Findings of Fact that were not supported by substantial evidence in the record. The role of the Board of Appeals is not to make the decision that the Planning Board would make but to determine whether the Planning Board's decision was in error as a matter of law, arbitrary or capricious or there was no substantial evidence to support. I have also looked at the appeal that was filed and that appeal just has two issues that were raised. One question is whether a member of the Planning Board had a conflict of interest that was properly dealt with which would make the decision illegal. The other question is it is stated that the Planning Board did not follow the purpose section of the Tower Ordinance which deals with the purpose of the Ordinance is to encourage co-location and minimize the total number of towers to permit the construction of new towers only where all other reasonable opportunities have been exhausted and to encourage the users of towers to configure them in a way that minimizes the need for additional towers. An issue with the Appeal is the purpose section of an Ordinance is not a standard that the applicant has to meet. It is a general statement in the Ordinance that you are supposed to use when you interpret provisions of the Ordinance but if you refer to Section 7 paragraph E of the Ordinance which replicates the purpose section by stating "Applicants shall identify all existing and proposed (on file in the Municipal Office) telecommunication facilities and/or towers, including their heights, located in the town and within one mile of the town boundaries. Applicants must provide evidence of the lack of antenna space on all such telecommunication facilities and/or towers, (except in cases where access is denied by tower or property owner), and shall identify other telecommunication facilities and/or tower structures and sites which have been investigated as an alternative to constructing a new telecommunication facility or tower. Applicant shall address the use of co-location and/or other alternative telecommunication facilities and/or tower structures and shall demonstrate that they cannot provide adequate communication service utilizing such existing telecommunication facilities, towers or structures." To me that paragraph in the standards of the Ordinance is in the Performance Standards is almost the same language as the purpose section. I would advise the Board that I think it would be appropriate for you to interpret the Appeal as saying that they did not demonstrate paragraph E of Section 7 and has not been met because the standards are the same

in both places. I think it would be putting form over substance to say that the Appeal is not valid because it is citing the purpose section rather than this paragraph. Nothing else in this Tower Ordinance is at issue in this appeal. This review has to be limited to the record and no one should be permitted to submit new evidence. There should only be two issues here regarding was there a conflict of interest that made the decision invalid and was that properly raised by the appellant at the lower level and whether or not the applicant demonstrated that there was no alternative way of meeting this need and whether the Planning Board made the appropriate Findings of Fact in a decision on that point.

Member Mawhinney said I spent 31 years in the telecommunication industry and is that a problem? Member Schuettinger said then you have good experience. Attorney Spencer said if you are disclosing that the Board should ask you if you feel you can be impartial on this application. Member Mawhinney said I feel I can be impartial. Attorney Spencer said and the Board should ask you if you are bias for or against any of the parties. Member Mawhinney said I have no vested interest.

Member Jones said I would like to disclose that prior to me being a member of this Board I attended several meetings, I did taping for Lake Region Television, on two occasions during the meeting on May 20 I made two different comments on two different topics one being making clarification on electromagnetic interference and that FCC registration and at one point there was a requested proposal for a moratorium brought to the Board of Selectmen and at that time I had argued against it because I felt that it had not met the standards that the state required. Attorney Spencer said when you were at the meetings were you there in what capacity? Member Jones said I was officially there to film for Lake Region Television, I never attended a meeting that I was not filming when it came to the cell phone tower. There might have been one time when I was passing by after hours filming another project so I could help break-down afterwards. When I heard there was an opening on the Appeals Board I stopped attending all meetings.

Mr. Veit said this is a hard one for the neighborhood because it seemed there were a couple prepared statements and lengthy ones which seemed to be against what the neighborhood was saying which makes us a little nervous. Vice Chair Smith Abbott said what statements are you referring to? Mr. Veit said ones made by Member Jones, they were long and lengthy and seemed to always be against the neighborhood's position. Member Jones said the only time that I remember making a prepared statement was when I brought up a concern regarding the moratorium. Chair Schuettinger said that was at a Board of Selectmen's Meeting? Member Jones said yes. Chair Schuettinger said there were two statements you made at a Planning Board meeting?

Member Jones said yes it is in the minutes and on the audio recording. The only time I was against anything was the moratorium.

Chair Schuettinger said should we ask Member Jones to recuse himself? Attorney Spencer said the Board should ask Member Jones whether or not he feels he could judge this fairly and based on that answer the Board should conduct a vote.

Vice Chair Smith Abbott said do you have a bias in general against cell towers? Member Jones said I have no bias on whether the tower goes up or down, I think that I was very clear when talking about the moratorium. Vice Chair Smith Abbott said so you feel you could be open and unbiased in reviewing the materials before us? Member Jones said yes.

Judy Veit said my husband was not able to attend the moratorium meeting at that time so I attended. We had the distinct feeling that he prepared his statement and came especially to address our request for a moratorium and one of the reasons he gave was that no one suggested they stop and have a moratorium last time they were going to put up a tower to address an ordinance and therefore why should we because it was in the same area and I felt that he was quite antagonistic toward us. Vice Chair Smith Abbott said do you think he was taking something personally that was more or less an issue? Ms. Veit said I felt that since he was a cameraman that he was taking a vested interest in this in coming out especially just to address this issue and he had been listening to our other conversations at the Planning Board meetings. Member Jones said I did talk about that there was a proposed tower in that general vicinity beforehand and stated that a moratorium is also utilized to stop projects at the moment that are lacking regulation based on state or local laws and my statement was that I thought there were sufficient laws in place and just because of the fact that people don't like the tower would it be sufficient to have a moratorium.

Member Wisner said is it enough that if there is even a sense of a conflict even it is not substantiated if it would be wise for Member Jones to recuse himself?

Member Jones said I would like to mention that the State does give Municipalities the right to create rules and regulations on what a conflict of interest is. If you are considering the possibility of having me recuse myself I would suggest that you review the guidelines. Attorney Spencer said the applicable standard is whether there is a pecuniary, financial, or personal interest, a member of the family and then there is another provision that states Municipal Officials should avoid the appearance of impropriety which is broader than the conflict of interest or the personal interest is. If someone is raising this issue the person needs to disclose whatever it is and

state how they feel and maybe the Board needs to vote on whether they need to recuse themselves.

Chair Schuettinger moved that in order for this to proceed in an orderly fashion with no further "cloud" on the record Member Jones should recuse himself. Member Wiser 2nd.

4 Approve / 0 Oppose / 1 Abstain (Member Jones)

Barry Hobbins, representative of New Cingular Wireless PCS, LLC (dba AT&T Mobility LLC) and American Towers LLC, said the submission of the appeal has certain addendums to it of which appear to be coverage maps that appear to be altered in a way to explain the different coverages. I would like to know if these coverage maps were entered into the record during the regular Planning Board hearing process which began on April 1 and ended in October. Mr. Veit said the coverage maps were shown on the screen to all the Planning Board members. Mr. Hobbins said have they been changed in any way by you from the original submission? Mr. Veit said there was one statement about Mr. Hobbins in which I apologized for in a meeting. Mr. Hobbins said but what about these maps? Mr. Veit said I don't believe so. Mr. Hobbins said I would just like to confirm that these were not additional statements. Mr. Veit said I may have left one or two maps out of the submission. Mr. Hobbins said I object to any of these being submitted. The record should indicate, that's our record, should be the representation of the appeal and not something that has been altered. Mr. Veit said what a second. Mr. Hobbins said my concern is that this is not representative of the record as far as numbering of the pages or any omissions of any of the coverage maps that are our record and our evidence. Attorney Spencer said if these maps are in the record and the applicant is citing these maps in support of his appeal and there are other maps that he didn't include it would seem to me that as long as these are in the record in the form that they are in he is citing these maps for the record we will be free to point the Board toward any other maps. This review is not limited to what he submitted it is unfortunately limited to this entire record.

Chair Schuettinger said we should address the conflict of interest issue. In light of that, they carefully indicated where it could be seen on the June 17, 2014 meeting. Mr. Hobbins said I don't know what the recording will be but there is another issue which is the preservation at the time of deliberations of the issue itself. On September 2, 2014 when the Board made it deliberations there was no discussion that arose as it did with Member Jones by members of the Board and there was no objection made on the record by Mr. Veit or any of the opponents with respect to the vote. It is the position of the co-applicants that this issue and Mr. Veit's ability for raising that issue because he failed to preserve, even though during the process on April 1 until September 2, there was one mention of that issue and that was on apparently June 17. The issue is it was not raised when deliberations began, it wasn't raised before the application was

deemed complete, it wasn't raised on June 17 to have the Board make a determination and it wasn't raised at the time of deliberations when the Board essentially closed the Public Hearing and began deliberations. There was no preservation of that issue and he should stop raising it.

Mr. Veit said the neighborhood does not have responsibility of disclosure the Planning Board does. We raised the bias, clearly a public bias, that is clearly during the public meetings. We do not have the responsibility for disclosure, the Planning Board does, that did not occur. The membership, I appreciate that you have been very careful, the Board of Selectmen have been careful, as in Maine Law and Planning Board Ordinances, there are simple questions that need to be asked and this disclosure did not occur. How can we do full disclosure if we do not know the people. We clearly raised the bias in the public meeting. Attorney Spencer said my recommendation to the Board would be to review the video and see what is said and proceed from there.

Michael Figoli, Planning Board Member, said I am the person of interest regarding conflict of interest so at some point I would like a few minutes to address the Board. Chair Schuettinger said I will keep that in mind for consideration.

Attorney Spencer said the advice I am giving the Board is this review is limited as to what is on the record so you can't add to it, however, what you can say is "here is what did, or didn't, happen during the proceedings. The Board has to make its decision based on the record itself.

Mr. Veit said Mr. Figoli is present so the Board can refer to him for what was said. Attorney Spencer said what did you say? Mr. Veit said we brought up the bias. Attorney Spencer said when you brought up the bias, what did you say? Mr. Figoli said he stated he thought the Planning Board was biased and Mr. Figoli responded by saying why because I was at three tower sites today, he won't disagree with that. Vice Chair Smith Abbott said "the whole Planning Board was biased, is that what you are saying? Mr. Veit said no, we talked about how three of the Planning Board Members were retired from telecommunication. We didn't have a problem with that, we did have a problem that he builds them. The question we have is does he build for AT&T, that is the main issue. Attorney Spencer said to have a pecuniary interest under the State Law he would have to own 10%. It would be important for the Board to see how this question was raised and whether this issue was preserved or not. The Board began review of the meeting of June 17, 2014 as a group, however, it was difficult for the Board to hear the meeting on the computer that was available so dvd's are available for Board members to review individually.

Mr. Veit said how would I know any conflict of interest, I would now know what to ask, it is the rules that a full disclosure must be made at the first meeting, I have been there for over a year and to this day do not know if Mr. Figoli builds for the applicants or co-applicants, it is not in the minutes. If Mr. Figoli would like to state that he does or does not work for AT&T or the American Towers we would be more comfortable but a statement to the effect has never been made.

Mr. Hobbins said three months later at the time of deliberations no one challenged Mr. Figoli. What the record indicates is that at some point a question was raised regarding his knowledge of antenna. There is case law regarding a television antenna which was an appeal regarding independent bias claims. Mr. Hobbins began submitting the case law to the Board. Mr. Veit said that would be new evidence. Attorney Spencer said legal argument is permitted which can include citation to Maine cases. Mr. Hobbins continued to submit to the Board members the case law. Mrs. Veit said our argument is that this should have been questioned right up to the end. AT that point I felt like Planning Board Member Dee Miller was referring to Mr. Figoli for information and people were listening to him because he was a tower guy. At that point it seemed pointless because there was already influence happening as they discussed the topic amongst themselves they were looking to him for guidance. At that point we decided to just appeal but there was no point in continuing.

Mr. Hobbins said page 2 of the case of law states "this recognizing well established law that Planning Board members may employ their competent personal knowledge, transcripts of Planning Board hearings and its deliberations reflect that no member of the Planning Board relied on specific evidence in this particular case it states that member statements before a Zoning Board of Appeals indicate that the Planning Board members permissibly employ their personal experience to discern fact from fiction." For example if the Planning Board had a member of the medical community and it was discussing an issue of relevance they could employ their personal knowledge.

Mr. Hobbins said the Planning Board took votes on individual line items when they were dealing with the Findings of Fact and Conclusions of Law. In fact there were a few items which were not unanimous.

Mr. Veit said how do you challenge something that is not revealed? If it is not revealed how do we protest it. Chair Schuettinger said I will allow Mr. Figoli the opportunity to speak. Mr. Figoli said I have never worked for American Tower and I have never worked for AT&T. I am not a "tower guy". I work for a telecommunications company. We occasionally do tower work. The only link I have to AT & T is I pay a phone bill every month. I have no financial interest and I have never gained a penny from any company that were presented here. I find the

seven points presented personally offensive and an attack on my ethics.

Mr. Veit said based on Mr. Figoli's statements we are withdrawing the concern for conflict of interest.

Mr. Hobbins said the same thing happened at the last hearing when my integrity was questioned. Attorney Spencer said you won your argument so we need to move on so at this point we only have one issue.

Chair Schuettinger said they are saying that the Planning Board did not vote on the purpose statement 7.E of the Tower Ordinance. Attorney Spencer said in looking at the Board's decision Article 6 incorporates Article 7. In the Board's Decision they went down through Section 6 but they may have swept in Section 7 because it is incorporated in section 6. The decision before you is if the Board addressed the requirements of Section 7E when they went through section 6. Therefore did the Board make a decision on these things and make an adequate decision with adequate findings of fact or was their decision not supported by evidence in the record.

Member Mawhinney said I am concerned with the so-called "sliver". I would like a definition of the "sliver" which could be a matter of safety for this Town. Is the existing tower adequate and can we bring in some experts to make a determination? Attorney Spencer said you can't bring in new evidence you have to make a determination based on the record of the Planning Board. The issue is whether the Planning Board made an error in their determination.

Chair Schuettinger said you will see by the information submitted that there were at least three tower studies done. Member Mawhinney said it was vague and confusing. Chair Schuettinger said we can take additional argument and then take all the information and review it to see if it does support the Planning Board decision.

Mr. Veit said there was only one independent RF study done, not three. Concerning the "sliver" the Sam Ingalls Tower has vast broad superiority. Chair Schuettinger said are you an expert in RF? Mr. Veit said no I am using the independent study done by the consultant. The newspaper was incorrect when they reported that the tower needed to be 295' and at one point the applicant said 400' but what was clearly forgotten was there is another tower in town and another tower on the mountain that both aim at this side. Mr. Hobbins and Mr. Chua, the AT&T RF consultant, referenced a "sliver" in which there is a tiny box where there is superior coverage over Hio Ridge Road where there are no roads and no people. We want the Town to follow the Ordinances which states if there is ability to collocate, which there is at the Sam Ingalls Road Tower, which has a superior signal the applicant should be required to go there first. There is an opening at 120' and there was ability during the time he applied at 132'. At this point the RF signal and the co-location is the only issue we are

bringing to your attention. Mr. Hobbins said the Sam Ingalls Tower is existing and was discussed numerous times during the Planning Board process.

Attorney Spencer said did they review Section 7E of the Tower Ordinance? Mr. Hobbins said in my recollection they did. The findings were not completed for at least one month so I am not sure if they were reflective of that but the record will make the indication. In the record there is a radio frequency report and there are coverage maps as well as alternative site analysis, and a letter from Mr. Veit to IDK communications, who was retained as a third party expert by the Town of Bridgton, to verify that the calculations and site submitted were correct and he concurred with all the information provided by the co-applicants.

Chair Schuettinger said why is AT&T dragging themselves through this process over this one tower? Mr. Hobbins said they are obligated under FCC licenses to provide coverage to the licensed areas and to address significant gaps of coverage due to E911 and public safety issues.

Chair Schuettinger said is that your closing arguments? Mr. Hobbins said we reserve the right because we have not seen the full record which includes the September 2, 2014 minutes.

Mr. Veit said it has nothing to do with coverage, he does not want to go on the Sam Ingalls Tower because if he goes on the Hio Ridge Tower he has co-locator space he is renting out. If he wanted superior coverage he would go on the Sam Ingalls Tower.

Pamela Kohring, citizen and resident of Hio Ridge Road, said one of the criteria was if there was reasonable coverage on an alternative site in the same area and when the Planning Board made the decision to go with the Hio Ridge Tower, what is reasonable coverage, because Sam Ingalls, in my opinion, seems reasonable.

Mrs. Veit said when the application was made the first meeting the Planning Board said the application was complete but there were additional items that needed to be addressed. By the next Tuesday we had a signed petition and voted in June that a tower needed to 750' from a private residence which makes this tower invalid. It seems since the decision had not been made. The application was complete so they needed more information wouldn't our petition apply? 750' is not an unreasonable distance. Attorney Spencer said this is not part of the appeal so it is not appropriate to bring it up at this time, it is not germane to this appeal. Under Maine Law if the Planning has begun a substantive review and unless something is retroactive it does not apply. Mrs. Veit said one of the abutters was not notified and they needed to be renotified so I think it is a valid argument.

Chair Schuettinger said I would like to recess the meeting to the next regular meeting date in November, take the submittals home and review prior to that meeting,

Attorney Spencer said the only issue is was paragraph E incorporated into 6E and did the Planning Board, based on the record, make adequate Findings of Fact and Conclusions of Law and was their decision arbitrary and capricious based on an error of law or based on Findings of Fact that were not supported by substantial evidence. It is not whether you agree with the Planning Board but if there was substantial evidence supporting their decision. If there was, then their decision stands. If they did not address this issue and make appropriate Findings of Fact that support their decision you can declare the decision invalid or if you find that they reviewed it but they didn't make adequate Findings of Fact for you to figure out what they actually did you can send it back to them to make Findings of Fact on that particular point.

Topics for Discussion

A. Revised Ordinance - Shoreland Zoning Ordinance

Chair Schuettinger recessed the meeting at 9:43p.m. to reconvene on Thursday, November 20, 2014 at 7:15p.m.

Respectfully submitted,

Georgiann M. Fleck, Deputy Town Manager
Town of Bridgton