

**TOWN OF POMPEY ZONING BOARD OF APPEALS MINUTES
AUGUST 31, 2015**

The Town of Pompey Zoning Board of Appeals meeting was held on Monday, August 31, 2015 at 7:00 pm at the Town Hall. Present were: Chairman David Tessier, Kevin Sharpe, Dave Hale, Don Neugebauer, Pat Frazee; Town Attorney Jeff Brown.

Chairman Tessier opened the meeting at 7:00 pm.

We have one item on the agenda, Verizon Wireless, 120 foot tower, additional 4 feet for lightning rod at 8144 Indian Hill Road. The Board has received the crane report from Verizon Wireless and a letter from CityScape dated August 25th.

Jared Lusk, attorney, Nixon Peabody and Gene DiDomenico, Verizon Wireless were present.

Jared Lusk first reviewed some items. At the August 3rd meeting, the deadline for the Crane Test Report was August 15th. Report was in by August 13th.

A couple of issues were letters from Ms. Bell, attorney for the citizens and a letter from Mr. & Mrs. Moseson regarding issues raised at the June 29th meeting – do we need 120 foot tower or 100 foot as suggested by Mr. Edwards of CityScape.

A crane test was performed in July at a cost of \$25,000. Exhibit FFF shows it in the August 13th submittable.

August 20, 2014 Ex. G of original application shows need and purpose of application. Submitted copies of Buellville Coverage Needs, dated August 31, 2015. Mr. Lusk then went over the report stating the need is well documented.

CityScape representative, Rick Edwards, has agreed that height makes a difference, it needs to be above the trees.

Crane Test showed results for 150 foot (original request), good coverage, 120 feet not as robust and 100 feet (more red in targeted coverage area). Rt 92 is a major problem area. 100 foot tower shows mostly red on map.

If the 120 foot tower is built, Verizon will not need another tower in the Town of Pompey. Marginally acceptable coverage at 120 feet. They need to get 4G up and running.

The Northeast portion of the Town needs coverage.

Went back to e-mail and Mr. Edwards' report dated August 25, 2015 and read the letter (e-mail).

Mr. Lusk then stated that the 100 foot tower does provide some coverage. Two antennas point north for Rt. 92 coverage and two antennas point south for coverage. They do recognize need to accommodate additional height (pine covering). Mono pines would add another 5-10 feet steel so branches can bolt into the tower.

Kevin Sharpe then asked if the other three existing towers benefit other communities (Manlius, Cazenovia and Sevier Road in Pompey)?

Mr. Lusk stated addition of new tower would benefit the entire network. It will allow for more coverage. It lacks 4G service because of topography.

Gene DiDomeinico stated that when a site reaches capacity, down tilting of all antennas creates a larger gap.

Don Neugebauer asked if the tower is not built, could you add height to other towers?

Gene DiDomenico said he doesn't believe Sevier Road and Cazenovia could be extended. They are co-habitated. Can only use so much before needing another tower.

The Town's expert, Rick Edwards of CityScape then spoke. He said he basically agreed with Mr. Lusk, but said Mr. Lusk took things out of context. Communications Act of 2012, allows anyone to increase a tower by 20 feet due to Federal Middle Class Tax Relief Act.

The map Mr. Lusk produced shows difference between 100 foot and 120 foot tower. The intent is not to show what the coverage would be, just difference between 100 foot and 120 foot, no matter what the height is, you will have coverage. He thinks you need more height (lower height, need more towers). Not disagreeing with what Mr. Lusk said, the higher it is, the better it will work.

Need to substantiate need for 120 foot tower over 100 foot and determine what impact the 120 foot tower has. Needs to be above treetops, if it isn't the signal can't develop.

If you think of RF as a light bulb, if dropped inside the trees, a light bulb won't work. The purpose is to show 20 foot difference over the treetops, and we have to remember the terrain.

He was asked to look at the difference between 100 foot and 120 foot. There are five active carriers in the area, all will need facilities. The speed of service would take more towers. Will need more facilities in the future. DSL is going away. Cable/satellite TV is going away. You need to look at what Pompey needs in ten years. A tower with pine camouflage needs to be 20 feet above treetops. Town needs to determine if Town can live with it. The RF engineer wants 120 feet or 150 feet.

Kevin Sharpe asked if there was a lot of modification to doing the mono pine?

Rick Edwards then stated that there will be gaps in service sometime in the future; there will be a need for another tower regardless whether it is 120 feet or 100 foot tower.

He then mentioned that high speed data is a national issue.

Rick Edwards, CityScape, then said that Verizon will need additional towers, possible would need one to have other carriers co-locate. Sprint and T-Mobile are building towers rapidly. Other carriers coming in, Verizon may utilize their towers.

Rick Edwards, CityScape, said that Rt. 92 gap is there right now. Cell coverage will be eliminated, everyone will be going to 4G.

Pat Frazee stated that if it is a 100 foot tower, other carriers probably wouldn't co-locate, but at 120 foot would co-locate.

Mr. Lusk stated for the record that Verizon would do that, waive rights under Federal law.

Mr. Lusk then said that according to his propagation data, Rt. 92 is not currently covered, but Rt. 92 will be covered by a 120 foot tower. It was done accurately to show coverage. They are fine with service in Pompey with 120 foot tower.

Chairman Tessier then asked if there were any more questions. There were none.

The Board next needs to take action on SEQR issue. Original long Environmental Assessment Form reviewed April 2, 2015. Also have copy of Part 3. The only change is property line shift through proposed simple subdivision so that the height of the tower fits tower set back. Tower height 120 feet, plus 4 feet lightening rod.

The new long Environmental Assessment Form was submitted August 13, 2015 by Nixon Peabody. Part 1 is completed by the applicant. Part 2, the Board reviews and Part 3 is a written portion made by Board's evaluation.

Chairman Tessier then went over Part 2 with 18 questions for any changes from original SEQR application.

1. Yes – same
2. No – same
3. No – same
4. No – same
5. No – same
6. No – same
7. No – same

8. No – same
9. Yes – same – note water tower is within ½ to 3 miles of site
10. No – same
11. No – same
12. No – same
12. No – same
14. Yes -same – will increase energy, no or small impact
15. Yes – same – lights over each door, no or small impact
16. No – same
17. Yes – same – notes on Part 3
18. a, b, c, d – same, e, f – notes on Part 3

Chairman Tessier then stated that he needed a motion re: SEQR.

Motion by P. Frazee, seconded by K. Sharpe to approve the SEQR as detailed in Part 3, which includes that the Board requires a camouflaged tree canopy on the tower. All in favor.

Chairman Tessier stated that we need to open the public hearing and hear from everyone that wants to speak and hopefully we will vote tonight. The Board does deliberate in public. They may have questions for the applicant or the consultant. Please try to keep your comments to three minutes. Please keep comments to new subjects. If there are procedural questions, then Attorney Brown and he can answer them.

Motion by D. Hale, seconded by K. Sharpe to open the public hearing. David Tessier, David Hale, Kevin Sharpe, Don Neugebauer in favor of the motion Pat Frazee voted nay. Motion approved 4-1.

Attorney Nadine Bell of Costello, Cooney-Fearon, stated she is here on behalf of Todd Caputo and other concerned Town residents. She realizes that this has been going on for months. She has gone over a lot of the documents and there have been a number of amendments and it seems as though there is never any clarity. That is not the role of the Board. She gave as an example that the applicant keeps coming in and changing the request.

There was an application for 120 foot tower, plus 4 foot lightning rod. This process has taken much longer than usual. In July the applicant did a whole new test. She has never seen where the applicant is in control of the process, the test was going to prove everything. The Town consultant feels Verizon did not provide what was needed. Verizon has to show burden of proof.

As for minimally intrusive, they have not shown the absolute need for 120 foot tower. She submits that it is not clear, minimally intrusive, don't go there. Indian burial ground is nearby.

She went over the traditional 5 requirements that the Board has to look at to approve a variance request. Code says 75 feet or 10 feet over tree height, whichever is less. You can't say it can't be achieved by other means. Neighbors have shown their concern.

If you are trying to make it look like a tree, going to 125 feet, it will tower over the other trees. 120 feet is a 25% increase over ordinance. Next, self created, it is. When the Board makes it's decision, applicant hasn't satisfied their burden. It is not the responsibility of Board to go to Verizon.

Chairman Tessier responded to her comments. The Board has worked with other applicants to see if they can make the project work. One came with an application and it turned out they didn't need it. We do work with the applicants.

If they come with a specific request, the Board can approve the request or not. The law is the same tonight. We are working with 120 foot height, plus 4 feet. This is a request for a variance between 75 feet and 120 feet. Sometimes it appears the applicant is in control, but there are federal laws. We don't use the five typical requirements for variances for this request. There is a special standard for public utilities. There was a three point test used for this application.

Attorney Brown explained: a) NY state law provides that wireless providers are public utilities for the purpose of zoning applications; b) applications are reviewed under one public necessity standard and c) in the context of telecomm facilities, the public necessity standard requires carriers seeking a variance “need only establish: 1. gaps in coverage exist; 2. the location of the proposed tower will remedy those gaps; and 3) the proposed facility represents a minimal intrusion on the community, looking at: a) property values; b) visual impact and c) potential alternate sites.

David Peckham of 4110 Gibbs Road. Still talking about one location. There is a new firehouse going up on Rt. 92. Suppose Verizon looked at that location? Start there, then look at an antenna farm. It would limit towers in the Town.

Richard Moseson of 8202 Indian Hill Road. A 124 foot tower made to look like a tree would be 130 feet. Tree height was 90 feet, now showing 70 foot average tree line. It would be fully visible and won't look like a tree. 4-5 other cell phone companies will be putting up towers, but if the tower was lower, it could look like a tree.

Section E of the propagation maps show 4G coverage. Rt. 92 shown with the crane test. Pompey Pines is mostly purple and covered by existing towers, We already have three towers. We have a lot of coverage.

I hope the Board realizes that they don't have to agree to the tower. Their map further south shows all red, will cover eventually.

Chris Moseson of 8202 Indian Hill Road. She feels that Jared Lusk is not focusing on the gaps. The crane test was targeted for more populated area of The Preserve. They haven't done due diligence. There is the Lipe silo that could have been looked at. Capacity issues can be solved. There are options that were not explored or presented.

Where the gaps are purple no one lives there. She offers that The Preserve has some coverage, but up to Rt. 92 is not that significant. White areas are not developed. We need a consultant to plan for the future. It is easier to disguise smaller towers.

Mark Underwood of 4113 Pompey Center Road. Since the beginning Verizon has said there are gaps and there will be problems. There are no problems. Very few people can use 4G. Currently there are 1700 phones with 4G capability. It will be 2021 before 3G goes away. It would be 4-5 years before the Town comes up with a plan.

The 120 foot co-location is a problem. Why would another carrier come in and use 100 feet? He knows some that still use 2G.

Motion by P. Frazee, seconded by D. Hale to close the hearing. All in favor.

Chairman Tessier then stated that everyone was welcome to stay and listen to the Board's discussion.

Several months ago he asked Attorney Brown to state the three items the Board needs to discuss before making a decision. 1. Gaps in service; 2. Tower will remedy gaps and 3. Minimal intrusion on the community.

The Board can deny, approve as presented or approve with modifications/conditions. We have talked about all of these items. The key is the height of the tower with array of antennas, lightning rod/camouflaged. It gives the Planning Board some flexibility. The Board can require camouflage. We need to work between 75 feet to 120 feet.

Motion by P. Frazee, seconded by K. Sharpe to deny the application based on the fact that Verizon Wireless has not demonstrated they have looked at all alternative locations and has not satisfied the need at the location for a tower. All in favor.

Attorney Brown then stated that if the request is denied, it needs to be in writing and supported by substantial evidence such as property values, visual impact, that the applicant has not looked at alternative sites; the tower fails to address the gaps in coverage, etc.

Pat Frazee then asked the question – could we go into executive session for private counsel?

Chairman Tessier stated that he sees no reason to. We don't normally do that. We have residents that could sue the Town, we have an applicant that could sue the Town.

We have to consider carefully, if over 110 feet it will be seen on a daily basis. Everyone had the opportunity to see the crane test. He drove around and saw the 100 feet and 150 feet above the tree line. 100 feet is pretty hard to see from a lot of directions. He doesn't feel the Board would be serving if we just deny. Even our consultant has said there is a need. The application is for 120 feet.

Don Neugebauer asked the attorney to go over the three tests we need to abide by.

Attorney Brown stated that the Telecommunications Act of 1996 states 1) state law provides that wireless providers are public utilities for purposes of zoning applications; b) applications are reviewed under one public necessity standard and c) in the context of telecomm facilities, the public necessity standard requires carriers seeking a variance “need only establish”. 1) gaps in coverage exist; 2) the location of the proposed tower will remedy those gaps; and 3) one proposed facility represents a minimal intrusion on the community, looking at a) property values; b) visual impact and c) potential alternate sites.

Don Neugebauer asked has the consultant said we need the tower?

Attorney Brown said the consultant has said they are valid concerns.

Don Neugebauer then stated that he believes what we have now will deteriorate and the gaps will grow.

Pat Frazee said that it is true if we deny, he's not sure he even wants a 75 foot tower. Not sure that is the direction to go.

Don Neugebauer feels there will be more gaps in the future.

Kevin Sharpe stated that no one has come forward about dropped calls. He doesn't see the gap coverage as an issue.

Dave Hale stated that we can't deny based on no coverage, there is coverage.

Attorney Brown said it needs to be in writing that there is no significant gap, do have coverage now, but not in the future.

Kevin Sharpe asked can you see in the future adding to the existing towers? Now, next year, future conditions? Things are okay now. If gaps exist, why aren't people here complaining?

Rick Edwards, CityScape, stated that they are adding frequencies.

Gene DiDomenico, engineer Verizon Wireless stated that capacity at current sites is at the limit. To correct the problem they need another tower where requested, or more towers closer together.

Chairman Tessier stated there are primary zones and secondary zones in the Town ordinance. This is a primary zone. There is no limit on the number of towers.

Don Neugebauer stated that as the demand increases, more towers are needed.

Attorney Brown stated that the ordinance says 75 feet or 20 feet above the tree line, whichever is less.

When evaluating community impact, look at the least intrusive means, look at least sensitive sites.

Don Neugebauer stated that 120 feet plus 5 feet plus 5 feet equals 60 feet over the tree line. He agrees that it can't possibly look like a tree.

Attorney Brown asked does the facility present minimal intrusion? Look at property values, do they decrease or is there no impact? You have received information on both sides. Visual impact, denial must be supported by substantial information.

Third, the evaluation of alternative sites.

Pat Frazee is concerned that improving the other three sites will not fix the problem.

Chairman Tessier stated that we need more locations.

Pat Frazee withdrew his motion to deny the tower.

Motion by K. Sharpe, seconded by P. Frazee to deny the requested cell tower based on information that the gaps don't exist, extreme aesthetics are not minimal, and does not fit in with the Town's Master Plan.

Don Neugebauer stated that the 100 foot tower is not that good for co-location for other carriers. He wondered how far the antennas are separated.

Rick Edwards, CityScape consultant stated that the antennas are separated by 10 feet.

Chairman Tessier stated that the difficulty is not getting enough information to support the motion.

Attorney Brown stated that the more detail provided, the better. We need to write it all out in the motion to deny.

Kevin Sharpe asked if we have a motion seconded, do we need to vote on it?

Chairman Tessier stated that they requested a 120 foot tower.

Mr. Lusk, attorney, Nixon Peabody stated that if it is a 100 foot tower approved, we would need another one in the Town of Pompey.

Don Neugebauer said we could approve with conditions and change the height of the tower in the conditions.

Attorney Brown said one option is to condition on deed restriction preventing future increase in height of tower. Verizon could sue the Town if conditions wouldn't work. Whether they agree or not, the Board has right to place reasonable conditions.

Don Neugebauer stated that regarding property values, a house with a view of the tower, it will absolutely affect the value. We are used to telephone poles, don't even know they are there. Someday it will be the same with cell towers.

Chairman Tessier stated there is a motion on the table that needs to be passed, denied or amended.

Attorney Brown stated that the Board needs to address appraisal (Verizon) who hired Pomeroy. It takes into account of local real estate agents.

Pat Frazee stated the goal is not that they don't want the tower built, but want it to happen with as minimal impact as possible.

Attorney Brown stated there are other sites. Verizon agreed to focus current Board decision on alternative site #1.

Chairman Tessier stated that alternative site #1, dated 8/13/15 needs to be in a motion.

Chairman Tessier said the only way to modify is to withdraw the motion to deny variance application and then approve with conditions

Kevin Sharpe said he will pull back his motion based on the fact that Verizon's entire application would be denied.

Chairman Tessier stated that we need to make the best judgment on behalf of the Town.

Attorney Brown stated that you could withdraw the motion, make a motion with conditions acceptable to the Board.

Don Neugebauer said one condition could be to limit tower to 100 feet to include 5 feet for lightning rod and crown.

Pat Frazee stated that the impact for 120 foot tower would not have the impact of 2-100 foot towers. 120 foot is less intrusive than two 100 foot towers.

Chairman Tessier stated that approval is specific to the site, and does not change the ordinance.

Kevin Sharpe and Pat Frazee both agreed to withdraw their motion.

Chairman Tessier asked do we have a motion with conditions at 100 feet?

Motion by D. Neugebauer, seconded by D. Hale to approve Verizon Wireless request with conditions to construct a cell tower limiting to 100 feet, plus 5 feet for lightning rod and camouflaging, and to deny further extension of height.

Attorney Brown said a deed restriction would be potential legal mechanism. He doesn't know if Verizon would agree to restriction. If they are not happy, they could withdraw the application.

Chairman Tessier stated Verizon said they would not come back for extra height.

Pat Frazee stated he still feels that 120 feet at one location is better than 2-100 foot towers.

Rick Edwards, consultant, CityScape said that gaps are proven and are existing and will be worse in the future. Request is now at 120 feet, it was at 150 feet. It would be shorter, and there would still be gaps and they would need another tower even at 120 feet. But would be in the future. Everything in the ordinance states 75 feet or 20 feet above the tree tops. If they need a second tower, it will be lower, but needs to be above the tree line.

Chairman Tessier stated that the new fire station being built on Rt. 92 is not in the Town of Pompey.

Attorney Brown said for clarification that the Board is concluding that gaps exist now and proposed tower does address current gaps.

Chairman Tessier stated there is a motion on the floor for a 100 tower, plus 5 feet for lightning rod, plus 5 feet for camouflage, and will waive right for extra feet located at

Alternate Site #1 as presented on submittal dated 8/13/15.

Attorney Brown said the gaps exist now. The location of the tower will remedy some gaps, will have an impact on the community. Conditions would lessen impact on the Community.

Pat Frazee asked what is the probability of another tower being built at whatever height?

Chairman Tessier is comfortable with recommendation from the consultant, Rick Edwards of CityScape for 100 foot tower plus camouflage.

Gene DiDomenico, Engineer, Verizon Wireless stated that with 120 foot tower, they would not need another tower in the Town of Pompey.

Chairman Tessier stated that the ordinance does allow co-locating.

Jared Lusk, Nixon Peabody, said that the condition of the FCC license is to provide coverage for entire license area. If they don't provide coverage, the FCC could pull their license.

Attorney Brown stated that the motion is for Alternate site #1, with conditions of 100 foot maximum, with additional 5 feet for lightning rod and camouflage, and would be legally prohibited to prevent an increase in tower height in the future.

Chairman Tessier asked for a vote on the motion as presented. Dave Tessier, Dave Hale and Don Neugebauer in favor of motion, Pat Frazee and Kevin Sharpe voted nay. Motion approved 3-2.

Motion by K. Sharpe, seconded by D. Neugebauer to adjourn the meeting at 10:25 pm. All in favor.

Respectfully Submitted,
Darla M. Mawson, Secretary
Town of Pompey Zoning Board of Appeals