

TOWN OF ERWIN PLANNING BOARD MEETING

MONDAY, NOVEMBER 6, 2017

7 P.M. ERWIN TOWN HALL

310 TOWN CENTER ROAD

Present: John Gargano, James McCarthy, Wayne Kennedy, Patricia Thiel, Joseph Reilly (Alternate),
 Brian Harpster, Ted Metarko, Doug Porter, Matt Maslyn (Alternate)

Guests: Kim LeBarron, Hillary Green, Deborah Green, Betsy Farmer, Daniel Brennan, Rita McCarthy,
 Barb Lucas

CHAIRMAN JOHN GARGANO OPENS THE MEETING AT 7:00 PM.

In accordance with the Planning Board's established procedure, the Board will hear all matters up until 9 PM. Any matters not completed by that time will be held over to the next regular meeting. As is the usual practice, the Board's consultants have met with the applicants prior to this meeting and have gone over the applications to ensure that they are as complete as possible and to point out any errors or omissions that can delay approval.

MOTION TO APPROVE THE MINUTES OF THE OCTOBER 2, 2017 MEETING.**MOTION BY: BRIAN HARPSTER****SECONDED BY: JAMES McCARTHY****DISPOSITION: 6 - 0****1. APPLICATION FROM DEMONSTOY LUMBER INC FOR A TWO LOT SUBDIVISION AT 24 RACE ST. WITH PUBLIC HEARING.****POINTS TO CONSIDER:**

The project is located in an R12.5 Residential District.

The applicant seeks to create two lots, one 2.57 acres to retain the existing business, and the second 2.18 acres for future residential development. The portion of the business that was on the 2.18 acres will be demolished. The business is pre-existing, non-conforming. Subdividing the lot so that a portion can become residential will make the lot more conforming.

<u>Criteria:</u>	<u>Required:</u>	<u>Proposed:</u>
Lot size	12,500 sq. ft.	2.57, 2.18 acres
Lot width	100'	210.34, 397.65

Kim LeBarron, of Demonstoy Lumber Inc., was present.

Planning Board member Matt Maslyn noted that the survey map did not clearly delineate where Race Street crossed the property.

Kim LeBarron responded that the portion known as Race Street is actually owned by the Demonstoy Lumber Company. It was discovered when the property was purchased from the railroad in 1996 however, they never contested ownership of the portion claimed by the Town of Erwin. She also noted that the surveyor referenced records dating back to 1937 and a portion of Erie Street has the same issue.

Town Manager Rita McCarthy stated that it will be necessary to research the ownership and if the portions considered to be part of Race Street or Erie Street are actually owned by Demonstoy Lumber, it will be necessary to have those portions formally dedicated to the Town.

The Board decided to continue with the application noting that the application could be approved with a contingency requiring Race Street and Erie Street be formally dedicated to the Town if necessary.

THE PLANNING BOARD DECLARES THE APPLICATION TO BE COMPLETE.

PLANNING BOARD REVIEWS THE EAF:

ENVIRONMENTAL ASSESSMENT FORM (EAF) – Part 2 – Impact Assessment

1. Will the proposed action create a material conflict with an adopted land use plan or zoning regulations?	NO
2. Will the proposed action result in a change in use or intensity of use of land?	NO
3. Will the proposed action impair the character or quality of the existing community?	NO
4. Will the proposed action have an impact on the environmental characteristics that caused the establishment of a Critical Environmental Area (CEA)?	NO
5. Will the proposed action result in an adverse change in the existing level of traffic or affect existing infrastructure for mass transit, biking or walkway?	NO
6. Will the proposed action cause an increase in the use of energy and it fails to incorporate reasonably available energy conservation or renewable energy opportunities?	NO
7. Will the proposed action impact existing:	
a. public / private water supplies?	NO
b. public / private wastewater treatment utilities?	NO
8. Will the proposed action impair the character or quality of important historic, archaeological, architectural or aesthetic resources?	NO
9. Will the proposed action result in an adverse change to natural resources (e.g., wetlands, waterbodies, groundwater, air quality, flora and fauna)?	NO
10. Will the proposed action result in an increase in the potential for erosion, flooding or drainage problems?	NO
11. Will the proposed action create a hazard to environmental resources or human health?	NO

RESOLUTION TO CLASSIFY THIS AS AN UNLISTED ACTION SINCE IT IS A RESIDENTIAL DEVELOPMENT OF LESS THAN 250 UNITS WITH PUBLIC WATER AND SEWER, DECLARE THE PLANNING BOARD LEAD AGENCY AND MAKE A NEGATIVE DECLARATION OF ENVIRONMENTAL SIGNIFICANCE.

MOTION BY: DOUG PORTER

SECONDED BY: TED METARKO

DISPOSITION: 7 – 0

Applicant Kim LeBarron questioned if the current exempt use of the property will remain with the subdivided parcels and Town Manager McCarthy affirmed that it would.

CHAIRMAN GARGANO OPENS THE PUBLIC HEARING AT 7:20 PM.

No comments from the public.

CHAIRMAN GARGANO CLOSES THE PUBLIC HEARING AT 7:21 PM.

UPON HEARING NO APPLICABLE ADVERSE COMMENT FROM THE PUBLIC, THE PLANNING BOARD APPROVES THE SUBDIVISION CONTINGENT ON RESOLUTION OF RACE STREET AND ERIE STREET OWNERSHIP AND AN UPDATED SURVEY MAP.

**MOTION BY: BRIAN HARPSTER
SECONDED BY: JAMES McCARTHY
DISPOSITION: 7 - 0**

The applicant is advised that the approval expires if the plat is not filed with the County Clerk within 62 days of signature.

<p>2. SITE PLAN AMENDMENT APPLICATION FROM DALRYMPLE GRAVEL & CONTRACTING CO., INC. TO ADD 3.66 ACRES TO THE MINE AREA AT 9158 SMITH HILL RD.</p>
--

POINTS TO CONSIDER:

The project is located in an RD Rural District zone.

The applicant seeks to add 3.66 acres to the Life of Mine area. There will be no change in ingress, egress, traffic, hours of operation. The new area proposed to be mined is at the back of the property, further away from surrounding development and therefore will have no impact on noise or visual aesthetics.

The NYS Department of Environmental Conservation and US Army Corps of Engineers are Involved agencies.

The application was presented by engineer Betsy Farmer of Dalrymple Gravel. She explained that Millennium Gas has relocated gas lines which originally crossed the Dalrymple property. The gas lines prevented the use of dredge machinery for a small portion of land at the south end of the property. Two maps were provided showing the existing mining operation and the proposed pond area including the reclaimed portion. She noted that the Army Corp of Engineers has approved the change and they are currently waiting for a response from the DEC.

Board member Patricia Thiel asked whether the subject area has already been disturbed. Engineer Farmer answered that the area has not previously been disturbed. The gas lines which were removed were within a 100' buffer area but did not run in the actual pond area.

Chairman Gargano asked if there would be any changes to ingress, egress, hours of operation, lighting, etc. and Engineer Farmer answered that there would be no changes.

THE PLANNING BOARD DECLARES THE APPLICATION TO BE INCOMPLETE.

BASED ON THE EAF, THE PLANNING BOARD CLASSIFIES THIS AS AN UNLISTED ACTION BECAUSE IT IS A NONRESIDENTIAL DEVELOPMENT DISTURBING LESS THAN TEN ACRES, AND DECLARES ITS INTENT TO BECOME LEAD AGENCY.

**MOTION BY: WAYNE KENNEDY
SECONDED BY: PATRICIA THIEL
DISPOSITION: 7 - 0**

DANIEL BRENNAN OF NIXON PEABODY LLP, REPRESENTING THE APPLICANT FOR ITEMS #3-#10, REQUESTED THAT THE PLANNING BOARD TABLE THEIR APPLICATIONS SO THAT THEY MIGHT SUBMIT ADDITIONAL INFORMATION. HE NOTED THAT THE ZONING BOARD OF APPEALS HAS TABLED ALL APPLICATIONS RELATED TO THE SAME PROJECTS. VERIZON WIRELESS IS PREPARING A WRITTEN RESPONSE TO THE ZBA REGARDING POSSIBLE ALTERNATIVES BY THE DECEMBER 2017 MEETING. ATTORNEY BRENNAN ALSO SUBMITTED A LETTER (Attachment 1) ADDRESSED TO BOTH THE PLANNING BOARD AND THE ZONING BOARD OF APPEALS STATING THE FOLLOWING OPINIONS: 1. "Special Use Permits and Use Variances are mutually exclusive" and 2. "The Planning Board may table the applications pending the Zoning Board of Appeals process."

RESOLUTION TO TABLE ALL APPLICATIONS FROM BELL ATLANTIC MOBILE SYSTEMS OF ALLENTOWN, INC., D/B/A VERIZON WIRELESS AND SUPPORT THE ZONING BOARD OF APPEALS DECISION TO EXTEND THE SHOT CLOCK TO MARCH 30, 2018.

MOTION BY: PATRICIA THIEL
 SECONDED BY: DOUG PORTER
 DISPOSITION: 7 - 0

3. SPECIAL USE PERMIT APPLICATION FROM BELL ATLANTIC MOBILE SYSTEMS OF ALLENTOWN, INC., D/B/A VERIZON WIRELESS FOR A COMMUNICATIONS TOWER IN A RESIDENTIAL DISTRICT AT 12 ERWIN ST

POINTS TO CONSIDER:

The project is located in an R7.2 Residential District.

The applicant seeks to erect a 34 ft utility pole, 38.7 ft cell tower at 12 Erwin St.

The application does not address the Special Use Criteria identified in §130-65.

New communications towers are permitted in Industrial and Rural Districts only. Co-located communications towers are permitted everywhere except B3 and MU Districts. Co-location is defined in §130-5 as "The use of a communications tower by more than one carrier". This is a new pole, not in use by any other carrier. No Use Variance has been granted.

4. SITE PLAN APPLICATION FROM BELL ATLANTIC MOBILE SYSTEMS OF ALLENTOWN, INC., D/B/A VERIZON WIRELESS FOR A COMMUNICATIONS TOWER IN A RESIDENTIAL DISTRICT AT 12 ERWIN ST

POINTS TO CONSIDER:

The project is located in an R7.2 Residential District.

The applicant seeks to erect a 34 ft utility pole, 38.7 ft cell tower cell tower at 12 Erwin St.

New communications towers are permitted in Industrial and Rural Districts only. Co-located communications towers are permitted everywhere except B3 and MU Districts. Co-location is defined in §130-5 as "The use of a communications tower by more than one carrier". This is a new pole, not in use by any other carrier. No Use Variance has been granted.

5. SPECIAL USE PERMIT APPLICATION FROM BELL ATLANTIC MOBILE SYSTEMS OF ALLENTOWN, INC., D/B/A VERIZON WIRELESS FOR A COMMUNICATIONS TOWER IN A RESIDENTIAL DISTRICT AT 50 CREEKSIDE DR

POINTS TO CONSIDER:

The project is located in an R7.2 Residential District.

The applicant seeks to erect a 34 ft utility pole, 38.7 ft cell tower at 50 Creekside Dr.

The application does not address the Special Use Criteria identified in §130-65.

New communications towers are permitted in Industrial and Rural Districts only. Co-located communications towers are permitted everywhere except B3 and MU Districts. Co-location is defined in §130-5 as “The use of a communications tower by more than one carrier”. This is a new pole, not in use by any other carrier. No Use Variance has been granted.

6. SITE PLAN APPLICATION FROM BELL ATLANTIC MOBILE SYSTEMS OF ALLENTOWN, INC., D/B/A VERIZON WIRELESS FOR A COMMUNICATIONS TOWER IN A RESIDENTIAL DISTRICT AT 50 CREEKSIDE DR

POINTS TO CONSIDER:

The project is located in an R7.2 Residential District.

The applicant seeks to erect a 34 ft utility pole, 38.7 ft cell tower cell tower at 50 Creekside Dr.

New communications towers are permitted in Industrial and Rural Districts only. Co-located communications towers are permitted everywhere except B3 and MU Districts. Co-location is defined in §130-5 as “The use of a communications tower by more than one carrier”. This is a new pole, not in use by any other carrier. No Use Variance has been granted.

7. SPECIAL USE PERMIT APPLICATION FROM BELL ATLANTIC MOBILE SYSTEMS OF ALLENTOWN, INC., D/B/A VERIZON WIRELESS FOR A COMMUNICATIONS TOWER IN A RESIDENTIAL DISTRICT AT 188 BEARTOWN RD

POINTS TO CONSIDER:

The project is located in an R12.5 Residential District.

The applicant seeks to erect a 34 ft utility pole, 38.7 ft cell tower at 188 Beartown Rd.

The application does not address the Special Use Criteria identified in §130-65.

New communications towers are permitted in Industrial and Rural Districts only. Co-located communications towers are permitted everywhere except B3 and MU Districts. Co-location is defined in §130-5 as “The use of a communications tower by more than one carrier”. This is a new pole, not in use by any other carrier. No Use Variance has been granted.

8. SITE PLAN APPLICATION FROM BELL ATLANTIC MOBILE SYSTEMS OF ALLENTOWN, INC., D/B/A VERIZON WIRELESS FOR A COMMUNICATIONS TOWER IN A RESIDENTIAL DISTRICT AT 188 BEARTOWN RD

POINTS TO CONSIDER:

The project is located in an R12.5 Residential District.

The applicant seeks to erect a 34 ft utility pole, 38.7 ft cell tower cell tower at 188 Beartown Rd

New communications towers are permitted in Industrial and Rural Districts only. Co-located communications towers are permitted everywhere except B3 and MU Districts. Co-location is defined in §130-5 as “The use of a communications tower by more than one carrier”. This is a new pole, not in use by any other carrier. No Use Variance has been granted.

9. SPECIAL USE PERMIT APPLICATION FROM BELL ATLANTIC MOBILE SYSTEMS OF ALLENTOWN, INC., D/B/A VERIZON WIRELESS FOR A COMMUNICATIONS TOWER IN A RESIDENTIAL DISTRICT AT 125 FOREST DR

POINTS TO CONSIDER:

The project is located in an R12.5 Residential District.

The applicant seeks to erect a 34 ft utility pole, 43.9 ft cell tower at 125 Forest St.

The application does not address the Special Use Criteria identified in §130-65.

New communications towers are permitted in Industrial and Rural Districts only. Co-located communications towers are permitted everywhere except B3 and MU Districts. Co-location is defined in §130-5 as “The use of a communications tower by more than one carrier”. This is a new pole, not in use by any other carrier. No Use Variance has been granted.

10. SITE PLAN APPLICATION FROM BELL ATLANTIC MOBILE SYSTEMS OF ALLENTOWN, INC., D/B/A VERIZON WIRELESS FOR A COMMUNICATIONS TOWER IN A RESIDENTIAL DISTRICT AT 125 FOREST DR

POINTS TO CONSIDER:

The project is located in an R12.5 Residential District.

The applicant seeks to erect a 34 ft utility pole, 43.9 ft cell tower cell tower at 125 Forest Dr.

New communications towers are permitted in Industrial and Rural Districts only. Co-located communications towers are permitted everywhere except B3 and MU Districts. Co-location is defined in §130-5 as “The use of a communications tower by more than one carrier”. This is a new pole, not in use by any other carrier. No Use Variance has been granted.

11. CONCEPT PLAN FROM DARLENE LEWIS FOR A TWO LOT SUBDIVISION AT 2424 TWIN OAKS RD**POINTS TO CONSIDER:**

The project is located in an R12.5 Residential District.

The applicant wants to subdivide the residential structure plus acreage off from a remaining larger parcel. The parcel with the residence will be approximately 10-18 acres. The remainder parcel will be approximately 110-112 acres.

Each parcel must be at least 2 acres and have a width at building line of 500 ft. Each parcel must be capable of supporting a driveway with a slope no greater than 10% and shall not exceed 2% within 25 feet of the intersecting public highway.

The representative for the applicant notified the Town that he was unable to attend the meeting due to a medical emergency. Town Manager Rita McCarthy presented the concept plan noting the proposed subdivision would meet zoning laws. The representative is a real estate salesperson. He would like to be able to market the property as two potential properties with the option of separating it into a smaller parcel including a house and a larger parcel that would have access from a different road. The exact size of each parcel is not known.

THE PLANNING BOARD DECLARES THE APPLICATION TO BE INCOMPLETE.

MOTION BY: PATRICIA THIEL

SECONDED BY: TED METARKO

DISPOSITION: 7 - 0

RESOLUTION TO ADJOURN THE MEETING AT 7:50 PM.

MOTION BY: BRIAN HARPSTER

SECONDED BY: JAMES MCCARTHY

DISPOSITION: 7 - 0

ATTACHMENT 1



NIXON PEABODY LLP
ATTORNEYS AT LAW

NIXONPEABODY.COM
@NIXONPEABODYLLP

Daniel F. Brennan
Associate
T 585-263-1450
dbrennan@nixonpeabody.com

1300 Clinton Square
Rochester, NY 14604-1792
585-263-1000

November 6, 2017

VIA E-MAIL & HAND DELIVERY

Zoning Board of Appeals & Planning Board
Town of Erwin
310 Town Center Road
Painted Post, New York 14870
Attn: Rita McCarthy

RE: Application for a use variance from the Town of Erwin Zoning Board of Appeals by Bell Atlantic Mobile Systems of Allentown, Inc. d/b/a Verizon Wireless to construct and operate a microcell wireless telecommunications facility a new utility pole to be located at 50 Creekside Drive, Town of Erwin, New York (Verizon Wireless' "Creekside and Beartown" Site).

Application for a use variance from the Town of Erwin Zoning Board of Appeals by Bell Atlantic Mobile Systems of Allentown, Inc. d/b/a Verizon Wireless to construct and operate a microcell wireless telecommunications facility a new utility pole to be located at 125 Forest Drive, Town of Erwin, New York (Verizon Wireless' "Erwin and Forest" Site).

Application for a use variance from the Town of Erwin Zoning Board of Appeals by Bell Atlantic Mobile Systems of Allentown, Inc. d/b/a Verizon Wireless to construct and operate a microcell wireless telecommunications facility a new utility pole to be located at 12 Erwin Street, Town of Erwin, New York (Verizon Wireless' "Erwin and Hamilton" Site).

Application for a use variance from the Town of Erwin Zoning Board of Appeals by Bell Atlantic Mobile Systems of Allentown, Inc. d/b/a Verizon Wireless to construct and operate a microcell wireless telecommunications facility a new utility pole to be located at 188 Beartown Road, Town of Erwin, New York (Verizon Wireless' "Lac and Beartown" Site).

Dear Ms. McCarthy and Members of the Zoning Board of Appeals and Planning Board:

By letters all dated September 11, 2017, Bell Atlantic Mobile Systems of Allentown, Inc. d/b/a Verizon Wireless ("Verizon Wireless") made application for special use permits and site

plan review for four proposed wireless telecommunications facilities to be mounted to new utility poles at the following locations: (1) 188 Beartown Road; (2) 12 Erwin Street; (3) 50 Creekside Drive; and (4) 125 Forest Drive in the Town of Erwin (the “Projects”).

Pursuant to the Town Zoning Code and direction from the Town, we believed that special use permits and site plan review were the appropriate land use approvals, and made application accordingly. However, by letter dated September 12, 2017, from Town Manager Rita McCarthy, Verizon Wireless was advised to apply to the Zoning Board of Appeals for use variances for the Projects. Given Verizon Wireless’ status as a public utility for zoning purposes and that the same legal standard applies regardless of whether the necessary use approval is a special use permit or use variance, Verizon Wireless is indifferent as to which approval is required¹. Nevertheless, Verizon Wireless submitted applications for use variances for each of the Projects on September 26, 2017, in deference to the Town’s interpretation.

Verizon Wireless appeared for the pre-conference meeting of the Planning Board, and the public hearing of the Zoning Board of Appeals, both on October 24, 2017, and received feedback from the Boards and the public. In response to the comments, Verizon Wireless agreed to provide answers in writing in advance of the next available Zoning Board of Appeals meeting, and the Zoning Board of Appeals agreed to table the matter until the responses were provided.

Verizon Wireless was subsequently informed by email from Ms. McCarthy on November 1, 2017, that the Planning Board intends to deem Verizon Wireless’ applications for special use permits and site plan approval incomplete because each of the Projects require a use variance and no use variance has been granted yet. However, there are two issues with the Planning Board deeming the applications as incomplete for failure to first obtain a use variance:

1. Special Use Permits and Use Variances are mutually exclusive

There can only be one “use” approval required for any project. If a project is not “permitted as of right”, then it can only proceed by special use permit (if the Code allows special use permits for such use); or if the Code does not permit the use as of right, nor by special use permit, then the applicant may apply for a use variance. However, a project cannot have both a special use permit and a use variance.

I also noted that the Town of Erwin Zoning Code defines a “use variance” as the “authorization by the Zoning Board of Appeals for the use of land for a purpose which is otherwise not allowed or is prohibited by the applicable zoning regulations.” (Code § 130-5). A “special use permit” is defined as an “authorization of a particular land use which is permitted in the Town of Erwin Zoning Law subject to requirements imposed to assure that the proposed use is in harmony with the law and will not adversely affect the neighborhood if the requirements are not met.” (Code § 130-5). The proposed wireless telecommunications facility cannot be both a prohibited use and a specially permitted use.

We understand that the Town has taken the position that use variances are required, and Verizon Wireless has so complied, but it renders the special use permit applications moot.

2. The Planning Board may table the applications pending the Zoning Board of Appeals process, but the applications are not incomplete

Turning to Federal law, on November 1, 2009 the Federal Communications Commission (“FCC”) issued a declaratory ruling regarding timely siting review, WT Docket No. 08-165 (the “Order”). The Order is intended to promote the deployment of broadband and other wireless services by defining a presumptively reasonable time beyond which an action on a siting application constitutes a “failure to act” under Section 332(c)(7)(B)(ii) of the Telecommunications Act, 47 U.S.C. §332(c)(7)(B)(ii). Among other matters, the Order provides that a party whose application has been pending for more than 90 days in the case of a co-location may file suit for “failure to act” under Section 332(c)(7)(B)(v) of the Telecommunications Act (also known as the “Shot Clock”).

While the Shot Clock permits a municipality to advise wireless telecommunication providers in writing within 30 days of submission if an application is incomplete, it would be improper to deem an application as incomplete simply because the Zoning Board of Appeals has not yet completed the process and verbally requested additional information at a public hearing. The applications were complete upon submission of the letters dated September 26, 2017, as each application complied with the applications requirements provided by the Code. Moreover, no written notice of incompleteness was provided within 30 days. The Shot Clock started to run on September 26, 2017.

The Zoning Board of Appeals verbally requested an extension of the Shot Clock at the October 24, 2017, meeting. The Shot Clock does not expire until February 23, 2017, which Verizon Wireless believes is sufficient time for the Town to review each of the applications. However, in response to the Zoning Board of Appeals' request, Verizon Wireless agreed to toll the Shot Clock from the date of the October 24, 2017, public hearing until November 28, 2017, which is the submission deadline for the next available Zoning Board of Appeals public hearing.

With the above voluntary 35 day tolling of the Shot Clock, the new expiration date of the Shot Clock will be March 30, 2018.

Should you have any questions, please do not hesitate to contact me. Thank you for your time and attention.

Sincerely,



Daniel F. Brennan

DFB/las
Enclosure

cc: Mark Coon, Verizon Wireless
David F. English, Esq., Town Attorney

¹ As explained in Exhibit C to the applications, Cellular Tel. Co. v. Rosenberg, 82 N.Y.2d 364 (1993), modifies the traditional standards of review for zoning approvals for wireless telecommunications facilities. Verizon Wireless is entitled to the public utility standard of review regardless of what zoning approvals are necessary, whether it be a use variance, special use permit, or site plan review.