

**HUDSON ZONING BOARD OF ADJUSTMENT
MEETING MINUTES
July 22, 2010**

I. CALL TO ORDER

Chairman Seabury called this meeting of the Hudson Zoning Board of Adjustment to order at 7:30pm on Thursday, July 22, 2010, in the Community Development Meeting Room in the Town Hall basement. Chairman Seabury then requested Acting Clerk Martin to call the roll. Those persons present, along with various applicants, representatives, and interested citizens, were as follows:

Members

Present: Normand Martin, Jim Pacocha, Donna Shuman, and J. Bradford Seabury

Members

Absent: Mike Pitre (Excused)

Alternates

Present: None

Alternates

Absent: Kevin Houle (Excused) and Marilyn McGrath (Excused)

Staff

Present: William Oleksak, Zoning Administrator

Liaison

Present: Ben Nadeau (Excused)

Recorder: Trish Gedziun

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II. SEATING OF ALTERNATES AND ANNOUNCEMENTS

For the benefit of all attendees, Chairman Seabury noted that copies of the agenda for the meeting, as well as an outline of the rules and regulations governing hearings before the Zoning Board of Adjustment, were available at the door of the meeting room. He noted the outline included the procedures that should be followed by anyone who wished to request a rehearing in the event the Board's final decision was not felt to be acceptable. Chairman Seabury pointed out that the Board allowed rehearings only if collectively convinced by a written request that the Board might have made an illogical or illegal decision or if there were positive indications of new evidence that for some reason was not available at the hearing.

Chairman Seabury announced that Mr. Martin would assume the role of Clerk in place of Mr. Houle, who was excused.

Chairman Seabury stated that because there were only four sitting Board members present, the By-Laws indicated that the applicant should be given a choice as to whether or not they wished the case to be heard with four sitting Board members, or to defer the case to the next available meeting, when presumably, there would be five sitting Board members.

Chairman Seabury noted that the applicants' representative for Case 190-187, Attorney Steven E. Grill, had stated that he wished to proceed with the case.

III. PUBLIC HEARINGS FOR SCHEDULED APPLICATIONS

- 1. Case 190-187 (7/22/10): Manuel and Kathleen Souza, 28 Lowell Road, Hudson, NH, requests the following:**
 - a. An Appeal from an Administrative decision issued by the Zoning Administrator dated May 7, 2010, which states that a Special Exception is required for the height of the proposed cell tower (80 feet allowed, 120 feet proposed) for the property located at 28 Lowell Road, Hudson, NH. [Map 190, Lot 187, Zoned B, HZO Article XVIII, Section 334-101 (C), Antenna and mast height.]**
 - b. A Special Exception to allow the increase of the height for the proposed cell tower (80 feet allowed, 120 feet proposed) for property**

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located at 28 Lowell Road, Hudson, NH. [Map 190, Lot 187, Zoned B, HZO Article XVIII, Section 334-101 (C), Antenna and mast height.]

- c. A Variance to allow reduction of the fall zone limitation for the proposed free-standing cell tower for the property located at 28 Lowell Road, Hudson, NH, from a linear distance equivalent to the height of the tower to a proposed distance of 27 feet. [Map 190, Lot 187, Zoned B, HZO Article XVIII, Section 334-102 (A), Fall Zone Calculation.]**

Acting Clerk Martin read aloud the posted notice, as recorded above.

Chairman Seabury asked Mr. Oleksak to explain why the matter was before the Board. Mr. Oleksak replied that the applicant had requested a zoning determination and after consideration based on the current regulations he decided that a Special Exception and a Variance would be required.

Chairman Seabury summarized the applicants' requests stating that the Zoning Administrator had decided that a Special Exception was required and the applicant disagreed with that decision. Chairman Seabury further stated that the applicant was present to appeal the Zoning Administrator's decision as well as to request a Variance.

(a) Discussion for An Appeal from an Administrative Decision

Chairman Seabury asked who was present who wished to speak in favor with regard to the application.

Attorney Steven E. Grill, from Devine Millimet & Branch, Professional Association, 111 Amherst Street, Manchester, NH, representing the applicant, T-Mobile Northeast, LLC ("T-Mobile") on behalf of the owners, Manuel and Kathleen Souza, addressed the Board, stating that the tremendous growth in wireless services over the past ten to fifteen years had necessitated licensed carriers to build additional antennae sites. He further stated that he felt the applicant's initial request should have been granted according to his interpretation of the zoning ordinance.

Chairman Seabury stated that the public input session would be skipped as there was no one present to speak in favor, in opposition, or neutrally with regard to the application.

Chairman Seabury asked if there were any members of the Board who had questions or comments.

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Chairman Seabury commented that he had been involved with the Planning Board as a recorder when the ordinance was created. He further stated that it was clear to him that the Planning Board was referring to “towers” when the ordinance was created. Chairman Seabury also stated that he had suggested that the Planning Board should have differentiated between the potential different types of structures.

Mr. Martin stated that he felt it was RSA 334-95 (D) which pertained to cell phone towers and not RSA 334-101 (C).

Mr. Martin made a motion to overturn the Zoning Administrator’s Determination.

Ms. Shuman seconded the motion.

Mr. Martin, speaking on his motion, stated that he felt RSA 334-101 (C) referenced antennas and mast heights, which had to do with radios -- such as HAM radios. He further stated that he felt the Zoning Administrator’s Determination should have been made based on RSA 334-95 (D).

Ms. Shuman, speaking on her second, stated that she had agreed with everything Mr. Martin had said.

VOTE: Chairman Seabury asked Acting Clerk Martin to poll the Board on the motion to overturn the Zoning Administrator’s Determination, and to record the members’ votes, which were as follows:

Mr. Martin	To overturn
Ms. Shuman	To overturn
Mr. Pacocha	To overturn
Mr. Seabury	Not to overturn

Chairman Seabury declared that the decision having been three votes to overturn the Zoning Administrator’s Determination, and one vote not to overturn the Zoning Administrator’s Determination, the motion had carried.

Chairman Seabury commented that the request for a Special Exception (B) had become moot because the Zoning Administrator’s Determination had been overturned.

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(c) Discussion for the request for a Variance

Attorney Grill read aloud from the Application for a Variance as summarized as follows:

1. *The proposed use would not diminish the value of surrounding properties because T-Mobile has selected a parcel which lies in close proximity to other commercial uses and is adjacent to a section of land that is largely undeveloped and is lined with very tall pines trees. Moreover, there are three runs of tall power lines immediately to the rear of the proposed site, which indicates that a use of the nature proposed is in keeping with the character of the surrounding uses. There is no reason to believe that further commercial development of the lot or the placement of another utility-type of use will affect the property values.*
2. *Granting the requested variance would not be contrary to the public interest because advanced wireless telecommunications services are an essential part of the communications infrastructure in today's world. It is precisely because of increased public demand and public need that T-Mobile must build the facility in question. T-Mobile's proposal is entirely consistent with the public interest.*
3. *In order to demonstrate the literal enforcement of an ordinance will result in unnecessary hardship, an applicant seeking a variance must show that: (i) No fair and substantial relationship exists between the general purposes of the public and the ordinance provision and the specific application of that provision to the property; and (ii) The proposed use is a reasonable one given the unique characteristics of the subject property, and T-Mobile's need to eliminate an existing gap in coverage in the area.*

Moreover, in the case of wireless services, "hardship" has a special meaning under federal law. In this regard, municipalities have a duty to adopt and apply regulations in a manner which afford federally-licensed carriers such as T-Mobile, a reasonable opportunity to provide the coverage required to provide adequate and reliable service to their customers.

4. *Granting the requested variance will provide the applicant substantial justice because unless it obtains the request variance, T-Mobile will be unable to fulfill its obligation to provide reliable wireless services to its*

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customers. As a result, a substantial loss will be suffered by T-Mobile if the request for a variance is denied. The general public will also not be harmed, in that they will be unable to obtain the level of wireless services required by individuals, businesses and public safety officials.

- 5. The proposed use will not be contrary to the spirit of ordinance because the zoning was adopted in the Town of Hudson to, among other things, generally secure “safety” from fires, panic, explosion, noxious fumes, and other such hazards and dangers” and “preserve and enhance the quality of life.” The proposed project will result in an increase in wireless coverage with the least possible aesthetic impact to the town.*

Chairman Seabury stated that he would again skip the public input portion of the meeting because there were no members of the public present to speak in favor, opposition, or neutrally with regard to the application.

Chairman Seabury asked if there were any members of the Board who had questions or comments.

Mr. Pacocha asked how many antennas the applicant was proposing to put on the monopole.

Attorney Grill replied that the applicant was proposing three antennas per sector for a total of nine proposed antennas.

Mr. Pacocha asked how far the proposed antennas would be from the existing structure.

Attorney Grill replied that the proposed monopole (including the antennas) would be approximately 100 feet from the rear line of the existing lower building.

Chairman Seabury asked how many feet the proposed monopole (including the antennas) would be from the road.

Attorney Grill replied that the proposed monopole (including the antennas) would be 324 feet from the road.

Mr. Dinesh Dasani, Radio Frequency Engineer, from T-Mobile USA, Inc, 15 Commerce Way, Suite B, Norton, MA, addressed the Board, stating that the demand for coverage was much higher than in recent years.

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Mr. Dasani also stated that customer demand dictated whether or not a new site was needed.

Mr. Pacocha asked what category the monopole fell under in the Table of Conditionally Permitted Facilities.

Attorney Grill replied that the monopole was 100 plus feet and more than five times the height of the tower from the corridor.

Chairman Seabury replied that the proposed monopole *was not* more than five times the height of the tower from the corridor. He further stated that the road, which Attorney Grill had just testified was 324 feet away, was in fact, the corridor (Lowell Road).

Attorney Grill stated that he still felt the applicant's proposal was a permitted use in the Business Zoning District.

Mr. Pacocha stated that he felt the proposed monopole was within 600 feet from existing dwellings which were located off of Lowell Road.

Mr. Pacocha stated that a variance from the requirement of HTC 334-96.1 was required.

Chairman Seabury stated that he agreed with what Mr. Pacocha had said.

Mr. Martin asked if it would be beneficial to defer the case until the next meeting which would enable the applicant enough time to determine whether or not an additional variance was needed.

Attorney Grill commented that he would agree to a deferral.

Mr. Martin made a motion to defer the case, date specific, to the August 26, 2010, meeting.

Mr. Pacocha seconded the motion.

Mr. Martin, speaking on his motion, stated that he felt the Board had already adequately discussed the motion.

Mr. Pacocha, speaking on his second, stated that he wanted to "see it done right."

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VOTE: Chairman Seabury asked Acting Clerk Martin to poll the Board on the motion to defer the case, date specific, to the August 26, 2010, meeting, and to record the members' votes, which were as follows:

Mr. Martin	To defer
Mr. Pacocha	To defer
Ms. Shuman	To defer
Mr. Seabury	To defer

Chairman Seabury declared that the decision having been four votes to defer the case, date specific, to the August 26, 2010, meeting, the motion carried.

V. OTHER BUSINESS

1. **Case 204-011 (7/22/10, Request for a Rehearing)**: Tammy Williamson, 14 Pelham Road, Hudson, NH, requests a Variance to allow the existing dwelling to become a two-family dwelling without the proper amount of acreage; 43,560 square feet required, 9,748.9 square feet exists. [Map 204, Lot 011, Zoned R-2, HZO Article VII, Section 334-27, Table of Minimum Dimensional Requirements.]

Chairman Seabury announced that he felt the case should be deferred as there were only four voting Board members present. He also noted that the applicant was not present as the matter was before the Board.

Mr. Martin asked how many times the Board could executively defer the case. Chairman Seabury replied that there was no defined limit but that he was reasonably sure that if the case were deferred too many times, that the applicant or the applicant's representative would make an argument that the Variance should be allowed because the case was never heard. Chairman Seabury further replied that he would consult with the Town Attorney to verify that.

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VI. ADJOURNMENT

All scheduled items having been processed, Mr. Martin made a motion to adjourn the meeting.

Ms. Shuman seconded the motion.

VOTE: All members voted in favor. The motion passed unanimously.

Chairman Seabury declared the meeting to be adjourned at 9:29pm.

Date: August 4, 2010

J. Bradford Seabury, Chairman

Recorder: Trish Gedziun