

NORTH BERWICK, MAINE 03906

MINUTES OF PLANNING BOARD MARCH 18, 2009

Present: Chairman Todd R. Hoffman, Julie Fernee, Shaun DeWolf, Mark Cahoon and Lawrence Huntley, CEO.

Absent: Barry Chase

Also Present: Bill Plouffe (Town Attorney), Roland Jacques, Margaret Allaire, Jeff Fournier, Amber Fournier, Jeanne Emerson, Richard Trefton (US Cellular), Bob Gashlin (US Cellular), Arthur L. Hall Jr., Alan Shepard (Attorney), Elizabeth G. Hall and Diane Kennedy.

1. Call to Order:

Chairman Todd R. Hoffman opened the Planning Board Meeting Workshop at 5:04 p.m.

2. Current Business:

Chairman Todd R. Hoffman explained that this meeting is a Planning Board Workshop with Town Attorney Bill Plouffe. There is a specific issue before the Board on the cell tower on Lebanon Road.

The Board has received legal letters from Alan Shepard and Richard Trefton that we will be discussing. This may bring up certain issues that the Board would like to confer with our attorney and possibly go into executive session.

This evening is not a public hearing or a presentation but we want to be as open as possible in what we want to do.

Bill Plouffe spoke that I have seen the letter March 9, 2009 from Attorney Alan Shepard representing abutter opponents to this cell tower and a letter March 16, 2009 from Dick Trefton Attorney representing RSA number one developer of the cell tower location. I also received a letter that I have not had a chance to go over dated March 18, 2009 from Alan Shepard apparently responding to some of the things in Dick Trefton's March 19, 2009 letter.

I 'am not unfamiliar with cell towers issues, although I haven't had to grapple with them in the recent past. I have the distinction I think of being the first Maine Attorney to represent municipalities sued in Federal Court with Telecommunications Act, not once but twice all by cell phone developers. It then went to the US District Court, and then went to the US District Court of Appeals, and was withdrawn when it got to that that was one case. The other cases went to the US District Court. This was around 1999 through 2001 involved the Town of Falmouth. The Town of Falmouth like the Town of North Berwick in that point of time didn't have particular provisions in their ordinance dealing with cell towers. They had provision in their ordinance dealing with towers generally but mostly radio and TV towers that they had in one place in

Falmouth which happened to be the high point in town, which was the old way of these things were done. There were radio repeaters out there and television stations and so forth. Then the cellular telephones became more and more popular they started to put antennas on for cellular telephones it had to do with that.

The whole area of municipal regulation if you will is a location of cell towers is actually quite complex and that the fact that you are struggling with this is not surprising since our ordinance doesn't address it directly.

The Town of Falmouth a few ago mostly to the efforts of one Town Councilor enacted in elaborate set of ordinances dealing with the location of cell towers. When these kinds of things started these controversies in towns and I can tell you from experience. That the cell tower telecommunications industries would very often come into town and say to them; you have no authority to do anything to stop us from putting our towers where we want to put them, and that was the message basically given.

And that is because 1996 Telecommunications Act enacted by congress trumps everything that you want to do. That is not true; there is actually a section of the Telecommunications Act, which is captioned something like preservation of zoning authorities. The balance of that section of the Federal Law tries to strike is what makes this area so complicated and raises so many questions. There are some fundamental out there; one of which that you cannot use some peoples concern about radio frequency health effects to turn down a telecommunications tower; that is right in the Federal Law. There are some people who rightly or wrongly feel that there are legitimate reasons to be concerned about health effects from radio frequency radio waves, but you can't turn that down. Congress wasn't persuaded that that was a legitimate basis. It is also clear from the Act taken as a whole that Congress was trying to facilitate the establishment of a national network of coverage for cellular telephones and that is pretty clear.

That leads to some of the issues; that you e-mailed me about concerning gaps of coverage and filling in gaps of coverage and what does it mean. Several years ago that was an evolving subject in the courts; District Courts and the Courts Appeal US Supreme Court and not really gotten into it yet. The general points of view from the courts and you have the differences depending on what part of the country the court was in and some of the courts were more favorable to the strength of the Telecommunications Act to really hamstringing local governments and that was favorable to the industry. The other Federal Courts were less favorable to that perspective and said that the towns maintain a lot of authority provided they did it right.

I think it is fair to say from the cases that I have read, from the general scope of the Act that if there are dead spots where calls cannot be made or calls are dropped, then there is a big concern and a legitimate argument on the part of the industry agreeable to fill in dead spots. The last I looked and maybe things have changed since then. There was a split in the cases I have read about, rather or not a dead spot meant that particular carrier for example: Verizon had a dead spot but did it mean that by roaming you couldn't pick up anybody; US Cellular. So I 'am a Verizon customer, Verizon has a dead spot, my phone goes over to roam and then I can pick up US Cellular so I can still communicate with the world. Some of the case law talks about that actually, being able to communicate with the world essentially from my cell phone.

There has been some back and forth, I guess here about radio frequency engineers testing that they do. I went through all of that with the Town of Falmouth and the Town actually went out and hired PhD Radio Frequency Engineer teacher at the University of Boston who use to work for one of the cell phone companies. It was absolutely enlightening to speak with him because what he had to say was so much more in-depth, than the information we were getting from some of the industry representatives. We actually went out and hired our own radio frequency engineer to go in his truck throughout the town where it was claimed that there were dead spots and do signal strength testing and that gets very complicated and what is an adequate signal strength or not, actually depends on the companies policy; at least it did then.

Chairman Todd R. Hoffman asked if he had his name and number.

Bill Plouffe answered I could get it. He is very expensive.

I'm not speaking about the company that is before you now, which is US Cellular. I'm not talking about any particular company.

Chairman Todd R. Hoffman asked that they didn't come with an industry standard.

Bill Plouffe answered that back then depending on the company and the strength of the signal that they considered acceptable. We also found out all the differences in the different types of cell phones. And if you go to your local cell phone store I found out that the folks selling you those products didn't have anywhere near the knowledge than the PhD Engineers did which claim to make the various chips that could be put in the phones. And the kinds of phones that there are and why some phones you can use in Europe and others you can't. So technically it is quite complicated and to really get into it is a real task for a town. It may not be necessary for a town to really get into it at that level. We were involved in litigation and we had to, it's not a place that the Town of Falmouth wanted to spend its money I'm sure.

There are other complicated things that come into play, for example we ran into this: a company will come in and say we have to have a tower in order to provide coverage; well our engineer went out and said, no you don't have to have a tower you could mount the antenna, the tower is not the transmitting and receiving device. It is just the device to hold the transmitting and receiving device and the wires that go out to it and you can do location on buildings on the high part of town for example and that might solve that problem. On the other hand there was great concern about there being places in town where the signal was either weak or was available only on one companies frequency expressed to us by EMS people for example. There is a legitimate argument that some of this gets into public safety especially in this day and age where there are people and one of the things Dick Trefton gave you as an article and is true I believe especially in the several years I was heavily involved in this. There are more and more people who are dropping their land lines and just relying on their cell phones or their Black Berries.

This is an involving area and it is quite complicated and is not probably as simple as industry representatives make you think that it is and the opponents make you think that it is. And there is this overlay of the Federal Telecommunications Act and that is usually; I hate to use this word: weapon of choice for companies who want to take towns to court that have turned them down

over location of cell towers. That is part of the laws there is nothing wrong with that that is just part of the law.

There have not been many cases that have gone to court in the Maine State Courts on cell towers that I'm aware of. There are cases on other kinds of communication devices like TV and radio.

Alan Shepard sent you a case involving not cellular. I do think cellular is in a category by itself because it is telephone coverage today 2009 because it does have its public safety aspects that are part of it, so it becomes quite complicated. I think most towns are well served to do. Planning Boards when they get into these issues is to be aware of that context, be aware of the Federal Telecommunications Act that the focus in the first place anyway on your own land use ordinance because the Telecommunication Act does not forbid you from doing that and as I understand it that is accentually where you are in this case. After a couple of meetings have come down to is this tower, which will host cellular communication antennas.

Is this an essential service and since we don't have a provision in our ordinance dealing specifically with telecommunication tower antennas. I 'am prepared to kind of walk you through how I would look at that question if I would go there. There are a lot of things people will overlook when they're reading zoning ordinances is the definition section. I went through the definition section and what comes close to hitting the mark for telecommunication towers is essential service. And it does mention a whole bunch of things; anything from municipal sewage lines to telephone cables, lines, poles and related equipment. It would be great if it said cellular equipment there, but it doesn't, but it does talk about telephone lines and I see nothing else in the definition, no other use category in the definitions that better captures what the use of cellular telecommunication equipment. I think that is the closest thing that you have. Then you go to your use table and you find essential service in the Farm and Forest District it is a Conditional Use and you have already done that.

Alan Shepard points out that essential services; when you go to the chart here is under public semi public and institutional and it actually says utilities including sewage collection and treatment facilities and essential services, so he questions whether or not a privately owned, like US Cellular can be an essential service if it is privately owned commercial. Dick Trefton counters in his letter so is Ma Bell in the old days privately owned.

If I'm still struggling with this I flip the page and I see under miscellaneous that it says uses similar to permitted uses and it says uses similar to conditional uses, if it is a conditional use in Farm and Forest as a conditional use.

This is a matter for all of you to determine I'm here to give advice. So to me this uses similar to conditional use allows me to come to the conclusion that based on this ordinance that these cellular telecommunication facilities are like essential services and I would probably consider them under that category; as a conditional use, just like essential services are in to Farm and Forest Zone and that is focusing on the land use. If I'm on the option that no this is not an essential service, it is not like enough like an essential service to consider that, then I have to start asking myself questions about well if it's not that where does this go in the Town of North

Berwick because now I do have Telecommunications Act looking over my shoulder, telling me I better allow these things in some place in town or I'm probably in trouble.

And I guess you could go with Alan Shepard's suggesting that it be a commercial use. There are certain places in town where it could go whether or not it would leave huge gaps in town, I don't know because I don't know the what other coverage there is in the town. That's generally how I would react to this; Alan put a lot of weight on this Town of Herman case that came out of the Law Court. I think it's interesting and something you should think about, but I think I'd come down on the side that its distinguishable they had choices in terms of there definition as to which category of the radio tower, as I understand an AM/FM radio tower it could fall into. Here as I see it really is lead to the essential service definition, which in our case again the courts are going to look at the text of our ordinance typically references telephones.

Chairman Todd R. Hoffman spoke that's what we always wrestle with and it's what where instructed to do under our purposes, and to establish fair, and reasonable set of standards for evaluating each development for per potion and partiality on its own merit.

Say for instance this is a conditional use. I think what we spend an awful lot of time with; we spent almost 9 months with Goldmark LLC on a new proposed sand pit and the abutters and it was a conditional use that is in our ordinance. But it is those conditions that we place on them and we have the authority to do that.

Bill Plouffe discussed that a conditional use; the law on that in Maine is essentially that it is presumed to be ok, but a particular manifestation of that use in a particular location may have certain aspects to it that you need to control through conditioning it. You have your conditional standards to classify something as a condition use does not mean that the applicant is home free. It means they have to go through the conditional use criteria and need to produce evidence to you that they can satisfy by each of the criteria, and you need to go through that evidence, including that evidence that is given to you by the people that are apposed to the applicant's position and determine whether the applicant convinced you that their application as presented meets the criteria. If it doesn't are there changes the applicant is willing to make in order to convince you that it meets the criteria or are there conditions that you feel you have to put on the permit that you feel are necessary in order for the use to meet the criteria. It is possible that based on the evidence in front of you that we just can't approve this because it doesn't meet the criteria, and you can say why. Where I think this case seems to be is in what you as interpreters of the ordinance in this case; which you are when you have an application in front of you. How the majority of you feel that is ought to be classified as a land use; where it falls in the tables, and then it will tell you what criteria they have to meet in order to get a permit.

If my interpretation of the ordinance goes to court on appeal, the court will make up its own mind regardless of what you do, which is unlike other issues under appeal where they will say; well that's what we call substantial evidence to support what they did. The interpretation of the ordinance in court is a matter of law. And as a matter of law the court will look at it a fresh, but we will go through the same kind of analysis that I just said; what is the plain text of the ordinance.

Chairman Todd R. Hoffman spoke that I remember a discussion years ago when we had a misplaced application; we felt anyway. It was your advice to really ask every question, keep to the book, and have a public record. But you say that goes out the window if it went to litigation.

Bill Plouffe replied only on the question on reading your ordinance interpretation. The ordinance interpretation with respect to this issue, and if it went to litigation the court would look at it a fresh with respect to things like “traffic” and you make a judgment call based on the evidence that the applicant has met the standard for the traffic not creating a safety hazard. The courts are going to look at that and say and I’m not here to substitute my judgment what the Planning Board did on traffic. If there was any evidence on the record that a reasonable person would lie upon to support the decision that the Planning Board made, then I’m going to uphold that decision. My question of ordinance interpretation, the court will look at it a fresh and make its own judgment as to whether or not this is in this case fits in the definition of essential service. Some cases get a little gray in terms of is it strictly a question of ordinance interpretation therefore a matter of question of law or is it a mixed question of law and fact and it isn’t always crystal clear, but by enlarge that is what the court will do on appeal, but you shouldn’t worry about that we are not on appeal; we are here tonight or at the next meeting you have is when you are going to chew on this and come up with a decision.

Chairman Todd R. Hoffman spoke that I have already referenced Goldmark LLC conditional use permit. I think one of the reasons it took 9 months was that we wanted an opposing parties aside from us to settle the issue, talk to each other, find resolution for these things that we felt were defined in the ordinance. It had to do with screening, which is what we are dealing with here. Contrasting residential verses commercial or industrial uses of property. We had a full house here and not a happy house for the third to forth meetings but towards the end there was a good luck with the enterprise because we had found ways to satisfy the abutters. Are there any suggestions along that line?

Bill Plouffe replied that is a good result with the gravel pit and quarries are difficult. That is great if the parties talked to each other and worked something out and they come up with a plan that everyone including the Board thinks meets the standards of the ordinance that you have to abide by. Even if the parties agree to something and it doesn’t meet the standard of the ordinance your option doesn’t mean a lot.

At some point sometimes applicants and abutters won’t talk to each other or start and can’t reach an agreement. Different Boards handle things differently all over the State, different cases are handled differently by the same Board, but ultimately you have to make the decision.

Shaun DeWolf asked Attorney Plouffe about cell tower and property values just in itself.

Bill Plouffe replied that issue has been raised, is that a legitimate thing to consider, if it is a conditional use standard in you ordinance and it usually is.

Chairman Todd R. Hoffman spoke that it is 1.2.h to protect property value, under performance standard

Bill Plouffe replied that you really want to go to conditional use standards. If it is listed under performance standard that is at least a gray area, maybe an area you not suppose to go in. I'm a believer that you need to go look at the standards that were enacted that apply rather than purpose statements that apply to the entire ordinance. Property values question is something that if you go there it is usually addressed by an applicant bringing in some type of letter from someone in the real-estate business. In the big cases you would have appraisers.

Chairman Todd R. Hoffman spoke that we have a very hefty for North Berwick real-estate for sale right now that abuts.

Bill Plouffe replied that people dealing with the estate are the administrator or the personal representative might come into you and say; I have evidence that from other towns I have had an appraiser go out and look at the impacts of the cell tower being this close and this visible to a residence and it impacted the property value that is how you would go about that.

Lawrence Huntley, CEO. asked Attorney Plouffe to refer to page 6-14

Article 6.9.6 Factors Applicable to Conditional Uses

1. the compatibility of the proposed with adjacent land uses and other property in the district;

Bill Plouffe answered that you could determine this compatibility standard to encompass property values.

Chairman Todd R. Hoffman spoke that our new Comprehensive Plan is before Town Meeting. In our new Comprehensive Plan and it has been sited by State Planning Office for its diligent and creativity, etc., we received good press. We have worked hard on it and throughout that though the spirit of it is, and what is so special and unique, and needs to be protected in North Berwick is this village centered rural community, and it is throughout the language. How does that play out?

Bill Plouffe replied that I stand before a Superior Court Judge and if he ask me; Mr. Plouffe where in the ordinance do I find reference to maintenance to its rural character of North Berwick. And I say it is in the Comprehensive Plan and he is going to site me a case out of the Maine Supreme Court.

The Town of Baldwin was very upset about a television tower with a flashing red light on top of a ridge. The people of Baldwin apposed it in front of the Planning Board or the Board of Appeals and said this is absolutely contrary to our Comprehensive Plan in Baldwin, which focused on maintaining rural character. And they said that it violated the national terminology in the Comprehensive Plan that it could not be allowed because one of the standards review action in their ordinance was that it was consistent with the Comprehensive Plan.

The Maine Supreme Court said that if you look in the Comprehensive Plan it also talks about economic development and talked about other things that the citizens of Baldwin would like to see. So the Supreme Court rejected their argument. So after that case I'm not a spirit of the Comprehensive Plan. The courts are more willing to look at whether or not the rezoning of a small piece of land in the middle of something else is consistent with the Comprehensive Plan; even there the court will usually uphold as being consistent because they can find some other

portion of the plan that values that this would promote. Spot zoning in some States is forbidden but in Maine the term has very little meaning. The only question whether or not the rezoning is done consistent with the Comprehensive Plan.

Chairman Todd R. Hoffman spoke that I have legal questions to ask in private.

Bill Plouffe replied that we can go into executive session to rights and responsibilities of the Board not subsist of questions.

Richard Trefton asked that do you plan to continue your conversation once you come back.

Chairman Todd R. Hoffman answered that we are going to continue but more on a workshop on the Boards responsibilities, legalities and procedures. We will not be specifically addressing issues of the cell tower application.

Shaun DeWolf moved to go into executive session at 5:45 p.m., Mark Cahoon seconded a motion. Vote, 4-0

Shaun DeWolf moved to come out of executive session at 6:15 p.m., Julie Fernee seconded a motion. Vote, 4-0

Bill Plouffe spoke that I had mentioned earlier the members of the Planning Board are also required to members of the Boards of Appeal act in a quoad sacra traditional capacity and that carries with it some burdens. One of the burdens is that you need to make your decision based on the text of the State Statues text of your ordinance not based on your personal feelings about things or the way you think that your ordinance ought to read. It also carries with it a burden of maintaining public trust in what you do and there is a State Statue on that, which is unfortunately vaguely written but it does, and when it talks about pecuary interest it is fairly explicit in terms of not having a financial stake of the out come of the application before you.

The stickier questions have to with bias or conflict of interest that is no necessarily obvious such as: a bad feeling towards this person, if there is any question in your own mind, my suggestion to you is to say I recluse myself from this. The Boards of Appeals by Statue; that decision and if that member wasn't recluse himself or herself then the other members of the Board take a vote. I don't think we have anything in our ordinance for the Planning Board.

Chairman Todd R. Hoffman replied we have our bylaws.

As a Planning Board member can you dismiss your self to speak as an abutter?

Bill Plouffe replied you can do that.

As a Planning Board member you can say on this matter I'm stepping down because I'm an abutter but I do plan to participate at the Public Hearing session. You do not go back up here as a member until that case is over.

If I'm out there and I think a Board member has a conflict; financial or they are bias or what ever and they won't step down. Why won't you step down because you are so dedicated to the public spirit in this or I'm thinking if I'm sitting out there he won't step down because he wants to get me or he wants a certain result?

Julie Fernee asked what you consider bias.

Bill Plouffe answered if you cannot fairly judge the evidence that is presented to you, either you have already made up your mind without hearing anything because you have it in for this person or you're against every proposal for gas station in this town or you have some animist towards an individual that's bias.

In cases that you think might go to court because there are abutters who are apposed something and you are granting the permit or you are denying a permit in a controversial case. You need to make findings of fact in conclusions of law. That is a big change in the past 15 years, it use to be the court would say well we'll look at the minutes and see what the Board did, if they can find any reasonable basis for what you did, the court will say fine, now the courts won't do that. They want to see in black and white either on a separate document or findings of fact or conclusions of law or notice of decision that is much more elaborate than preprinted form or maybe in very well documented minutes. The courts want to know not just what you did, but why you did it, but why you did it gets tough.

Shaun DeWolf spoke that on the findings of facts; we have done it where we had to generate our own findings of facts and submit it to the Board in my work as an engineer. Do I as a Vice Chairman and the Chairman of the Planning Board need to be more diligent on taking notes to give to him or can we have that to throw back at the applicant.

Bill Plouffe replied that you could say to the applicant that the prevailing side if you will; we will entertain your draft findings of facts conclusions of law and we will discuss them, and submit them 10 days in advance and share them with the other party if there is another party, and we will discuss them and maybe change them or you could ask a member of the Board to do it or you can sit around and do it yourself. One of the common mistakes is one member of the Board will address; let say traffic, well I think there is evidence on both sides and I could go either way on this, but I think the traffic study by Daluca Hoffman persuaded me that there is no traffic hazard here because there only going to be 10 trips per peak hour. That is that is said, but what do the other members Board think. You need to get consensus if you will on each one of the criteria; so the court can say, the Board looked at traffic; the Board isn't just one person. Sometimes if you look at the minutes you'll have; one guy says I was persuades by Daluca Hoffman report findings; another person will say. I didn't like that report I thought the Girl Palmer report was more persuasive. Then come to vote to approve the project and of course, did they approve traffic or not and what if they did. Why did they do it? I don't know, I'm going to sent it back. The problem with sending it back is you have wasted all that time and money and effort to go the way up to Superior Court only to have them send it back.

Shaun DeWolf asked that we had another issue on an applicant that came before us and a lot of us were e-mailing back and forth about codes and regulations.

Bill Plouffe answered I'm glad you brought up e-mail, because especially if you get into these new things like chat room, twitter and face book, where it is a virtual conversation; your not suppose to do that

Mark Cahoon asked if I sit down with a Board member and sit down and have a cup of coffee; you can't even discuss it there.

Bill Plouffe answered it's not a meeting because there isn't more than two of you. I don't think it is good practice to talk about the substance of matters that are pending before the Board; outside of Board meetings.

It is supposed to be out in public and if everyone did that and someone comes in that's wired; so someone is sitting out there and you guys all come in and it's a very complicated case, you look at each other. Can I have a motion, hey I'll make a motion, we'll approve this, is there a second hey; bang its approved and the people out there now say, there was no discussion, they must have been discussing it someplace, it wasn't here. And again it is the public trust.

Shaun DeWolf spoke that e-mails that I was referring to were all the stuff about the wetland, if it was a vernal pool or not and it was going around for discussion; not towards the applicant, but what a vernal pool was or wasn't , what class it was.

Chairman Todd R. Hoffman spoke also someone suggesting looking at this site or going to State regulations.

Bill Plouffe replied that your not talking about a substance of an application your researching or CEO advice to you on what section of the ordinance to look at and that kind of thing; its public information.

Chairman Todd R. Hoffman spoke that is there a line you don't step over with e-mail.

Bill Plouffe replied that if you are discussing subjects, which ought to be discussed here, the substinuit pertaining to a particular application, then have the discussion here, not in e-mail where the public can't see it.

Julie Fernie spoke that I think that it is important to be reminded that we are in a position of public trust, bit it really is not unimportant for any of us. It is something that we have to be aware that we are responsible for something, which is more than us as an individual.

Chairman Todd R. Hoffman spoke that we take pride in being fairly informal and it has worked pretty well. Are there things there that we have to be careful?

Bill Plouffe replied that there are a couple of things that can be pit falls. One is if you get into a co-planner with the applicant of the project and that is a fine line. The other thing in terms of Board meetings is not closing off the public hearing portion and allowing members of the public in effect become a defector of the Board as you are deliberating. The Chairman supposable closed the public hearing and the public continue to ask question or make comments. I really

think you should say; sorry the public hearing is closed it is now the time for the Board to deliberate and make a decision. It is an important job that you do.

3. Preview next agenda:

4. Other Business:

5. Preview Previous Minutes:

6. Adjournment:

Mark Cahoon moved to adjourn at 6:41 pm, Shaun DeWolf seconded a motion. Vote, 4-0

Lawrence Huntley, CEO
Planning Coordinator

Respectively Submitted:
Anita Lambert, Stenographer

Chairman: R. Todd Hoffman

Julie Fernee

Shaun DeWolf

Barry Chase

Mark Cahoon

Copies:
Chairman R. Todd Hoffman
Julie Fernee
Shaun DeWolf
Barry Chase
Mark Cahoon
CEO
Town Manager
Selectmen
Christine Dudley
ZBA
File