

ZONING BOARD OF APPEALS  
REGULAR MEETING MINUTES  
WEDNESDAY  
AUGUST 4, 2021

RECEIVED

AUG 30 2021

WESTPORT ZONING  
BOARD OF APPEALS

Members Present: Roger Menard, Chairman  
Gerald Coutinho  
Peter Borden  
Constance Gee  
Raymond Elias

Also present was Robin Stein, Town Counsel; and Ralph Souza, Building Commissioner/Zoning Enforcement Officer; Attorney Brian Corey; Peter Correy of Municipal Communications LLC (attended via conference call); Ivan Pagacik from IDK Communications (attended via conference call).

Chairman Menard called the Zoning Board of Appeals meeting to order at 6:30 p.m. with the reciting of the Pledge of Allegiance.

Chairman's Announcement - Under MGL Chapter 30A, Section 20(f) - Meeting being recorded.

Chairman Menard advised that the Board would be conducting in-person meetings in accordance with the CDC's guidelines that persons who have not been fully vaccinated against COVID-19 are requested to wear masks or face coverings while attending the meetings. The Board of Health has also highly recommended that masks be worn.

1. Chairman Menard opened the continued hearing on the petition for special permit and variance of Municipal Communications LLC, Applicant, and Brian J. Giblin, Owner, with site plan approval for a wireless communications facility to be located within a residential/agricultural district, to construct a 150-foot monopole-style tower, with minimum of 12 panel antennas and related equipment, in compliance with Article 6.3 as Recodified. The subject property is located at 67 Masquesatch Road, Westport, MA and is shown on Assessor's Map 58, Lot 173G.

Chairman Menard introduced the Board members who will be deciding this matter: Roger Menard, Gerald Coutinho, Constance Gee, Peter Borden and Raymond Elias.

Chairman Menard noted that the Board would accept any evidence that the Applicants would like to submit; the Board would discuss and ask questions; and, then, the hearing would be opened up to the public for comment. He also advised that the Board would hear only new evidence and that any evidence presented in prior hearings should not be repeated.

Chairman Menard read e-mails from Norman Buck, 1 Least Tern Circle, Westport, MA regarding property that he owns that he is willing to provide for this project. Chairman Menard also read an e-mail that the Board received this afternoon from Garrett Stuck.

Ivan Pagacik from IDK Communications, the Board's consultant, was in attendance via conference call. Mr. Pagacik addressed the Board, explaining that:

1. He was hired by the Board as a consultant, to provide information and opinion after reviewing the Applicant's consultant, as well as the report submitted by the residents' consultant, David Maxson, known as the Isotrope Review. He also reviewed coverage gap maps to determine appropriate height of the tower/antenna.
2. The applicant did not provide any coverage analysis for tower heights other than the proposed 150 foot tower to determine what the coverage would be at lower heights.
3. The Isotrope report identified alternative sites however the Applicant responded that those sites would not work. The Applicant did not provide engineering or coverage analysis showing why the alternate sites would not work.
4. The Applicant should have provided coverage analysis at different tower heights and for identified alternate locations in order for the Board to make an informed decision.

Attorney Brian Corey, Jr., 519 American Legion Highway, Westport, MA, who represents the Applicants, stated that, on June 21, 2021, he provided the alternate analysis for the sites. Chairman Menard said he did not believe that that information had been provided to the Board at that time. Attorney Corey read a letter dated June 22, 2021 regarding the request of AT&T in 2014 that a parcel of land be located for a 170-foot tower. The Applicant determined that the only site appropriate for this tower would be at 67 Masquesatch Road.

Chairman Menard stated that the letter had, in fact, been entered into the record.

Attorney Corey then read a letter dated August 2, 2021 from Peter Corry of Municipal Communications, essentially stating that the Applicant had made every effort to find alternative sites, but none were appropriate to accomplish effective coverage of the gaps of the Westport Point area. This was after reviewing alternate locations such as Tripp's Boatyard, United Methodist Church and the Gifford property. AT&T considered these sites and rejected them as inadequate. Also, AT&T agreed to lower the height of the tower to 150 feet. AT&T provided drop-calls information for the area: 389,544 dropped calls during a 70-day period from May 7, 2021 to July 9, 2021, taking into consideration the busy season for the area. AT&T and the Applicant have concluded that there is no other area adequate to provide the tower height and coverage.

Town Counsel Robin Stein asked Attorney Corey whether he had submitted the coverage gap maps to the Board.

Attorney Corey said that he had submitted those in response to the Isotrope Report, but he would re-submit them to the Clerk to provide to the Board.

Attorney Corey reiterated that the Tripp's Boatyard would not work because the height of the antenna would be too short; and the church steeple at the United Methodist Church would be inadequate because the steeple would need to be raised an additional 80 to 90 feet and the church is a historical structure.

Chairman Menard noted that, although the Applicant has provided an analysis (percentage of coverage) that would be derived from the tower at the subject location, the Applicant has not, however, provided a similar analysis for alternate sites. Attorney Corey stated that the analyses had been presented to the Board at the prior hearing; however, Chairman Menard noted that the percentages were not discussed. Chairman Menard also stated that, although there would never be 100% coverage, some of the alternate sites, according to the coverage maps, looked as if they would work well.

Attorney Corey said that what AT&T is looking to accomplish is adequate coverage. However, Chairman Menard noted that the term, adequate, may mean something different to AT&T than someone else.

Attorney Corey also stated that the Telecommunications Act requires that towers provide that other carriers be placed on the towers. He contends that this tower would comply with that provision of the TCA. Further, in compliance with the TCA, the Applicant looked at alternative sites, which were either not available or inadequate to fulfill AT&T's needs.

Peter Corry, CEO of Municipal Communications, was in attendance by conference call. Peter Corry stated that he has done everything possible to find another appropriate site and would ask that the Board make a final decision tonight so that he may proceed forward. He said that, although he wants to provide coverage for residents, he is not willing to continue looking at locations that are brought up at this time.

Attorney Corey said that:

1. Aesthetic issues are not relevant and the case law supports that contention.
2. The Zoning Bylaws in Westport effectively prohibit AT&T from servicing its users. This issue creates a hardship.
3. The tower will not be visible, other than to those who are driving (i.e. approaching while driving) in the area.
4. The tower will not only serve the southern area of Westport, but also the entire Town.
5. The Zoning Bylaws effectively prohibit users from conducting business if they have no coverage.
6. The proposed site is situated a short distance from the wind turbine on the Chardon property. The wind turbine is visible from all locations.

7. There will be no increase in noise, noxious odors, or disturbances to the neighborhood.

8. The site will be visited once a month for maintenance purposes; and there will shrubbery along the fence line.

9. The Applicant would appreciate the Board's making a determination this evening.

10. Several options for the tower have been offered (i.e. original pole, showing antennas, monopine or monopole), painted to blend with the skyline.

Town Counsel Robin Stein asked that Attorney Corey explain efforts taken by the Applicant to secure an alternative site and a list of the sites viewed by the Applicant.

Peter Corry said that sites in the search area are researched. Because the search area is small; in this case, there was an extremely limited area and, therefore, the proposed site was found and entered into a lease with the owner.

Mr. Corry said that the project has been submitted to the State Preservation Office for review.

Mr. Elias asked if the Applicant had any interest in the Chardon property as a possibility for the tower.

Mr. Corry said that he has been unable to make a deal with the Chardons.

Attorney Corey answered further, stating that the Chardons did not participate in the past (namely, in 2014, 2018 and in 2021), nor were they willing to go forward at this time. He also said that he questions the neighborhood group that brought this property forward as he believed the group was aware that the Chardon property would not be available.

Accordingly, Attorney Corey requested that the Board grant the special permit and approve the variances. When asked if the Applicant would allow municipal departments -- such as fire and



police -- to install antennae on the tower at no expense to the Town, Attorney Corey said that the Applicant is willing to do that.

Mr. Elias said that other towns also tend to oppose sites for towers that do not comply with the bylaws.

Mr. Corry said that, if the tower were to be taken down in the future, the property would be put in its original condition. Mr. Corry said he would be willing to post a bond to the Town in this regard.

Town Counsel Stein addressed some concerns, including lighting (unless required by a federal agency), adequate site safety and access, prohibition on signage, no excessive noise, heat or odor.

The Applicant agreed to these conditions, adding that the generator is operated by propane and would be housed in a separate structure on the site.

Mr. Coutinho noted that the Conservation Agent had e-mailed the Board on March 2, 2021 regarding the site draining in a southerly direction into Route 88 and into Rolling Springs Brook, which is a protective fishery.

Attorney Corey disputed the information in the e-mail, stating that the Conservation Agent was actually addressing the brook that is north of the proposed site and, although it is in the same watershed, there would be no drainage into the Rolling Springs Brook. Attorney Corey also noted that the Applicant has received an Order of Conditions from the Conservation Commission for this site, and this issue was never addressed throughout the process. The only drainage into the site would be from a manhole on Drift Road.

Mr. Coutinho expressed a concern about the fall zone and the effects to the residents should the tower fall.

Mr. Corry stated that the tower is designed to fall within the compound area, a 2,300-2,500 square-foot area. He said that, in his experience, he has never seen a tower fall, nor was he aware of any tower that has fallen. Mr. Corry also noted that the

monopine tower is designed for better coverage and can hold up to six (6) carriers. The monopole holds up to three (3) carriers. He said the biggest threat to a tower would be a wildfire, not a strong storm.

Mr. Coutinho said he is skeptical that the tower would fall as said. He is concerned with residents being able to vacate the area during a storm if the tower has fallen onto the road.

Answering Mr. Coutinho's question regarding equipment being stored inside a monopole, Mr. Corry said he would be willing to do it that way, however, AT&T customers would not receive the maximum service and effectiveness of the tower. He said a monopine tower would be more effective and provide better service. He said the monopine would also provide for various other carriers, including DISH Network.

Mr. Coutinho raised the prior application by AT&T for the Olin Howland Way property that did not require the extent that is being asked with this site. Mr. Corry said that that tower would not accommodate users who utilize their cell phones for data, Google searches, banking, and other applications that users do at this time.

Although Mr. Pagacik agreed with some of the information provided by the Applicant, he did note that the Applicant has not provided enough information that lowering the height of the antenna would not provide adequate coverage. The only issue may be that co-locations for other carriers would diminish with a lower height. As a consultant, Mr. Pagacik said that he always asks the Applicant to provide data as to various heights and the coverage provided at each height to compare with what is being requested.

Mr. Corry said that the tower must be above the tree line.

Mr. Coutinho asked about whether the antennas can be flush mounted. Mr. Pagacik said that it can be done, however, will require more vertical real estate.

Mr. Elias asked Mr. Pagacik if he believed that there were coverage gaps. Mr. Pagacik said that, although he has not done an analysis

himself, solely looking at the coverage maps provided by the Applicant would show gaps.

Chairman Menard opened up the discussion to the audience.

Attorney Philip Beauregard, 32 William Street, New Bedford, MA, addressed the Board on behalf of his clients, who opposed the application. He stated that:

1. The TCA can preempt local zoning bylaws; however, only at such time as the Board determines that the Applicant has performed its legal obligation in finding alternative sites.

2. His clients ask that the Board not disregard the Isotrope Report.

3. The Applicant is a developer, not AT&T.

4. He does not believe that the Applicant has put forth objective evidence that supports the variances being requested. Therefore, the Applicant has not performed its legal obligation to research other sites.

Attorney Corey stated that federal case law does not mandate that all sites must be explored; and that the Applicant made exhaustive efforts to find other potential sites for the tower prior to filing the application.

Garrett Stuck, 1998 Main Road, Westport Point, MA stated that the hardship is that AT&T cannot provide coverage; there is no communication from AT&T that this is the only appropriate site; discussed the information in the Isotrope Report; and does not believe that the Applicant performed its due diligence to find other sites.

David Cole, 2037 Main Road, Westport Point, MA stated that, although he is not opposed to the coverage gaps being serviced, he contends that there are other options as to sites.



Jonathan Bachman, 1798 Main Road, Westport Point, MA discussed the balloon tests. He said that the tower will be directly obstructing his view.

Betty Slade, 2037 Main Road, Westport Point, MA stated that the church remains very interested in providing a location for a tower; Tripp's Boatyard remains willing to provide a location for an antenna; that the proposed site is across from the historic district; the balloon test clearly demonstrated that the tower will be seen from Main Road; and those opposed are not only from the Westport Point area, but also from various parts of Westport who are concerned with the tower's proposed site.

Mr. Coutinho said that the recent proposed site has not yet been discussed. The Buck property is near the Bayside Restaurant. Chairman Menard noted that the Applicant is interested in sites within a 400-yard radius of the proposed site.

Chairman Menard said that he would not close the hearing at this time; however, he would poll the members and ask that each member provide a summary of what he or she is thinking at this time. He said that he will then consult with Town Counsel to draft a decision, which would be the only matter discussed at a future meeting.

Attorney Beauregard asked if he could forward a revised proposed decision to the Board for consideration. Chairman Menard stated that he could do so, however, the draft decision will be prepared with Town Counsel, considering all of the information that has been presented over the past several hearings.

Mr. Coutinho noted that the Applicant had submitted proposed findings immediately prior to this hearing and the Board had no opportunity to review the document.

Chairman Menard provided his summary of the petition:

- 1) It appears obvious that the proposed tower will improve cellular reception in the area around the Westport Point and southern Drift road sections of town.
- 2) The proposed tower will provide 5G cell phone reception for some areas of the town.

- 3) The proposed tower will improve emergency response in some areas of town.

#### Cons

- 1) The proposed tower violates the Westport Zoning By-Law section 6.3 in that the cell tower is outside of the identified telecommunications facilities overlay district.
- 2) The proposed tower violates the Westport Zoning By-Law section 6.3.5.c. Section 6.3.5.c requires cell tower shall not be erected nearer to any property line than a distance equal to the vertical height of the tower. The proposed tower is 25 ft from one property line and 39 feet from another property line while the tower is proposed to be 150 feet high.
- 3) The proposed tower violates the Westport Zoning By-Law section 6.3.5.d. Section 6.3.5.d requires that the tower shall be set back from any public way, except interstate highways, a distance equal to at least one and one-half times the vertical height of the tower. The proposed tower is only 50 feet away from a very busy Drift Road and also very close to a very busy route 88 such that a cell tower failure could impact traffic and safety. The by-law requires  $150 * 1.5$  or 225 feet set back. Placing the tower this close to two very busy roads is a major safety concern.
- 4) The proposed tower is located just outside of and easily visible from a Westport historic area.
- 5) The applicant has repeatedly justified the location of the proposed tower by identifying the location as the optimum location. During the hearings several alternative sites were identified, all of which were dismissed by the petitioner reiterating that the proposed site is the optimum location. Based on the information and testimony provided by the petitioner, the petitioner has not shown that they investigated thoroughly alternative sites citing that the proposed site is optimum. The petitioner would not consider any site that did not meet their optimal needs and 'requirements' without ever actually identifying those requirements. Their proposal is an all or nothing approach and does not consider sub-optimal coverage. Their own analysis demonstrates that alternative sites could fill a substantial portion of the coverage gap. The petitioner

actually stated that based on their 'requirements' the only acceptable sites would be within about a 300 yard radius from their proposed site. This effectively eliminates all other potential sites even if other sites could fill a substantial portion of the low signal areas. The petitioner would also not consider having multiple sites to provide the coverage.

- 6) Any variance required for a Special Permit would require identification of a hardship. According to Westport Zoning By-Laws the hardship must be related to the topography of the land. The petitioner stated the hardship is AT&T would not be able to meet the FCC requirements without this tower. This hardship is not supported by their refusal to investigate alternate properties, is primarily business oriented, and is not based on any aspect of the proposed site.
- 7) The petitioner initially refused to fund a consultant to verify the technical aspects of the tower including cell area coverage as requested by the Zoning Board of Appeals. Private citizens did fund a technical expert and found discrepancies in the petitioner's analysis including coverage and height requirements to achieve coverage. The citizen funded expert also identified alternate sites for a tower. After the petitioner reviewed the results of the abutters technical expert, the petitioner agreed to fund an independent consultant. The independent consultant found that the petitioner did not provide any technical details regarding how a lower cell tower height would impact coverage. Likewise, the independent consultant found that the petitioner explored additional sites but again provided no engineering to support their claims of coverage.
- 8) The analysis provided by the petitioner is based on 4G service even though they spent a great deal of time expounding upon the virtues of 5G. The improved capability of a 5G system may be a benefit to some however it is not, in itself, a reason for adding a new tower. The current 4G technology provides the necessary communications and emergency services.
- 9) The petitioner did agree to a balloon test in which a balloon was raised to the appropriate height and in the same general location. As expected, the proposed 150 foot tower will be easily visible from the historic district as well as areas almost to the very popular Horseneck Beach.



- 10) The AT&T website clearly shows that all of the Westport Point section is fully covered. The AT&T engineering analysis to support the proposed tower indicates that there is essentially no service in Westport Point section of Town. The truth is more likely to be something between full coverage and no coverage. Obviously there are major coverage gaps, but not nearly as extensive as indicated

Mr. Coutinho stated that he is not convinced that this site is the only solution; that there is only ¼ mile that we can look at; during the first hearing months ago I asked for the Applicant to fund an independent per review consultant which was refused. Months later the Applicant agreed to fund a peer review. Because the Applicant would not fund a consultant at the first hearing, the Board was placed in a difficult timeframe because the consultant did not have sufficient time and information to render an opinion. The Board has heard no technical evidence as to why no other site is feasible. I think that other sites have potential. We recently received notice that there is another potential property close to the river which would not be significantly obtrusive and which could be effective especially if combined with a second one.

Ms. Gee said she was not convinced the Masquesatch site was the only possible workable site; would two other sites cover the area; she is concerned with the request for five (5) variances, as well as a special permit to operate outside of the overlay district; she is concerned with implied litigation, the threat of which puts the Board in a difficult position, although that cannot be allowed to determine the decision; she is concerned about AT&T's mandate that this is the only site.

Mr. Borden stated that he agreed with the other members' opinions as to the subject site being the only possible site; that the Tripp Boatyard has ample space for a tower; he believes that the Board should be ready to make a decision, one way or the other, as there have been numerous hours spent on this matter.

Mr. Elias agreed that there would be many violations of the Zoning Bylaws; he is concerned that the courts are overturning Zoning Boards' decisions; that he has read and listened to hearing minutes

of other Towns in Massachusetts; he is concerned with the possibility of litigation; is concerned with the possibility of a health issue to residents; granting of several variances is a serious concern; the Board's consultant said the Board should receive further information; and he is undecided at this time.

Chairman Menard said that he and Town Counsel would work together on a draft decision, to be presented and discussed at the next meeting. Accordingly, Chairman Menard made a motion to continue this matter to Wednesday, August 18, 2021 at 6:30 p.m. at the Town Hall. Mr. Elias seconded the motion, which was passed unanimously by the Board.

Administrative Items:

1. Minutes of July 28, 2021 - Ms. Gee made a motion to approve the minutes. Mr. Borden seconded the motion and the Board voted unanimously to approve the minutes of the July 28, 2021 meeting.

2. Regarding 581B&C Drift Road (Casey Amaral), Ms. Gee asked that this matter be placed on the Board's agenda for August 18, 2021 for discussion as to non-compliance by the owner with the Board's decision.


At 9:26 p.m., Mr. Elias made a motion to adjourn the meeting. Mr. Borden seconded the motion, with all members voting in favor by unanimous vote.

Adjournment.

Respectfully submitted,

  
Maria I. Branco, Principal Clerk  
to the Zoning Board of Appeals

APPROVED:

  
Roger Menard, Chairman