

Case 08-16
McLagan – 62 Concord Road

MINUTES OF THE PUBLIC HEARING
SUDBURY BOARD OF APPEALS
MAY 19, 2008

The Board consisted of:

Jeffrey P. Klofft, Chairman
Elizabeth A. Taylor, Clerk
Nancy G. Rubenstein
Stephen A. Garanin
Benjamin D. Stevenson, Associate

Notice was published in the Sudbury Town Crier on May 1 and 8, 2008, posted, mailed and read at this hearing.

Mr. Klofft, Chairman, explained the requirements necessary to substantiate the granting of a special permit. He also explained that if anyone is not satisfied with the Board's decision, they have the right to appeal to Superior Court or Land Court within twenty days after the decision has been filed with the Town Clerk, and that possible other appeals may exist under current law.

Robert Haworth was present, representing the owner, Donald McLagan, also present, for a petition to demolish an existing structure and construct a larger structure on a non-conforming lot. The lot is non-conforming in area and frontage.

Mr. Haworth explained that they have met with the Historic Districts Commission (HDC) and have received approval to demolish the house. The house is in disrepair. It has mold and septic problems. A meeting is scheduled for this week with the HDC to discuss the details of the new structure.

The house has been moved back to accommodate a new septic system and reserve area. In response to questions from Ms. Rubenstein, Mr. Haworth said the new garage will be the same size as the existing one; however, it will be an attached garage. Although the garage will be a little closer to the lot line than the existing detached garage, it will conform to all setback requirements. The existing driveway will be utilized for the new structure and the line of hedges along the side will remain.

Following a review of the plan the Board was in agreement that the proposed reconstruction would more appropriately fit in with the neighborhood. There were no further questions or comments. The hearing was closed.

The following motion was placed and seconded:

MOTION: “To grant Donald McLagan, owner of property, a Special Permit under the provisions of Section 2460B of the Zoning Bylaws, to allow demolition of an existing structure and construction of a new residence not to exceed 2,944 s.f., which will exceed the area of the original nonconforming structure, said residence to conform to all zoning setback requirements and to be constructed in the location as shown on Plan titled “Proposed House & Garage” which is marked as Exhibit #1 and made a part of this Decision, property located at 62 Concord Road, Residential Zone A-1.”

This Special Permit shall lapse if construction has not begun, except for good cause, within 12 months following the filing of the Special Permit approval, plus such time required to pursue or await the determination of an appeal under M.G.L., Chapter 40A, Section 17.

Construction must be completed no later than one year after commencement.

VOTED: In favor: 5 (unanimous) Opposed: 0

REASONS: The petitioner requires a special permit due to the nonconforming nature of the property. The Board finds that the proposed reconstruction will not be substantially more detrimental to the neighborhood than the existing nonconforming structure. The existing structure is in disrepair and the proposed reconstruction will be an enhancement to this neighborhood which is in a historic district and as such, is subject to the jurisdiction of the Historic Districts Commission thus ensuring the design will be appropriate to the area.

Jeffrey P. Klofft, Chairman

Elizabeth A. Taylor, Clerk

Nancy G. Rubenstein

Stephen A. Garanin

Benjamin D. Stevenson, Associate

Case 08-17,18,19
Omnipoint Communications
Lot 001 Pratts Mill Road

MINUTES OF THE PUBLIC HEARING
SUDBURY BOARD OF APPEALS
MAY 19, 2008

The Board consisted of:

Jeffrey P. Klofft, Chairman
Nancy G. Rubenstein, Acting Clerk
Stephen A. Garanin
Benjamin D. Stevenson, Associate

Notice was published in the Sudbury Town Crier on May 1 & 8, 2008, posted, mailed and read at this hearing.

Mr. Klofft, Chairman, explained the requirements necessary to substantiate the granting of variances and special permits. He also explained that if anyone is not satisfied with the Board's decision, they have the right to appeal to Superior Court or Land Court within twenty days after the decision has been filed with the Town Clerk, and that possible other appeals may exist under current law.

Mr. Klofft also noted that Associate Member Jonas McCray was unable to be present this evening. He explained that in the event the public hearing is concluded this evening, a vote to approve would require a unanimous vote of the four members present. If it is continued, under the Mullin Rule Mr. McCray would be allowed to review this evening's proceedings and be able to sit for the continuance. He asked Omnipoint's representative, Jennifer Lewis, how she would like to proceed. Ms. Lewis preferred to open the hearing this evening and proceed with the presentation of the application.

Ms. Lewis was present to represent three petitions (1) a Use Variance to locate a wireless communications facility outside of the Wireless Overlay District, (2) a Variance to allow a radiating component to be located within 500 feet from a residential lot line, and a Special Permit to install and operate a wireless communications facility. The property is shown on Town Map G06 as Lot 001, Pratts Mill Road and is zoned residential.

An overview of the guidelines for property selection was provided by Ms. Lewis. She said T-Mobile undergoes an investigation of properties within a targeted search area consisting of a radio frequency propagation system and computer modules that will detect gaps in coverage in the T-Mobile network. Also taken into consideration are customer complaints and feedback as well as data which includes dropped calls. With this criteria, Omnipoint is able to develop a search ring. A team of experts then looks at properties which can be leased, are zonable, will allow for the ability to construct a tower, and which work from a radio frequency standpoint.

Ideally Omnipoint would have preferred to locate within the wireless overlay district. However, there were no properties within the overlay district that would meet the coverage objective and serve to fill in an existing gap.

The next best alternative would be to identify large parcels of land with commercial uses. This parcel, owned by the Sudbury Water District (SWD), is a 33 acre parcel with a commercial use. There is significant tree coverage on this site and as outlined in the plan, the intent is to retain as many trees as possible. Only a few trees are marked to be cut down - most will be pruned and preserved because they serve as a natural camouflage.

Ms. Lewis explained that the previous proposal for a wireless facility was on the same property owned by the SWD but was a different parcel on that property. Because it was discovered that the monopole would be within 400-feet of a well, that proposal was withdrawn and this new proposal has been submitted. Ms. Lewis said this proposal is more ideal than the previous one in that it will not require a variance for setback from a school and the amount of variance relief from a residential property line is less.

The proposed installation consists of a 100-foot monopole, 9 proposed 72”X13 ½” panel antennas, and includes room on the tower for two additional carriers to collocate. Omnipoint seeks to locate at the 97-foot marker on the pole. The other spots are at the 87-foot marker and the 77-foot marker.

The ground equipment consists of three BTS cabinets and one battery backup. Also, in accordance with FCC regulations, antennas will be installed to serve public safety functions. Coaxial cable which connects the ground equipment to the antennas will run up through the monopole out of sight and completely shielded by the monopole. The entire facility will be enclosed within an 8-foot high chain link fence and two 5-foot gates. Access to the site is through a 10-foot wide access easement which runs over Water District property from the Hollow Oak Drive public way. It will run over the existing path which will be widened and graveled.

Given that the Board requested an independent review of the previous location, Mr. Klofft asked why the Board should not consider asking for another review for this new location.

Ms. Lewis did not believe the change in location was significant enough to warrant another review. She said the coverage objective is the same – but in a slightly different location.

Mr. Klofft asked whether the new location was at the same topographical level.

Ms. Lewis said this location was lower, which she felt was better because the tree coverage will provide a better screen. However, she would have to speak with the RF engineer whom she had expected to be present this evening, but wasn't.

Mr. Klofft said in the past when the Board dealt with towers there was a concern about the height of the pole, the trees, and the thought was that it had to be above the trees.

Ms. Lewis said she was not saying that the trees are higher than the facility. She believed the topography was lower; however, the antennas will still be above the tree line which they need to be in order to operate. She referred to the balloon test which was conducted on May 11 although she did not have the photos of that test.

Mr. Klofft said the balloon test would have given abutters an idea as to the height of the monopole above the existing tree line.

Mr. Klofft said the previous request had the coverage extending further onto Route 27. That previous request, plus the Willis Hill facility, was supposed to close the coverage gap. He said this new proposal appears not to do that anymore.

Ms. Lewis said the coverage is reduced with this new proposal. Omnipoint needed to move the facility because the facility would be too close to the wells. This is the secondary location – coverage is not as good, but it still meets the objective and reduces the amount of relief required to construct the facility.

Prior to proceeding, Mr. Klofft informed the audience that the Board is somewhat limited in terms of what it can do because of legislation passed in 1996 called the Telecommunications Act (TCA) which takes certain “hot button” issues off the table to a certain degree. He said he would entertain some limited comment on those issues since the federal district circuit in which Sudbury is located has not moved specifically on those - although three other circuits have ruled and which do exist as precedent that our courts would look at it similarly.

Ms. Rubenstein had question with regard to the coverage map and the differences between this location, the previous one, and also the Willis Hill location with regard to meeting coverage objectives. She asked whether this means there is a new gap that Omnipoint will be trying to cover later.

Ms. Lewis apologized for her RF engineer not being present to answer those questions. She could only say that Omnipoint targeted their coverage objective and that this site is the only feasible alternative location which will meet the coverage objective. The coverage objective has shifted slightly due to the fact that it couldn't be located in the original proposed location and as such had to be shifted.

Ms. Rubenstein noted that the easement to the facility shows that there will be bollards there. She asked what else is planned – whether there will be signs.

Ms. Lewis said the only signage proposed would be that which is regulated by federal, state or local – just warning signs – and a 24-hour contact number. It would be just the bollards with cables between the access restraints, the existing gravel path. She said they would be widening the existing gravel path – it'll be a proposed 10-foot wide access easement.

A comment was made from the audience that there is no existing gravel path. It is just a pathway consisting of dirt and sand.

Ms. Lewis said her information was that it was gravel, but it could be sand. They will be widening the existing access with gravel.

Mr. Garanin said he would like to see photos of the balloon test results. He asked where the notice was advertised.

Ms. Lewis said it was advertised in Middlesex News. She said the bylaw allows advertisement in a newspaper within this area and they were able to advertise in the Middlesex News to meet the deadline under the bylaw.

Mr. Stevenson said a few weeks ago the previous proposal was the most reasonable feasible alternative - this proposal wasn't even on the table. He felt it difficult to determine whether something is the most reasonable, feasible alternative if there are no other alternatives put out on the floor. He asked whether Ms. Lewis is given access to the process that goes on at T-Mobile or with the RF engineer to know why one site works and another doesn't.

Ms. Lewis said when Omnipoint originally came before the Board with the design, it was on the same property, the same landlord, just a different parcel on that property. It's the same alternative and although it isn't as good as the initial proposal in terms of meeting the coverage objectives, they are working with it.

Mr. Stevenson said there was nothing to compare this proposal with and asked whether there would be an opportunity to present some other alternatives.

Mr. Klofft said he would concur with Ms. Lewis that from a radio frequency point there is not enough difference to warrant another analysis. However, he felt there are differences in the proposal given the topography which was why he did not feel this was the same proposal and gives merit to Mr. Stevenson's comments. The topography is lower and the location has been moved in such a way that the coverage area is not the same. He said the previous application attempted to close the coverage gap for certain areas and this closes different areas.

Mr. Klofft opened the hearing for public comment and explained the process for same.

David Phillips, 20 Hollow Oak Drive, abutter – said the SWD does not use Hollow Oak Drive for access – they use East Street. He said at the end of Hollow Oak Drive there is a 3-foot wide path and to widen this path would create a traffic situation on Hollow Oak Drive. He also questioned the need for service as he has no problem with cell phone service in this area.

Mr. Klofft explained that because Board members are not radio frequency experts, the town has the right to request at the applicant's expense that a third party radio frequency engineer be hired to do an analysis of the radio frequency availability. That was done and the analyst supported the claims of the applicant that there was insufficient radio frequency in the T-Mobile signal in that area.

Robert Kamsler, 20 Center Street, abutter, said the T-Mobile website coverage map for the area where he lived had a 3-bar coverage. The map said there was good coverage.

Ms. Lewis said the coverage objective is reliable in-vehicle coverage and three bars is not considered reliable vehicle coverage – five bars is.

Mr. Phillips reiterated his concern for the proposed Hollow Oak Drive access which he felt would not only create a hardship with regard to additional vehicle traffic and maintenance of

the access, but would also create a hardship with regard to the vegetation that will be disturbed to gain access.

In response to questions from Mr. Klofft regarding use of the access for maintenance, Ms. Lewis estimated access 1-2 times as month is needed for maintenance with an additional need if the site goes down during inclement weather. Maintenance, including plowing of the gravel road in the winter, is addressed in the lease agreement with the SWD.

Mr. Phillips commented on the variance being requested from the 500-foot residential property line. He felt that to grant this variance would set a precedent which would allow other carriers to come in and do the same.

Mr. Klofft said there are towers in town that are as close, or closer to residential lot lines, than in some areas. The difference is that this application is for a variance to locate a cell tower in a residential district that does not have a pre-existing cell tower facility that was constructed prior to the overlay district. This is new – and will create a significant legal hurdle for the applicant to cross in order to obtain approval.

Mr. Phillips said Omnipoint hasn't observed the SWD's access or evaluated the current conditions of the land. Additionally, he said there was no notification in the local area for the balloon test.

Sarah Hubbell – 5 Hollow Oak Drive and Barbara Natoli – 6 Hollow Oak Drive, abutters, submitted a petition signed by 55 residents against this application as well as materials containing talking points for discussion this evening. They requested the Board deny the variance request for the reasons outlined in those talking points:

Specifically, (1) There are existing sites within the wireless overlay district under provisions that could be used and the applicant's engineer isn't present to prove that those are not viable locations.

(2) There are 6 existing towers within a 4-mile radius of this area – the nearest being 2 miles away. A significant gap in reliable coverage must be demonstrated – not a higher level of coverage.

(3) There are 4 residential properties that would be negatively affected if the town chooses to overturn the 500-foot setback from a residential lot line which sets a bad precedent for future development for the town because this is an area where there has never been a monopole or other cell tower presence.

(4) The bylaws indicate that one of the preferred alternatives is the steeple towers. The Methodist Church on Route 27, which had a ban on cell towers, has during the past year had a change in policy. Route 27 is one of the areas that is indicated as a area of concern.

Mr. Klofft asked whether T-Mobile has looked into this.

Ms. Lewis did not know whether they had done so in the past year. She said the lease with the SWD was executed last May, and under those lease terms Omnipoint is representing for this location and is restricted by the fact that there is an executed agreement in place to go out and pursue alternatives.

(5) Omnipoint has dealt with Brookline for three years to provide coverage in south Brookline and they were having a series of disagreements about cell towers. They have come up with a solution that will be in place and operated by Externet. The Brookline town meeting of 2006 voted to allow for a system to be located throughout south Brookline. (Ms. Hubbell submitted a copy of the distribution map) This particular system allows for a base station to be located on town property as dictated on the map in red. The rest of the existing communication materials are linked to regular utility poles.

In reply, Ms. Lewis referred to page 11 of the independent consultant's report which states "repeaters and small scale antenna systems such as this are unable to address such a large area of inadequate coverage since they are primarily intended to provide fill-in of small gaps."

(6) The lease that was signed with the SWD is a 10-year lease and allows for renewal of up to four different times for 3-5 years for a potential of 30 years under the terms of the lease. The town bylaw specifies that a free-standing monopole which requires a special permit is good for 5 year periods only.

Mr. Klofft said the lease of the land is separate from the use variance and special permit. Typically, special permits issued by the Board are renewable to monitor the safety conditions at the site and to insure that the pole and all related equipment is properly maintained. A lease could run forever; however, if for some reason the conditions of the special permit were not being met, this Board could deny a renewal application. The facility could still exist there, but it wouldn't be able to operate if the special permit was not renewed.

Ms. Hubbell said the SWD lease agreement gives the tenant the right to alter, replace, expand, enhance and upgrade the facility at any time during the lease.

Mr. Klofft said if this permit is granted, there would be conditions restricting them from any expansion without first having to come back to this Board.

Ms. Hubbell asked about the decibel level of the cabinets. Ms. Lewis said it has been explained to her that the noise would be no louder than an air conditioner. The cabinets are about the size of a refrigerator.

Ms. Hubbell quoted from the bylaw with regard to the requirements for the balloon test which was advertised in the Middlesex News. She said the test for the previous location was advertised in the Sudbury Town Crier and that this one should have been advertised in the same newspaper. A show of hands indicated many had not seen the advertisement.

Ms. Lewis said after placing the ad she found out that the contact person at the Sudbury Town Crier was no longer working there and that her legal notice did not make publication in the Sudbury Town Crier. It was therefore published in the Middlesex News.

Mr. Klofft asked whether Omnipoint would entertain a second balloon test.

Ms. Lewis did not think so. She said it was published in accordance with the bylaw. The Middlesex News has a general circulation in Sudbury. It was a clear day – visibility was ideal.

Mr. Klofft said the Board will require photos of the test.

Ms. Hubbell asked whether there would be a light on the tower. Ms. Lewis said there would not.

Ms. Natoli asked whether a cell tower on this location would effectively eliminate any possibility of a well within a 400-foot radius of this tower

William Cossart, SWD, said although there are no plans for future wells in this location, it would preclude development. He said the original proposal, which was within the 400-foot radius, at the time it was reviewed, seemed acceptable. However, he said DEP, made the decision that the tower would not be permitted within the 400-foot radius. Therefore, he would say that the state logic would probably apply and a well could not be constructed within 400 feet proximity of the tower.

Discussion followed on how the SWD determines the need for wells. Ms. Cossart said they are constantly looking for other sources of water but have adequate supplies for water to satisfy any planned build-out in Sudbury. In terms of drought or historic dry periods, he said water bans are implemented. They do not look at it in terms of looking at worse case scenario drought conditions.

Ms. Lewis said there are termination rights under the lease. The landlord has the ability to terminate the lease agreement. Although she was not sure of the exact wording, she would think it would cover the need for additional wells.

Mr. Klofft said the Board might want to consider similar language in the permit should it be granted.

Ira Levine – 106 Pratts Mill Road, resident, asked the reason for the 400-foot setback from the wells. Mr. Cossart said the radius is to protect the well from any contamination; i.e., animals, industrial pollution, etc. He said basically the intent is to leave that area natural.

Ian Springsteel, 34 East Street, abutter, said he has opposed cell towers and have sent letters in the past. Referring to the criteria for granting special permits, Mr. Springsteel said he would argue that there would be a significant visual change and a significant change in the use of that land from being commercial in a residential zone to being used for commercial purposes.

As to the criteria that the use not be offensive to the adjoining zoning districts, Mr. Springsteel said he and some of his neighbors saw the balloon during the test. He said a cell tower with 6 or 7-foot panels on it is a distinct visual nuisance in this neighborhood.

Mr. Springsteel felt that allowing this monopole would set a terrible precedent for allowing other towers in residential areas in Sudbury and chastised the SWD for signing this lease.

Robert Kamsler – 20 Center Street, abutter, said it was not clear why, for business reasons, T-Mobile wants to do this. He said technology is changing to the point where towers won't be needed everywhere. In just the last 10 years where there have been huge changes in digital networks and cell technology.

Ms. Lewis said she would rely on the report from the consultant who did find that there is a gap in coverage in this area, and that this site will allow us to fill in that coverage gap.

Mr. Klofft added that while it may be true that technology is changing which may obviate the need for cell towers, Omnipoint needs to operate and run their business based on the facts as they see them today – which is why they are here.

Paul Lamoureaux, 25 Hollow Oak Drive, resident, spoke to the setting of a precedent and the visual impact should this application be granted. He asked how many more panels would that mean if two additional carriers were to collocate on the pole.

Mr. Klofft asked whether the panels were enclosed or external.

Ms. Lewis said they are external. In addition to Omnipoint's 9 panels, there is potential for 18 more panels..

Mr. Klofft asked why this pole wouldn't be a stealth facility.

Ms. Lewis replied that it is for coverage – stealth systems don't travel as far.

Mr. Lamoureaux voiced concern that Omnipoint would not be willing to fly another balloon. Ms. Lewis said she would ask; however, they did meet the criteria established by the bylaw.

Mr. Klofft said the Board requested that Ms. Lewis ask for another test, but noted that Omnipoint has the right to say no. He added that the Board will want to continue this hearing because the members will want to see the photographs. In addition, they would want the RF engineer to be present to answer questions.

Mr. Lamoureaux said there will be an impact on the quality of life in this area. He said children walk and ride their bikes everywhere in that whole area. He voiced concern with regard to the additional traffic – and also the traffic during construction.

Faramarz Faramarzpour – 15 West Street, abutter, 33-year resident, said there are a lot of trails and bicycle paths in that area. He voiced concern for the impact on the environment and aesthetics of the environment.

Ms. Natoli commented that additional providers would mean additional trucks and traffic on the access road, and potentially the Water District could use this as access resulting in greater impact.

Thomas Joyner – 19 Center Street, abutter, referred to 6 bullet points listed in the minutes from the March 17th hearing which were requested by the Board to be provided by Omnipoint. He asked whether those had been submitted.

Mr. Klofft replied that they have not been provided and are part of the reasons why this hearing will be continued. He reiterated that the Board will need to have the RF engineer present to explain the data and results of the balloon test.

Mr. Joyner said it was mentioned at the previous hearing that Omnipoint does not have a plan. He said would like to see a plan.

Further discussion followed on the purpose of the TCA of 1996 and its implications. Mr. Klofft said the Board is trying to work within the framework that has been established under the Act. He said although there are some things which cannot be considered, such as the health issue and property value issue, there certain things that need to be considered and precedent is a major issue.

Mr. Kamsler asked whether the SWD had a different threshold to meet in order to put a cell tower on its property. Mr. Klofft said the criteria was the same for them as for any other property owner. They would have to come before this Board and the Board's job is to evaluate whether what is being applied for is the least intrusive option that is available.

Mr. Kamsler asked whether the SWD has leased other parcels.

Mr. Cossart said only cell towers have been considered.

Barbara Joyner, 124 Pratts Mill Road abutter, said she would never have considered buying her home knowing that a cell tower essentially could be built there. She said there are many small children in the neighborhood and voiced concern as to the unknown effects of radiation.

Mr. Klofft said while he understood her concern, the Board's hands are tied to a large extent on health issues – those issues are not on the table to be considered.

Mr. Cossart said he understood this hearing will be continued. He wanted to point out that in the interim, before the Board makes its decision, the Water District is going to require Omnipoint to come back with regard to this change in location. He said the Water Commissioners are also concerned about the new access road and concerned that they did not have the opportunity to view the balloon flying. In addition, from his understanding of the property, the tower may be more conspicuous in the new location. He said in any event, the SWD will be requiring Omnipoint to come back and their application will be reconsidered.

Mr. Klofft said for the next hearing, the Board wants to see the photos from the balloon test and to have the RF engineer present to answer questions and present the bulleted information listed in the minutes of the March 17, 2008 hearing.

The hearing was continued to July 21.

Jeffrey P. Klofft, Chairman

Nancy G. Rubenstein, Acting Clerk

Stephen A. Garanin

Benjamin D. Stevenson, Associate

