

Zoning Board of Appeals Decisions Decisions for: 02-04-2016

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FALMOUTH ZONING BOARD OF APPEALS

FINDINGS AND DECISION

APPEAL NO: 98-15

APPLICANT/OWNER(S): BELL ATLANTIC MOBILE OF MASS. CORP, LTD.
d/b/a VERIZON WIRELESS

SUBJECT PROPERTY: 132 East Falmouth Highway, East Falmouth, MA
Assessor's Map: Map 33, Section 11, Parcel 009, Lot 000A

DEED/CERTIFICATE: Book 4668 / Page 317

SUMMARY: Variance Granted

PROCEDURAL HISTORY

1. Under a date of October 22, 2015, the applicant applied to the Zoning Board of Appeals for a Variance pursuant to Section(s) 240-68 B. and 240-203 of the Code of Falmouth to construct a new 100' lattice tower within the 10' setback replacing existing tower with conforming setbacks and associated cabinetry on subject property known as 132 East Falmouth Highway, East Falmouth, MA.
2. Notice was duly given as required by Section 11 of Chapter 40A, M.G.L., as well as notices sent to all persons deemed to be affected thereby as they appear on the tax list, and at which hearing, at the Board's discretion, relevant and appropriate testimony was heard.
3. A duly advertised public hearing was opened on December 3, 2015.
4. The public hearing was terminated on February 4, 2016, wherein the Board consisting of Chairman Kimberly Bielan, Clerk Terrence Hurrie, Member Ed Van Keuren, Member Paul Murphy and Associate Mark Cool [sitting as voting member] made a decision to Grant the Variance with conditions. Minutes from the hearing are on file in the Board of Appeals.
5. The applicant was present at the hearing and reviewed and discussed proposed plans with the Board.
6. The Board received documents and information prior to and during the public hearing that are on file in the office of the Board of Appeals at Town Hall, as set forth below:

Letters/E-mails from Abutters/Interested Parties

12/2/2015 E-mail Letter from Melanie Kulpeksa of 15 Old Barnstable Road [immediate abutter] to Board of Appeals stating opposition to Variance request.

Letters/E-mails/Information from Applicant/Representative(s)

E-mails between Board of Appeals staff and representatives for Verizon Wireless regarding plans and information from October 2015 through January 2016.

10/22/2015 Applicant submitted a copy of Cellular License for Cellco Partnership – Verizon Wireless – expires 10/1/2020

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11/10/2015 Applicant submitted a copy of the approval from the Federal Aviation Administration dated 4/6/00, for the existing tower and a copy of the Federal Communications Commission Antenna Structure Registration

12/3/2015 RF (radio frequency) Report by C2 Systems submitted by applicant's representative

12/3/2015 Calculated Radio Frequency Emissions Report by C2 Systems submitted by applicant's representative

1/29/2016 "Enclosure and Sound Data Sheet – Gas" for proposed Generator on-site, submitted by applicant's representative

1/29/2016 Letter from McLane Middleton of January 28, 2016 re: Supplemental Memorandum in support of applications

Letters/Referrals/E-mails from Town Departments

11/24/2015 Referral submitted by Board of Health Agent Carignan with no comment.

11/5/2015 Referral submitted by Conservation Commission Agent Kasprzyk with no comment.

11/3/2015 Referral submitted by Engineering Department (S. Schluter) with standard comments not affecting proposed variance.

11/2/2015 Referral submitted by Falmouth Fire Rescue Department with no comment.

10/26/2015 Referral submitted by Marine Environmental Services with no comment.

10/28/2016 Referral submitted by the Planning Department staff with statement: Tower is within the Search and Rescue Overlay; see 240-188 height limit.

Plans submitted by Applicant/Applicant's Representative

1/29/2016 Set of Plans drawn by Turning Mill Consultants, Inc. with a final revision date of 1/28/16, stamped and signed by James P. Stroke, P.E. on 1/28/16 – plans consist of Drawings T-1 'Title Sheet', Z-1 'Abutters Map', Z-2 'Site Plan', Z-3 'Compound Plan', Z-4 'Generator Plan', Z-5 'Existing & Proposed Tower Elevations', Z-6 'Features within 300'' and Z-7 'Conceptual Plan of Alternate Lattice Tower Locations' – all with a Board date 'received' stamp of January 29, 2016; and

"Platform Canopy 12' x 8' Burial or Base Shoe" plan drawn by Site Pro 1, consisting of Drawing COV812 dated 7/3/2013 and Drawing COV 1012 dated 7/2/2013 – both with a November 10, 2015 Board date 'received' stamp.

Hearing: December 3, 2015

Peter Anderson with McLane Middleton reviewed the proposed plans to remove the existing cell tower that has a conforming setback to the rear and side property lines of subject property and erect a new lattice tower that will be 6.9' from the side yard setback, thereby requiring a variance. He reviewed the existing fenced area where the tower will be located [same as existing tower] and the equipment that will be added to the fenced area such as a generator and cabinetry for associated equipment. Mr. Anderson gave the history of the existing tower that has existed since the early 1970's and in 2004 a variance was granted with a special permit for the 100' tower. He explained that the existing structure does not have the integrity to withstand any additional panels/antennas and the due to the proposed tower's construction the piers of the tower will be 6.9' to the property line – the tower above the fenced area will be 10'; the design and construction of the tower is required for structural integrity of use for antennas and panels to be installed on it. Cabinetry is proposed within fenced area as well as a generator that will sit near the side yard property line. Mr. Anderson briefly discussed the Telecommunication Act of 1996 [as amended] – touching on the regulations regarding: 'imposing any regulation that makes it impractical for a carrier to provide coverage in any area; requiring a carrier to conduct an exhaustive search of any area before permitting telecommunication tower; not allowing telecommunication towers in specific zoning district.'

Note: Special Permit and Variance #152-04 Decision shows the Board voted approval of a Special Permit – in the body of the decision it states that the variance would have been for the cabinetry close to the property line [2.5']; but was not necessary as the cabinetry was moved to the interior of the existing building.

Steve Shurtleff, PE explained the structural integrity and location of the proposed tower. He explained the location of the tower is limited due to other activities permitted on site (two other operations).

The Board discussed plans with Mr. Anderson and Mr. Shurtleff. The Board had questions regarding level of noise of generator proposed near abutter property, location of new equipment within fenced area with verification from Building Commissioner as to setbacks and if applicant looked at other locations on the site where the tower could be erected not creating a variance. The Board discussed and agreed to continue the hearing to receive further information requested.

Member Van Keuren made a motion to continue the hearing to February 4, 2016 at 6:30 PM. Member Murphy seconded the motion. Motion carried 5 – 0.

Hearing: February 4, 2016

Peter Anderson reviewed the four items the Board requested information on. He noted that revised plans were submitted and asked the Board to review page Z7 of the plans that show two other possible locations with fall zone showing; the alternate locations would greatly impede the existing operations on the property and be a detriment to the oil trucks that come onto and leave the property. He also noted that the generator location was changed from near the abutting residence to the south end of the existing building on site and that the cabinetry is now proposed inside the existing building and not within fenced area. Mr. Anderson spoke on the 'hardship' and 'topography' of the subject property and the difficulty due to two other operations on site. He briefly reviewed the Nextel Communications v. Town of Wayland case wherein the outcome that the lack of a more appropriate location within the immediate surrounding area is a 'unique circumstance'. (Mr. Anderson's letter of January 28, 2016 cites other cases regarding telecommunication.) Mr. Anderson discussed the 'ice throw' and had submitted information in letter of 1/28/16 as explanation. In summation, Mr. Anderson discussed the hardship in locating the proposed tower and reminded the Board that the only setback violation will be the two piers that will not be visible from a roadway [6.9' setback] due to the surrounding 6' fence; and the property rights of owners of the land that we lease.

Board discussed.

Chairman Bielan asked for any public comment in support or opposition of the proposed project. There was no public comment.

Member Van Keuren made a motion to close the hearing. Member Murphy seconded the motion. Motion carried 5 - 0.

Chairman Bielan closed the hearing.

FINDINGS

The Board of Appeals, after carefully considering all of the facts and evidence submitted at the hearing, makes the following findings:

The subject property located at 132 East Falmouth Highway in East Falmouth contains 23,800 square feet of Business 2 and Residential C zoned land. The existing and proposed tower location is within the Residential C zoned portion of the property. The applicant applied under Section(s) 240-68 B. and 240-203 of the Code of Falmouth to remove the existing tower that meets side and rear setbacks and to construct a new tower that will be 6.9' from the side yard property line, thus requiring a variance for relief of setback requirement. The proposed tower will be approximately six inches less in height than the existing tower. The applicant revised the plan to propose the cabinetry inside the existing building adjacent to the tower; and to locate the proposed generator at the south end of said building away from the abutting residential property. The proposed tower will maintain the original carrier on said tower [Sprint] and add Verizon. The property has benefit of a Special Permit #79-79 allowing the existing underground fuel tanks

to be increased. Records do not indicate that a special permit was applied for in order to construct the existing cell tower on site. However, in 2004, special permit #152-04 was granted to decrease the tower height from 140' to 100' and no variance was required as the applicant agreed to locate the cabinetry proposed for cell tower, in the existing building.

Section 240-203 of the Code of Falmouth - "Conditions for granting variances." Gives the Board of Appeals the power after public hearing notice and posting of hearings to grant upon appeal or upon petition, a variance from zoning in cases where the Board specifically finds circumstances owing to soil conditions, shape or topography of land or structures, but not affecting the zoning district where land is located, and may involve substantial hardship – financial or otherwise – to the applicant. Relief may be granted by the Board of Appeals without substantial detriment to the public good and without nullifying/derogating from the intent of the bylaw.

The Board finds that the exiting tower to be removed has existed on site for many years and that there have been no complaints logged regarding said tower. The Board further finds that the existing tower had at one time been 140 feet in height and in 2004 received a special permit [#152-04] to lower the tower to 100 feet in height. In the special permit it was noted that the existing tower was built in the 1970's. Furthermore, the Board finds that the property has an existing fuel company with underground fuel tanks and fuel trucks.

The Board finds that the shape and topography of the land is such that the proposed tower location is the only appropriate location on the site. The Board further finds that the applicant leases a portion of the subject property and is limited in location by property owner's rights and use of property as a fuel company with underground tanks and fuel trucks on and off the site daily. Furthermore, the Board finds that there is a hardship to the applicant relative to coverage in the area for telecommunications if the variance is not granted; and also that the topography and use on subject property constitutes a hardship as well in locating the said tower.

The Board finds that the proposed new tower is not a detriment to the public good, in fact it will be an improvement in telecommunications for the community and a marginal gap in coverage will be resolved. The Board further finds that the proposed is an enhancement to the site as the new tower will have the structural integrity necessary to accommodate carriers and antennas for telecommunications. Furthermore, the Board finds that the nonconforming setback created through the erection of a new tower [6.9' to the northerly side yard property line] will not be visible due to the 6' fence surrounding the tower structure.

The Board finds that the applicant worked with the Board's concerns and revised the plan to move the generator to the south side of the existing building away from the immediate residential abutter; and located the cabinetry in the existing building. The Board further finds that federal regulations/policies encourage co-location of carriers on sites when possible.

The Board finds through testimony, that Verizon Wireless is now the owner of the tower on subject property. The Board further finds that the granting of the variance does not derogate from the previous special permit for the tower [#152-04].

Section 240-68 of the Code of Falmouth – "Setbacks", subsection B. (1) Minimum setbacks from side and rear lot lines shall be 10' for residential structures and appurtenant accessory structures in excess of 100 square feet; (3) for principal structures other than dwellings in Residential, Agricultural, Business 2, Business 3 and Marine Districts the minimum setback shall be 20'.

The Board finds that the cell tower, although not accessory to the existing building on subject property, it is not the principal structure or use on subject property and therefore the setback required to side and rear property lines shall be 10'.

In addition to the above findings, the Board finds that the proposed tower will be in harmony with the general purpose and intent of this chapter and does include consideration set forth in Section 240-216 of the Code of Falmouth as follows:

- A. The site is adequate in terms of size for the proposed tower through the variance criteria above.
- B. The site is suitable for the proposed use as a telecommunications tower has existed on subject property for many years [circa 1970's] with no complaints according to Town records; and the proposed tower is not an expansion of any use on subject property.

- C. There will be no impact on traffic flow and safety as there is no change in the location of the existing driveway on site and no new traffic will be attributed to the proposed tower.
- D. The visual character of the subject property will be improved; and there is no impact on any view or vista from the roadway or abutting properties.
- E. The sewage disposal system on site is unaffected by this variance approval.
- F. There are adequate utilities to subject property.
- G. The proposed tower discussed and represented herein will have no effect on the supply of affordable housing in Falmouth.
- H. There was no Site Plan Review required by the Planning Board and the referral submitted to the file from the Planning Department commented that the property is within a 'Search and Rescue' overlay.
- I. The application is within compliance of all applicable sections of the zoning bylaws as approved herein.
- J. The approval of this variance does not include any affordable housing.

Member Murphy made a motion to Grant the Variance with conditions. Member Van Keuren seconded the motion.

NOW THEREFORE

BE IT RESOLVED, that the Board of Appeals (herein referred to as Board) being of the opinion aforesaid and acting under the provisions of the Code of Falmouth voted 5 – 0 to Grant a Variance to Bell Atlantic Mobile of Mass. Corp., Ltd. d/b/a Verizon Wireless (herein referred to as Applicant) under Section(s) 240-68 B. and 240-203 of the Code of Falmouth to construct a new 100' lattice tower within the 10' setback replacing existing conforming tower (setbacks) and associated cabinetry on subject property known as 132 East Falmouth Highway, East Falmouth, Massachusetts. This variance is subject to the following conditions:

1. The tower location, cabinetry and generator location, construction, setbacks, height of tower and use of tower shall be as represented to the Board and as shown on plans submitted and reviewed by the Board entitled as follows:

- Set of Plans drawn by Turning Mill Consultants, Inc. with a final revision date of 1/28/16, stamped and signed by James P. Stroke, P.E. on 1/28/16 – plans consist of Drawings T-1 'Title Sheet', Z-1 'Abutters Map', Z-2 'Site Plan', Z-3 'Compound Plan', Z-4 'Generator Plan', Z-5 'Existing & Proposed Tower Elevations', Z-6 'Features within 300'' and Z-7 'Conceptual Plan of Alternate Lattice Tower Locations' – all with a Board date 'received' stamp of January 29, 2016; and

- "Platform Canopy 12' x 8' Burial or Base Shoe" plan drawn by Site Pro 1, consisting of Drawing COV812 dated 7/3/2013 and Drawing COV 1012 dated 7/2/2013 – both with a November 10, 2015 Board date 'received' stamp.

2. There shall be no derogation from previous special permits #79-79 and 152-04 through this Variance approval.

3. Any deviation, no matter how minor, from plans submitted and approved, orally or in writing, by this Board, shall be submitted to the Board for approval prior to implementation of said change. Minor changes may be administratively approved by the Zoning Administrator.

4. This variance shall not take effect until a copy of the decision bearing the certification of the Town Clerk that 20 days has elapsed after the decision had been filed in the office of the Town Clerk with no appeal being filed, or an appeal has been filed within such time, is recorded in Barnstable Registry of Deeds. (Any person exercising rights under a duly appealed special permit does so at risk that a court will reverse the permit and that any construction performed under the permit may be ordered undone.)

5. This variance approval shall lapse one year from the date on which this decision is filed in the Town Clerk's office if a substantial use of the Special Permit has not sooner commenced except for good cause as determined by the Board of Appeals.

Decision of the Falmouth Zoning Board of Appeals Continued:

Variance Number: 98-15

Applicant: Bell Atlantic Mobile of Mass. Corp., Ltd. d/b/a Verizon Wireless

Subject Property: 132 East Falmouth Highway, East Falmouth, Massachusetts
Map 33, Section 11, Parcel 009, Lot 000A

Action: The Board of Appeals, by the signature below, being present, certifies the vote of the Board as follows for the above referenced:

Vote: 5 – 0 to Grant a Variance as represented to the Board, based on the Findings stated herein and with the above stated Conditions.

Terrence J. Hurrie, Clerk, Board of Appeals

_____ Date Filed With Town Clerk

Notice is hereby given that any appeal from this Decision shall be made pursuant to Section 17 of Massachusetts General Laws, Chapter 40A, and shall be filed within twenty (20) days after the date of filing of this Decision in the office of the Falmouth Town Clerk.

Notes:

Variance #98-15 / Verizon Wireless / File w/ the Town Clerk 2/16/16