

Appeals Board

Richard W. Perkins – Chair
Stephen L. Malcolm- Vice Chair
Scott G. Adams
James Tonan
Jeanne Fuller
Martin Page – Alternate
David Steinmetz - Alternate



Town of Boothbay Appeals Board
Tuesday, August 12, 2014
Minutes

1. **CALL MEETING TO ORDER:** *Chairman Richard Perkins called the meeting to order at 7:00PM.*
2. **ROLL CALL OF MEMBERS:** Richard Perkins, Stephen Malcolm, Scott Adams, James Tonan, Jeanne Fuller and Martin Page

Also Present: Sally Daggett, attorney for the Town of Boothbay, James Chaousis II, Town Manager, and Daniel Bryer Jr. CEO
John Springer, attorney for Mariner Tower, Louis Vitali, President Mariner Tower, Daryl Wilson and Mr. Cook for AT&T, Jeff Preble and Scott Hinckley for Wright Pierce, Lucy Spaulding, land owner.

3. **OLD BUSINESS:** **Public Hearing on Use Variance Application of Mariner Tower III, LLC and Lucy Ann Spaulding** for wireless telecommunications facility at Ocean Point Road (Map R9, lot 12A). Property is located in the Special Residential zoning district.

Mr. Perkins began by giving a review of what has happened so far. There are no current violations on this property, the taxes have been paid, and there is a lease between Mariner Tower and Lucy Spaulding. The applicant is asking for a variance to place a cell tower in a residential area where it is not an allowed use.

Mr. Perkins said that all evidence submitted at previous hearings pertaining to the proposed tower on the Farrin property would be submitted in its entirety for this hearing.

Mr. Springer, spokesperson for the applicant said this is the second site the applicant has applied for a variance on. The first application was for the Farrin property and that application was denied. At the meeting for that application strong differences of opinion were expressed and one of the suggestions was that the applicant look at other properties, one of the properties suggested was the Spaulding property. He said the process worked as this will make a much better site, it is a large piece of property (8+ acres), and it is heavily wooded and further away. He said the applicant listened to what the Board of Appeals and the abutters said. The applicant understands they need to meet certain requirements, but it is an undisputed fact that they will need a variance no matter what piece of property they chose to put a tower on. They have leased a 100'x100' area of this 8.8 acre piece of land and the closest line is 150' away. Site plans have been submitted as part of the application.

The reports will show there are no significant Vernal pools on the property. The previous tower asked for was to be a mono pine and this one is a mono pole. This design was chosen at the request of the Spaulding's as they feel it will blend into the background easier and looks better. There will be four antenna arrays, to allow co-location of three more carriers. The pole will be 120' tall, with AT&T being located at the 115' array and 10' needs to be allowed between arrays so the 4th co-locator would only be at 85'. This is considered a small pole. The height is driven by line of site technology and the limiting power of the hand set. The use that this variance is

asking for is a passive use. They will need power and electricity, the noise will be small, and there would not be much traffic in the area.

Mr. Springer said he believed that Mariner Tower had answered all the questions from Wright Pierce and that there were no outstanding issues.

Mr. Springer next talked about the RF (radio frequency) plots. He reviewed some of the plots showing what exists now, what would be available for different sites. The different colors on the plots show coverage in buildings, in vehicles, fair coverage, poor coverage and non-existent coverage. He stated the technology is very accurate; it does AT&T no good to have inadequate data. AT&T is currently on the Time Warner tower on County Club Road but the site is too far away to cover the proposed gap in East Boothbay. AT&T is also on the water tower. The plots showed the coverage with the water tower turned on and off and what the coverage would be like with a tower on the Spaulding property. One site will not cover the whole area where it is needed.

Mr. Springer reviewed some other suggested sites, such as Bigelow and Red Hawk Reach and explained why these sites would not work to cover the needed area.

Mr. Springer said the board cannot simply keep saying try another location. He referred to the 1st Circuit law, Federal law and the Telecommunications act. He referred to the two memos submitted for the last application, one from himself and one from Sally Daggett that were almost identical.

Mr. Springer said that the board cannot discriminate against carriers, if there is a significant gap, there has to be a way to fill it, the board cannot deny them. Mr. Springer went on to discuss the Banks case.

Mr. Springer reviewed the criteria and how he felt the applicant met all of the conditions and criteria.

Mr. Malcolm asked if Mr. Springer would go through the gap criteria again.

Mr. Springer said they look at the RF coverage, look at travel corridors, houses, people, and the geographic footprint. He referred to a small cell analysis that was submitted by Wright Pierce.

Mr. Malcolm asked what precludes them from coming back for more towers for areas still needing coverage. He said he is trying to understand where this is going.

Mr. Springer said there was no guarantee that they would not come back. The demand is driven by handheld devices. He said if the population doesn't grow, they would not need to come back but if the population does grow they will need more, it is driven by demand.

Mr. Malcolm asked if four carriers on a pole is the max. What would happen if a 5th carrier wants to be on the tower?

Mr. Springer said that sometimes the pole can be made taller, but that would require coming back before the board.

Mr. Malcolm asked if 85' is the lowest a carrier can go and why. Mr. Springer said that anything below 90' is rare, the coverage is just not that great mostly because of the tree coverage.

Martin Page asked how close another tower could be put up.

Mr. Springer said that sometimes it is a condition of the variance how close another tower can be however if co-location is not possible other carriers need to be allowed in. The BOA could tell another applicant they would have to prove that they could not co-locate. Co-location is a way to reduce towers and many ordinances provide for this.

Sally Dagget said the tower approved in 2002 had conditions requiring this.

Jeanne Fuller said she thought they had a good case for essential services. This raised questioning about the use of cell phones and if they are a luxury and not a necessity. Ms. Fuller mentioned that height restrictions do not include towers, she is wondering why this did not go through the Planning Board.

Mr. Perkins commented that if the Telecommunications Act went into effect in 1996 and the 2002 tower went through the Planning Board why this has not been addressed in the Ordinances yet. Mr. Perkins pointed out that there have been many changes to the ordinance since then. Why has no one suggested the ordinance be changed so it would allow applications such as this to go through the Planning Board as that is where it belongs?

Scott Adams talked about the 50year lease and how it gives the landowner no rights when it is up for renewal every five years. Mr. Adams feels that the hands of the BOA are tied. He feels the ordinance change to allow this to go before the Planning Board should be brought before the voters. Mr. Adams does not feel that this tower in this location will help, that a tower on Spy Glass hill would reach more year round people; this will reach mostly summer people in Ocean Point.

Mt. Vitali read part of the lease out loud. It is to be renewed every five years and if the tower is ever abandoned, or no longer is use, the tower company must remove the tower.

Mr. Perkins thanked Mr. Springer for addressing all the concerns.

Steve Malcolm asked attorney Sally Daggett if the BOA could put conditions on an approval and she responded that yes they can, it is within their right to do so. Mr. Adams said this could only be done after a variance is granted and cited 5.6.7.2 (A variance shall not be granted for establishment of any use prohibited by this Ordinance in Section 3.7 or3.9.) Even then there would be limitations and restricts on conditions that could be applies.

Sally Daggett suggested everyone look at the conditions that were placed on the 2002 tower and see if this is something that they think they can do.

At 8:30PM Dick Perkins said they would take a ten minute recess while the Board reviewed the conditions.

At 8:40 PM Dick Perkins called the meeting back to order.

Mr. Springer said he had reviewed the conditions on the 2002 tower and found the conditions mostly agreeable. He said that in #9 they would agree to 150' no cut and instead of 100' and file it with the Registry. He also said in #13 that said no to allowing dish types with a diameter of 24" or greater to be attached to the pole that it be changed to 36" without coming back to the board. He said AT&T does not use this type.

Mr. Perkins opened the floor up to public comments.

Sally Gleasner read a prepared speech. She said she has summered in East Boothbay for years and she requested the board not grant the variance, she urged them to stand against greedy corporations and to protect the natural and historic treasure that East Boothbay is.

Tom Watts talked about co-locating; he said he is unsure why other companies do not need such tall towers or what other alternatives are available. He said he is a Verizon customer and has perfect coverage in this area.

Jean Gibson reminded the board of the handouts and presentation she gave at the hearing for the previous application. She provided the board with a copy of policy's for the Adirondack Park.

Brad Betts said he is still against the tower but if we have to have one this is a better location, a better option. He said last time the applicant was asked to check alternative locations and that has been down, they did listen. Mr. Betts asked why 120', could it be lower such as the one in Edgecomb or the Water Tower. He asked if the information he presented at the last application be considered for this application. Mr. Betts said he did an experiment with both an AT&T phone and a Verizon phone and found that the coverage in the East Boothbay area was the same. This was the only empirical evidence given.

Mr. Bayrd talked about the Eagles and Hawks at Ocean Point. He said he was against the tower and that the Big Corporations seemed to have more rights than he did.

Chris Betts said he has Verizon and that it works at Grimes Cove. He said no one wants a cell here except Mariner Tower. He said he does not understand why they would want to go where they are not wanted.

Chris Lawler said he has adequate Verizon coverage and talked about the birds and nature and his concerns with them being disturbed.

Steve Malcolm asked how they test the criteria for co-locating.

John Springer said that AT&T co-located on the Country Club Road and the water tower. He said the last thing a carrier wants is to have to build a new tower. There is no other place for them to co-locate that will fill the gap.

Mr. Cook said that five miles is about the range of a tower depending on the trees and the topography.

Daryl Wilson said there are too many variables; often it is less than five miles, that is the threshold.

Scott Adams asked how many towers it would take to cover the whole area.

Mr. Cook said there were too many variables, that they will co-locate if possible, then look at what other options are available.

Mr. Perkins asked questions about roaming and how that works

Mr. Cook said they prefer to handle their own customers. A carrier cannot control the experience or reliability of another carrier. He said there was a one to two mile radius in this area.

Scott Adams asked if a system of small towers along the peninsular could be constructed to cover the whole area.

Mr. Cooke said that a 120' tower is considered small. He also said that what is being proposed will not cover the entire gap.

Mr. Adams and Mr. Springer disagreed on the amount of the gap that this tower would cover. Mr. Adams thinks the amount of coverage impacted by this tower will mostly cover an area occupied by seasonal people and asked why they did not try to cover the area occupied mostly by year round residents by using a central or northern tower. Mr. Springer felt a tower in this location would cover the majority of the gap.

Mr. Springer said in the information he was given, there was no clear way to get the percent of year round residents living in a particular area.

Mr. Springer said that Mariner Tower may or may not apply for more towers in the future. Yes a string of 100' – 120' towers would fill the entire gap.

Mr. Cook said yes it was possible they would need more sites in the future.

Martin Page asked how they determined this area should take precedence of other areas.

Mr. Springer said AT&T felt it was needed in this area, and Mr. Cook said they look at all the dropped call data, customer complaints and that the need is customer driven. There was no evidence provided to support this information.

Danielle Betts said that she felt Bigelow was a better site and that Mariner Tower had talked with them before the first application. She feels they still should be looking at what other options are available.

Dick Perkins said it was time to look at the variance criteria and asked Scott Adams to walk the board through the criteria.

5.6.1 General, the board of Appeals may grant a variance if –

A. If the activity development or use is not prohibited by this Ordinance and is consistent with the land use goals and objectives of Section 1.8

Scott Adams made a motion that this is clearly prohibited and does not meet this standard and Steve Malcom seconded the motion. Vote: 5-0 in favor.

B. if the proposed development or use would meet the standards of this Ordinance except for the specific provision(s) from which relief is sought.

Steve Malcolm made a motion that the proposed development would meet the standards of the ordinance 1.8.1 B&C that based on visual impact which is less than on the previous application and subjective, it would not violate the ordinance and Jeanne Fuller seconded the motion. Vote: 5-0 in favor.

C. If the minimum setback for new subsurface wastewater disposal systems from water bodies required by the Maine Subsurface Wastewater Disposal Rules is not reduced

Scott Adams made a motion this was not applicable to the application and James Tonon seconded the motion. Vote: 5-0 in favor.

D. Except as provided in Sections 5.6.2, 5.6.6, only when strict application of this Ordinance to the petitioner and the petitioner's property would cause undue hardship

5.6.1.1 Except as provided in Section 5.6.6, the term "Undue Hardship" as used in Section 5.6 shall mean all of the following:

A. The land in question cannot yield a reasonable return unless a variance is granted
Scott Adams made a motion that this application has not met this condition as there was no evidence that the value of the property would be reduced by denial and Steve Malcolm seconded the motion. Vote: 5-0 in favor.

B. The need for a variance is due to the unique circumstances of the property and not to general conditions in the neighborhood
Scott Adams made a motion that this application did not meet this condition as it is not due to the unique circumstances of the property but to the business use of the applicant and James Tonan seconded the motion. Vote: 5-0 in favor.

C. The granting of a variance will not alter the essential character of the locality, and Steve Malcolm made a motion that this condition was not met as it would alter the character and there are likely alternatives. James Tonan seconded the motion. Vote: 5-0 in favor.

D. The hardship is not the result of action taken by the applicant or a prior owner
Steve Malcolm made a motion that the applicant and co-applicant have not met this condition and James Tonan seconded the motion. Vote: 5-0 in favor.

Scott Adams made a motion that this variance application cannot be granted and James Tonan seconded the motion. Vote: 5-0 in favor.

Scott Adams made a motion to suggest to the Selectmen that they take prompt action to make it a priority to make such applications the purview of the Planning Board as they are better equipped to handle them and can do a better job. The Planning Board is the appropriate forum for these applications. Steve Malcolm seconded the motion. Vote: 5-0 in favor.

The board will meet at 7:00PM on Tuesday August 19th to sign their written decision.

5. ADJOURN: Scott Adams made a motion to adjourn the meeting at 10:00PM and Steve Malcolm seconded the motion. Vote: 5-0 in favor.

Minutes respectfully submitted,

Sherry Tibbetts
Secretary