

Zoning Board of Appeals  
July 18, 2011  
Casco Community Center

Members Present: John Devereaux, Sue Durkee, Lawrence Sawyer, Chair and Tom Bossie

Members Absent: Terri Linnell

Staff Present: Elwin Thorpe, CEO and Sandy Fredricks, Secretary

Public Present: Pat Troy, Barry Hobbins, Esq.; William Horton, Erika Frank, Esq. and Bob Gashlin

7:00 PM

Larry Sawyer calls the Meeting of the Zoning Board of Appeals to order.

Agenda:

Larry states we have one item on the agenda, a continuation from May 16, 2011 of an Administrative Appeal of the decision of the Planning Board regarding a cellular tower as the Zoning Board was awaiting input from independent legal counsel.

Chairman Sawyer states the following information for the record:

1. Please recognize all statements through him.
2. Please introduce yourself before speaking.
3. Applicant will receive a written Decision within 7 days of this meeting and has 45 days to appeal to Superior Court.
4. Applicant may stay for the Decision but cannot in any way participate in this part of the meeting.

He further states since the Board did not close the Evidentiary portion from the May meeting, there is still an opportunity to be heard. The Board received an opinion from Robert Crawford of Bernstein Shur which was directed at the issues the applicant set forth in the appeal.

**EVIDENTIARY**

Larry asks if the applicant wishes to submit any further information.

Erika states they reaffirm their objections as previously set forth and the arguments they have presented. She continues, briefly, in response to the letter submitted by Bernstein Shur, § I Jurisdiction, we would argue that the applicant at the Planning Board did not apply for a Subdivision. This is an

appeal of non-subdivision applications as the Board below did not hear that issue.

In the Bernstein Shur letter, §II Minimum Lot Size disputes that requirement of 80,000 square feet which appellants feel should apply. Mr. Crawford disagrees; however, Ms. Frank continues, arguably it is a clearly defined lot and under Maine law a lease is a creation of a lot and is described by metes and bounds thereby it creates a separate lot from the host lot which requires it to be reviewed as a new lot.

Ms. Frank continues in § III of Mr. Crawford's letter regarding Allowed Use in the Residential Zoning District, we requested review pursuant to the more restrictive requirements of the Residential District per the Subdivision Ordinance, however, the Planning Board chose to ignore that. Any other more restrictive ordinance on the Town's books should be applied.

Barry Hobbins introduces himself and Bob Gashlin. He continues that nothing has really changed in this application except we have another procedure being utilized by the applicant in this particular case who feels aggrieved and legal opinions of Natalie Burns as part of the record of the Planning Board and that is what this matter is being based on, it is not a de novo matter. AT&T has been through a lot regarding this matter. First time this issue was looked at was November 2009. AT&T went forward with the process and met all requirements of the Zoning Ordinance and the Wireless Telecommunications Ordinance. When AT&T first came to Casco there was no Wireless Telecommunications Ordinance to regulate towers. The State Planning Office put together a Wireless Telecommunications Ordinance and Casco was one of the communities that adopted a Wireless Telecommunications Ordinance. In Robert Crawford's opinion letter, he goes into and addresses all the issues as did Natalie Burns' letters.

Barry continues, look at the ordinance, regarding the jurisdiction of this Board over the applicant's argument this matter should have been reviewed under the Subdivision Ordinance, there is a provision in Casco's Subdivision Ordinance there is a process for an aggrieved party if they feel things have not been considered and that is to go to Superior Court. This Board does not have jurisdiction to consider subdivision issues. He continues, this is not him speaking, this is what the ordinance says and this is what your attorneys have said.

Barry further states, AT&T revised the plans for this particular site five (5) times to meet the requirements of the ordinance and the Planning Board. The plans were reviewed by the Town's Planner as well as the Board. This Board has to find an error in the process by the Planning Board and thinks you will see there is no jurisdiction for this Board to address the subdivision issue; if you look at the opinion of Natalie Burns regarding the lot size issue as well as

the review of the ordinance and Mr. Crawford's opinion, that matter is quite clear. In the fourth or fifth paragraph of Mr. Crawford's letter he addresses the lot size issue by stating the bulk and space standards are applied to a lot as a whole and not to each use within the lot. Further, looking at the Residential Zoning District, why would the community adopt a Wireless Telecommunications Ordinance if there was not going to be a difference. Mr. Crawford cites Davis v. SBA Towers II, LLC, 209 ME 82, ¶ 15, 979 A.2d 86,92 which addressed the issues that have been raised and finally, this Board cannot reverse the Planning Board unless they find those proceedings "contained a procedural error or was clearly contrary to the ordinance". Barry continues, this Board shall not conduct a *de novo* hearing. If you review each of the items the Planning Board reviewed, you will see they were very methodical.

In the first hearings, the neighbors filed a Quiet Title action which is still pending. This Board has no jurisdiction regarding subdivision pursuant to the ordinance and our argument is that the opponents should be estopped from raising that argument in a Rule 80B appeal as their time has run on that such as the "dead cop issue" where you continue to delay a case hoping that the officer cannot appear to testify. Under the Telecommunications Act there are procedures in place and these actions violate that Act.

Larry asks the Board members if they have any questions. Each member present indicates they have questions.

Ms. Frank states that many of the issues the appellants raise have not been resolved such as if the application of the terms of a more restrictive ordinance. Many of the issues are arguable and need to be carefully considered.

Larry closes the Evidentiary portion of the meeting and opens the Deliberations.

### **DELIBERATIONS**

Sue moves we support the decision of the Planning Board.

Larry states he has a motion to deny the appeal and affirm the decision of the Planning Board. He asks Sue if she will agree to allow him to break the motion down. Sue states she agrees to allow Larry to amend the motion.

Larry states the appellant argued the Planning Board violated the Subdivision Ordinance because there was a need to file an amended Subdivision plan and under that same ordinance the State Statute Title 30A, §44061 requires a new lot be reviewed under Subdivision. He continues that there is at least one argument whether this Board has jurisdiction to hear the Subdivision issue appeals.

Larry moves that this Board does not have jurisdiction for these purposes to hear subdivision issues.

Larry asks those who believe the Zoning Board has jurisdiction over subdivision issues to raise their hands. No hands are raised.

Larry asks those who believe the Zoning Board has no jurisdiction over subdivision issues to raise their hands. Sue, John and Larry raise their hands. Tom abstains from an opinion in this matter.

Larry moves to amend Sue's motion that the Zoning Board of Appeals make a decision that cellular towers is a permitted use in a residential district under the Zoning Ordinance.

John seconds.

Any discussion? None.

All in favor? 3 yes (Larry, Sue, John)– 0 no – 1 abstain (Tom)

Larry states the last issue is that the Planning Board erred because of the minimum lot size.

Larry moves the Zoning Board of Appeals determines that the Planning Board approval is not in violation of the 80,000 square foot size as set forth in the Zoning Ordinance.

Sue seconds.

Any discussion? None.

All in favor? 3 yes (Larry, Sue, John) – 0 no – 1 abstain (Tom)

John moves that the Zoning Board of Appeals finds the Planning Board did not err in review of noise, blasting, trespassing, impeded travel on the right-of-way, damage to the right-of-way, invalid transfer of rights in the right-of-way, visual nuisance and invasion of privacy.

Larry seconds.

Any discussion? None

All in favor? 3 yes (Larry, Sue, John) – 0 no – 1 abstain (Tom)

Larry moves to deny the appeal from the Planning Board decision.

Sue seconds.

Any discussion? None

All in favor? 3 yes (Larry, Sue, John) – 0 no – 1 abstain (Tom)

Larry states we have Minutes of the June 20, 2011 meeting to review.

Sue moves to approve the Minutes as written.

Larry seconds.

Any discussion? None

All in favor? 3 yes (Larry, Sue, John) – 0 no – 1 abstain (Tom)

Larry moves to adjourn.

Sue seconds

Any discussion? None

All in favor? 3 yes (Larry, Sue, John) – 0 no – 1 abstain (Tom)