

**STILLWATER TOWNSHIP
ZONING BOARD OF ADJUSTMENT
December 20, 2011
Stillwater School**

MEMBERS PRESENT: Mr. Powell, Mr. Stachura, Mr. Sarni, Mr. Saal, Mr. Hammond, Mr. Lippencott, Mrs. Feenstra, Mr. Lockwood

MEMBERS ABSENT: Mr. Daingerfield

A REGULAR MEETING OF THE Stillwater Township Zoning Board of Adjustment was held on Tuesday, December 20, 2011, at 7:30 p.m. at the Stillwater School, 904 Stillwater Road, Stillwater, New Jersey. The meeting was called to order by Mr. Lockwood in accordance with the Open Public Meetings Act.

The flag was saluted and roll call taken.

Certification was submitted by Mr. Lippencott for the meeting of November 28, 2011.

MINUTES

Mr. Powell made a **motion** to approve the minutes of November 28, 2011, seconded by Mr. Hammond.

Roll Call Vote: Mr. Powell, yes, Mr. Hammond, yes, Mr. Saal, yes, Mr. Sarni, abstain, Mr. Lippencott, yes, Mr. Stachura, yes, Mr. Lockwood, yes

HEARING

Nextel of New York, Inc. & JCP&L, Block 1703, Lot 21, Cal. No. 569

Mr. Sarni cited a conflict and stepped down from the hearing. Certification was submitted to the Board by Mr. Lippencott for the November 28, 2011 meeting.

Greg Meese, Esq. was present on behalf of the applicant. **David Owen, Esq.** was present on behalf of the objectors. Mr. Meese and Mr. Owens indicated they had no further witness testimony to present.

At 7:33 p.m. this portion of the meeting was opened to the public.

Randall Sprague, 982 Route 521 was sworn in. Mr. Sprague asked to be considered as an expert and he provided his background as a licensed engineer and professional planner in New Jersey and as a certified value specialist and past member of the Hampton Township Zoning Board of Adjustment. In response to questioning by Mr. Meese, Mr. Sprague stated he currently manages construction projects including chimneys and silos and he has no experience with telecommunication facilities. He explained a certified value specialist is value engineering on projects over \$20 million and is required by law.

Mr. Sprague compared the fall zone of the tower to a building, stating a building tends to fall in and a tower tends to fall over. He conducted internet research and distributed handouts of articles pertaining to the failure of towers. The handout packet was marked into evidence as **O-15**. Mr. Sprague expressed concern with ice falling and stated the fire department, church and both parking lots will be at risk of a falling tower. He briefly reviewed the articles and noted the photograph on the last page of the information packet depicted the top of a tower that fell and landed a distance from the tower. Mr. Meese objected noting there was no evidence to authenticate the photograph. In response to questioning by Mr. Meese on the tower design, Mr. Sprague stated it may have been Mr. Maroski's **SP** testimony that the tower is designed to fall into itself, however there is no assurance that it will happen that way. Mr. Sprague stated an engineer would certify to the design but not to the work of a contractor. He agreed that failures are a very small percentage. Mr. Sprague discussed the recent flooding in the area of the proposed tower and was concerned with reoccurrence during a similar storm and access to the fire department and tower would not be possible. He displayed eight photographs of the Neldon's Brook area during the flooding marked as **O-16**:

Photo #1: View from the northside looking south to Newton Swartswood Road

Photo #2: View from the northside looking upstream at Neldon's Brook

Photo #3 through Photo #8: Various views of backyards and flooding across Newton Swartswood Road

Mr. Lockwood indicated he had spoken with Township Engineer Michael Vreeland who indicated the slopes of the stream were armored and channel height increased, and his understanding was that this event would be considered a 500 year occurrence. Mr. Sprague referred to exhibits O-1 and O-4 regarding the municipal boundary line. Mr. Meese asked Mr. Sprague if he was a professional surveyor, he indicated he was not, and Mr. Lockwood stated the Board is relying on the professional surveyor testimony regarding the issue. Mr. Morgenstern stated the Board does not have jurisdiction over the matter.

Joel Pinsker, 930 Emmons Lane, Stillwater was sworn in stating he sees no reason to grant variances from rules set up to protect society. He stated he contacted the Board of Public Utilities (BPU) regarding JCP&L's service record and they indicated JCP&L is slightly worse than PSE&G and better than two other utility companies, suggesting they do not need to improve all that much. BPU indicated the cell tower would not help improve response to events such as the recent storm as they operate on different frequencies. Mr. Meese explained JCP&L is trying to overcome different trucks coming from different locations by using one system and allowing all to communicate with each other. Nextel will also fill gaps for the public network. Mr. Pinsker asked the Board to deny

the application because there are other locations for the tower where a use variance may be needed but not all the variances regarding the fall zone and safety issue.

Sally Cable, 98 Mary Jones Road, Hampton was noting there was an earthquake in August, Hurricane Irene, Tropical Storm Lee, and a snowstorm of 16 inches recently, possibly compromising the integrity of the soil. She expressed concern with the fall zone and the close proximity of the church, citizens, and cars. She stated the Board is considering variances from requirements that were meant to protect the public and she asked them to consider if this location is a good place for a cell tower.

Linda Grau, 263 Swartswood Road, Hampton was sworn stating there are merits presented by the applicant regarding better cell phone coverage and the JCP&L response time; and demerits expressed by the public regarding aesthetic and safety concerns. She reviewed the role of the Zoning Board and the planner testimony presented by both sides. She made the following points: the site is not suitable for a semi-rural area of Stillwater; the tower sites in photos presented were not in areas similar to this area; the site is not in demarcation of the heritage sites but is across the road from such and it would be a complete violation of a heritage site to have a tower in this area; the ordinance that existed when the applicant was searching for a site did not require municipal priority, the current ordinance does require it; just because there is no other suitable property in the zone for the tower does not mean the applicant cannot look for a more suitable site, co-location has the possibility of future extension of the tower or an additional tower; a map regarding coverage was presented by a resident demonstrating coverage is far from comprehensive; there was no JCP&L testimony on response time improvement due to the tower; and tower applications have been defeated all over, including one in 2010 in Cranford that was defeated due to the negative impact on property value and nearby recreational park. Ms. Grau reviewed the 15 guidelines of the Municipal Land Use Law, Section 40:55D-2(a)-(o), Purpose of the Act with respect to the proposed tower and felt there was not enough benefit to outweigh the detriment and the application should be denied.

Michael Killen, 1023 East Shore Drive, Stillwater was sworn in and he referred to the Open Space and Recreation Plan (OSRP) and the natural assets to the township, discussing the placement of the tower and its direct conflict with the plan.

Scott Goriscak, 919 Swartswood Road, Stillwater was sworn in stating he resides three houses from the proposed tower site. He discussed the recent storms and flooding and stated the road in front of Swartswood Lake has to be closed during rain. He asked how this tower could be footed to avoid the water as a pond of water still remains in front of the church next to the tower location. The township dredged the stream but the County and State have both failed to address the area under the bridge which still has not been cleared.

Lisa Grau, 962 Route 619, Stillwater was sworn in stating the number one priority should be to protect the citizens, the township and its unique rural character. She was concerned with the reference to case law of what is acceptable and what can be sued for. She stated it is not our burden and the Board has to protect the public. She expressed concern with safety and eyesore issues and the effect on the beauty of Stillwater.

At this point, this portion of the meeting was closed to the public at 8:26 p.m.

David Owens, present on behalf of objectors Kenneth and Kathleen Bradley, Robert Shankman, Mr. and Mrs. Helaudais. Mr. Owens presented his summation, providing a brief summary of the application and tower structure. He discussed the setbacks of the tower as follows: 59' from the firehouse; 109' from Helaudais property. He discussed the deviations from conditional use standards and suitability and reviewed the ordinance with respect to the property. Mr. Owens discussed the fall zone, and reviewed the setback and separation distances: 122'4" from the west lot line, 60' deficient; 109'7" from the north lot line, 73' deficit; 73' from east lot line, 109' deficient; approximately 88' from the shed; 58' from the pavilion; 59' from the firehouse – a total of six variances and five of the variances are worse than they were before the tower location was moved closer to the building. He stated one main purpose of the Municipal Land Use Law is the protection of public safety and no one can guarantee the tower will not fall. He made reference to testimony by Mr. Masters and Mr. Bertona regarding the fall zone and reviewed the required setbacks of 456' to residential properties and houses of worship and 182' to non-residential uses. The tower will be 222' from residential lot 19, 234' deficient, 166' from residential lot 20, 290' deficient; 109' from residential lot 6, 347' deficient; 73' from the church property, 383' deficient; 122'4" from non-residential lot 1.03, 60' deficient. – requiring five additional variances. He asked why the deficiencies were not addressed or explained by the applicant. He referred to testimony presented by Mr. Steck regarding suitability and the small size of the property and discussed the negative criteria with regard to the setbacks and separation distances. He stated the Municipal Land Use Law also promotes a desirable visual environment and the tower will be big, imposing, metallic, illuminated throughout the night and will ruin scenic vistas/views and be an ongoing eyesore. He noted Hampton Township also expressed opposition. With regard to the Master Plan and OSRP, the property is at the edge of a Natural Heritage Priority Site, edge of delineated wetlands, and in a designated Greenway, all will adversely impact the area. Mr. Owens further reviewed the ordinance requirements and the lack of compliance by the applicant. He referred to case law on the denial of variance approval for a cell tower, Omnipoint vs. Bedminster. He discussed the three additional variances for exceeding the permitted height and size of the equipment shelter and having two principle uses on one lot. He felt a D2 variance would also be necessary as the fire department will lose non-profit status becoming a non-conforming use. He stated the applicant claims the tower is inherently beneficial as JCP&L is part of the application, however they have failed to present what percentage will be used by JCP&L vs. public use. He referred to the case law Smart vs. Fair Lawn 1998, and also to the municipal property search by Nextel with the governing body and the direction to the firehouse, noting that does not make the site suitable. He reviewed the existing Nextel tower sites in the area: Newton, large, old water tower; Fredon 30 acres; Stillwater 55 acres; Hampton 116 acres; and the proposed site 1.4 acres. He addressed coverage and co-

locators, and possible future extension or additional tower and again questioned the municipal boundary line. He noted the State Park is 2/10 mile to the east; Big Swartswood is 1300' to the south; Little Swartswood is 1000' to the north and is New Jersey's first State Park in an effort to preserve open space. Mr. Owen stated the site is not suitable for all the reasons stated, he thanked the Board and concluded his summation.

Greg Meese, Esq. on behalf of the applicant, presented his summation. Mr. Meese provided a brief background on the application, stating Nextel and JCP&L are co-applicants to address communication issues between workers coming into the area from different states to improve its service and institute one system for all communication. The tower will also allow public communication. The gap in service was reviewed by Mr. Bertona and was not disputed by Mr. Menkes. The application initially showed the gap by modeling, followed by the drive test and requested data, all with the same outcome. The applicant worked directly with the town council to address the gap and pursue municipal sites as required by zoning ordinance. Numerous sites were reviewed; there were no permitted sites in the township where the facility could be located and no existing tall structures in the area. He stated the suggestion that other properties should have been pursued regardless of zoning, has no support in case law or statutory law. Nextel reviewed the zoning plan, ordinances, and maps, and all directed to the conditionally permitted use. The first priority would be for permitted use, followed by conditionally permitted use and the fire department serves as a municipal purpose and is a conditionally permitted use site. The zoning code and map directs this tower to this zone, which happens to be located near Swartswood Lake. He referred to the discussion of the visual impact from lake and park, stating zoning permits it in this area, and noting the first choice was the park across the street which is located in the NHPS. He addressed the fall zone and indicated the towers are designed to kick in on themselves, take the wind load and not fall like a tree. There have been very few occasions when this has happened, very remote and very rare, with tens of thousands of the facilities in existence throughout the country. He discussed the alternatives in the zone indicated by the DEP I-Map presented by Mr. Masters, noting other properties are located in wetlands and the NPHS; the properties remaining are the church, firehouse or properties toward the historic area, none of which can meet the setback requirements. The subject site allows for the setback distances to be maximized more than any other site in the zone. Mr. Meese stated the photographs of other towers and locations presented were to remind the Board towers are located on highways, adjacent to firehouses, municipal buildings, schools, and the risk is slight. No matter where a tower is located the same rules apply as to construction in accordance with State building codes, wind and ice loads, and if the tower falls it is designed to kick in on itself. Referring to the Stillwater Master Plan, Mr. Meese discussed the community facilities plan to accommodate future population and growth and the maintenance of emergency services facilities. A wireless communications tower is a part of the emergency services network. The Master Plan also states that development should be directed towards main roads and away from residential properties. Mr. Meese referred to testimony by Mr. Steck and Mr. Masters regarding the I-MAP and the NHPS designation, which identifies the most important natural areas of the state to be used by developers and decision makers. This designation limits where the tower can be built in existence with current zoning. Mr. Meese stated the testimony by Mr. Steck that the applicant should ignore the zoning for a more preferable site is unsupported by any case law, and seeking a use variance rather than going to a location where it is conditionally permitted is also unsupported. Mr. Meese referred to the flooding issue and noted the flooding in the area of the tower was ankle deep during a 500 year event. The foundation is designed by an engineer to allow the tower to be safely constructed and it can be reviewed by Board Engineer Rodman. Mr. Meese discussed the D1 vs. D3 use variance, stating proof has been provided to satisfy either criteria. Nextel has a license issued by the FCC, and as indicated by the court in *Smart vs. Fair Lawn*, the issuance of an FCC license should demonstrate that the public good is served by allowing the application. Federal testimony must be provided demonstrating there is a coverage gap and Nextel has done so. He referred to the deficiency in service and the distances to existing tower sites surrounding the subject site: Hampton 1.9 miles; Newton 3.65 miles; Fredon 3.65 miles; Stillwater 4.5 miles. He stated according to the Telecommunications Act of 1996 the municipality may not prevent the provision of wireless service and must allow for the construction of facilities to provide these services. Mr. Meese referred to a memorandum he submitted earlier in the hearings regarding alternative sites and stated prior to the application submission there was an exhaustive search for a tower site with the municipal authorities and there has been no suggestion that there is an available alternate site. Case law is very clear that a site that would require a use variance is not considered an available site as it is conjecture that a variance would be granted for the site. He stated this use is a benign commercial use, no noise, glare, traffic, odor, vibration or noxious characteristics. The structure has been designed to look like a flag pole, which is a common site at a firehouse, with an alternate flagless pole also presented, eliminating the need for lighting. The radiofrequency emissions are well within the limit of the FCC standards. Mr. Meese referred to the Wireless Communications and Public Safety Act of 1999 and its purpose. He asked the Board to review the testimony and efforts undertaken by the applicant over the past couple of years to locate the facility in accordance with the desires of the community. There is no permitted zone available; no existing structures; leading to the conditionally permitted zone. He asked what other properties in the zone are sufficient, stating this is the most suitable. He noted the applicant is not seeking a height variance as the zoning code allows towers to be a height of 199', this tower is 152' or 49' lower than what is permitted. Mr. Meese stated this is a suitable property, thanked the Board and concluded his summation.

Robert Morgensten, Board Attorney, provided a summary of the applicable law and issues to be decided, including case law and the Municipal Land Use Law. He referred to a brief summary of the applicable law as contained in the book "New Jersey Zoning and Land Use Administration," William M. Cox, page 235/236 with respect to satisfying positive and negative criteria. He reviewed a more expansive statement of the law in the book referencing pages 472 through 475 and *Coventry Square vs. Westwood*. He reviewed the experts who testified on behalf of the applicant and objectors. The Board must decide if the conditions applying to

telecommunication towers and equipment as conditional uses in the Neighborhood Commercial (NC) zone have been met, Section 240-114J.2, and he discussed the following:

If the conditions have not been met should a “d(3)” variance be granted.

To determine this issue the following issues must be determined: Is the lot particularly suited to the use notwithstanding its nonconformity with some conditions. Has the negative criteria been met.

To determine this issue the Board must determine is the impact to adjacent properties so great as to be damaging to the neighborhood so that there is a substantial detriment to the public good. Is there an impairment of the intent and purpose of the master plan, zone plan and zoning ordinance if the variance is granted.

Mr. Morgenstern reviewed the variances necessary:

-240-114J.2(e)(1) – Required setback at minimum 120% of the height of the tower from any adjoining lot line (180 ft. minimum). Proposed 73 ft.

-240-114J.2(e)(1) – Minimum 180 ft. from non-appurtenant buildings. Firehouse distance proposed is 59 ft.

-240-114J.3(f)(1)(b) – Setback from base of tower to residential lots a minimum of 300 ft. or 300% of the height of the tower whichever is greater (minimum 456 ft. 6 in.); proposed 109 ft. 7 in. to the residential land to the rear and approximately 258 ft. to residential Block 1703, Lot 20.

-Setback from residentially zoned lands for non-residential uses, minimum 120% of the height of the tower from any adjoining lot line. Proposed 73 ft. to non-residential land (the church).

-Minimum of 120% of the height of the tower (180 ft.) from non-appurtenant buildings. The church is 164 ft. from the tower. 240-114J(2)(3)(1)

-240-114J.2(i)(1)(a) – The cabinet or structure shall not contain more than 200 ft. of floor area. The proposed cabinet contains 240 sq. ft.

-240-114J.2(i)(1)(a) – The proposed cabinet or structure shall not exceed 10 ft. in height. The proposed cabinet is 11 ft. 3 in. in height.

-240-114J.2(a)(3) – Location priorities. Such antenna shall be located in accordance with the following prioritized locations:

(a)First priority shall be on real estate owned by the Township of Stillwater.

(b)Second priority shall be on an existing tower.

(c)Third priority shall be on an existing or proposed water tower, high tension tower or existing structure within or near the Township of Stillwater.

The proposed use does not comply with these priorities. However, the fire department is a use similar to a governmental use in that fire protection is often a governmental use in many municipalities. There was testimony from Mayor Morrison and the Applicant’s professionals that no Township owned land was available. No existing towers exist.

-240-104G(1) – No lot shall have erected upon it more than one principal residential or commercial building or use except as otherwise specifically authorized by this chapter.

In my opinion a variance is not required from this section because the fire department use is not a commercial use. The cell tower is a commercial use but that would be the only commercial use on the lot.

At this point, the discussion was opened to the Board. Mr. Lockwood asked the Board to present their comments and observations at this time.

Mr. Powell expressed concern with the ordinance height percentage requirements of 120% and 300% and the reasons those numbers were established and how they were determined by the township; stating those numbers have been so grossly under met.

Mrs. Feenstra expressed concern with the D3 variance requirements and felt this lot is not suitable due to its size of 1.5 acres. She stated that although it matches the Master Plan and is a quasi-municipal property, the impact on adjacent properties is huge and it will clearly be seen from Little Swartswood Lake.

Mr. Lockwood stated in his opinion the flag pole tower does not always look believable due to its size and scale.

Mr. Stachura stated the relief requested is grossly exacerbated with respect to the zoning ordinance. He stated the flag pole is less of a visual impact as opposed to an antenna tower but he questioned whether either option, a monopole or a flag pole, is suitable for this area. He would have liked the placement of the compound tucked closer to the fire department building to minimize the impact. Mr. Stachura stated he was not sure the applicant provided sufficient testimony to support suitability or appropriate location.

Mr. Lockwood stated the zoning ordinance is effective but it is a challenge as to whether there is any lot located in the NC zone that can satisfy the setback requirements. He felt the origin of the setbacks may have been based on a safety issue and the tower falling. He referred to the Radiofrequency/Overall Comprehensive Plan and its revisions to make the plan more comprehensive. Mr. Lockwood felt there would be another tower in the future and therefore another option such as a smaller tower could have been presented on this site and had fall zones within the property lines. Mr. Lockwood felt the photographs of the flagless poles presented by Mr. Masters were effective. He questioned whether the comprehensive plan was advanced to the level it should have been with respect to the tower location on the site and the height of the tower.

Mr. Hammond stated a tower on the national level is favored, however in this particular situation he was unsure if it is necessary or best for the community. He was concerned with future Nextel towers to cover other gaps and stated a comprehensive plan supplying full service throughout the township as required by the ordinance has not been provided. He also expressed concern with the possibility of future height extensions of the proposed tower.

Mr. Saal and Mr. Lippencott concurred with the other Board member comments.

Following the board comments, Mr. Hammond made a **motion** to deny the application, seconded by Mrs. Feenstra.

Roll Call Vote: Mrs. Feenstra, yes, Mr. Lippencott, yes, Mr. Powell, yes, Mr. Stachura, yes, Mr. Lockwood, yes, Mr. Saal, yes, Mr. Hammond, yes
The secretary announced the motion passed at a vote of 7-0 to deny the application.
At this time a five minute recess was taken at 10:09 p.m. and the Board reconvened at 10:14 p.m. with Mr. Sarni rejoining the Board.

RESOLUTION

Scalley, Block 2401, Lot 13.02, Cal. No. 519, requesting an extension of approval granted to construct a single-family dwelling on the subject property.

Mr. Lockwood made a **motion** to adopt the resolution seconded by, Mr. Stachura; all of the conditions of the Resolution of this Board dated January 23, 2006, remain in full force and effect and apply to this extension.

Roll Call Vote: Mr. Powell, yes, Mr. Hammond, yes, Mr. Saal, yes, Mr. Sarni, yes, Mr. Stachura, yes, Mrs. Feenstra, yes, Mr. Lockwood, yes

OTHER BUSINESS

Manser, New Image Lanscape Services, Block 2401, Lot 19.06Cal. No. 558, request for an extension of ise approval granted to operate a landscaping and lawn care business in a residential zone.

Mr. Stachura made a **motion** to grant a 90-day extension to March 20, 2012, seconded by Mr. Powell with the following conditions applying:

1. The grant of the variance is extended until March 20, 2012.
2. The time for the Applicant to obtain a Letter of Interpretation from the New Jersey Department of Environmental Protection is extended until March 20, 2012.
3. The deadline for the Applicant to obtain site plan approval from this Board is extended until March 20, 2012.

Roll Call Vote: Mr. Powell, yes, Mr. Hammond, yes, Mr. Saal, yes, Mr. Sarni, yes, Mr. Stachura, yes, Mrs. Feenstra, yes, Mr. Lockwood, yes

BILLS: None

Correspondence:
2012 Appointments

Liaison Report: None

There being no further business, Mrs. Feenstra made a **motion** to adjourn the meeting at 10:21 p.m., seconded by Mr. Powell. In a voice vote, all were in favor.

Respectfully submitted,

Kathy Wunder, Board Secretary

Laurence Lockwood, Chairperson