

MINUTES

Town of Wappinger
Zoning Board of Appeals - **SPECIAL MEETING**
March 15, 2022
Time: 7:00PM

Town Hall
20 Middlebush Road
Wappinger Falls, NY

Summarized Minutes

Members:

Mr. Galotti	Chairman	Present
Mr. DellaCorte	Co-Chair	Present
Mr. Barr	Member	Present
Mr. Lorenzini	Member	Present
Mr. Shah	Member	Absent

Others Present:

Mr. Horan	Town Attorney
Mrs. Roberti	Zoning Administrator
Mrs. Ogunti	Secretary

SUMMARY

Adjourned Public Hearing:

Tarpon Towers II, LLC Wireless Telecommunications Facility	Variances granted with conditions
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Ron Evangelista, et al	Adjourned to April 26, 2022
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Video of the March 15, 2022 Zoning Board of Appeals Special meeting:

https://www.youtube.com/watch?v=njnp_7v_Gfg

THE TOWN OF WAPPINGER ZONING BOARD OF APPEALS WILL CONDUCT A SPECIAL MEETING ON MARCH 15, 2022 AT 7:00PM TO VOTE ON THE APPLICATION FOR TARPON TOWERS.

Adjourned Public Hearing:

Appeal No. 19-7689 (Commercial Variance)

Tarpon Towers II, LLC Wireless Telecommunications Facility: Seeking an area variance Section 240-81G(4)(c)(2) of the District Regulations in an R40/80 Zoning District.

-Where no tower can be located closer than **750 feet** on a horizontal plane to an existing dwelling unit, the applicant can provide **678 feet** to **106 Caroline Drive East, Tax Grid No. 6056-03-261413**. **Thus requesting a variance of 72 ft.**

-Where no tower can be located closer than **750 feet** on a horizontal plane to an existing dwelling unit, the applicant can provide **558 feet** to **108 Caroline Drive East, Tax Grid No. 6056-03-259396**. **Thus requesting a variance of 192 ft.**

-Where no tower can be located closer than **750 feet** on a horizontal plane to an existing dwelling unit, the applicant can provide **732 feet** to **107 Caroline Drive East, Tax Grid No. 6056-03-238390**. **Thus requesting a variance of 18 ft.**

-Where no tower can be located closer than **750 feet** on a horizontal plane to an existing dwelling unit, the applicant can provide **585 feet** to **114 Caroline Drive East, Tax Grid No. 6056-03-250363**. **Thus requesting a variance of 165 ft.**

-Where no tower can be located closer than **750 feet** on a horizontal plane to an existing dwelling unit, the applicant can provide **550 feet** to **110 Caroline Drive East, Tax Grid No. 6056-03-255378**. **Thus requesting a variance of 200 ft.**

-Where no tower can be located closer than **750 feet** on a horizontal plane to an existing dwelling unit, the applicant can provide **649 feet** to **116 Caroline Drive East, Tax Grid No. 6056-03-242352**. **Thus requesting a variance of 101 ft.**

The property is located at **110 Chelsea Road** and is identified by **Tax Grid No. 6056-03-339420**.

Mr. DellaCorte:

Mr. Lorenzini:

Vote:

Motion to open the Adjourned Public Hearing.

Second the Motion.

All present voted Aye.

Mr. Horan explained Judge Kenneth Karas' Decision and went over conditions that could be added to the ZBA Decision.

RESIDENTS WHO SPOKE:

Lou Benya, 90 Chelsea Road, Wappingers Falls, NY 12590
Mark Springer, 108 Caroline Drive (East), Wappingers Falls, NY 12590
Carla Springer, 108 Caroline Drive (East), Wappingers Falls, NY 12590
Ricky Harrison, 106 Caroline Drive, Wappingers Falls, NY 12590
Chris Barclay, 86 Chelsea Road, Wappingers Falls, NY 12590
Karen Bolz, 94 Chelsea Road, Wappingers Falls, NY 12590
Marcy Wagman, 50 Old State Road, Wappingers Falls, NY 12590
Ron Bowles, 4 Chelsea Road, Wappingers Falls, NY 12590
Brian Purcell, 10 Caroline Drive, Wappingers Falls, NY 12590

Mr. Lorenzini:

Mr. Barr:

Vote:

Motion to close the Adjourned Public Hearing.

Second the Motion.

All present voted Aye.

Mr. Galotti:

Mr. Lorenzini:

Roll Call Vote:

Motion to grant the applicant the variances based on the attached Decision and Conditions.

Second the Motion.

Mr. DellaCorte	YES
Mr. Lorenzini	YES
Mr. Barr	YES
Mr. Shah	N/A
Mr. Galotti	YES

SEE ATTACHED FINDINGS & DECISION

FINDINGS & DECISION:

At a Special Meeting of the Town of Wappinger Zoning Board of Appeals held at Town Hall on the 15th day of March, 2022.

TOWN OF WAPPINGER ZONING BOARD OF APPEALS APPLICATION FOR AN AREA VARIANCE FINDINGS & DECISION

Appeal No.	19-7689
Application Date:	October 9, 2019
Applicant	Tarpon Towers II, LLC
Premises Located at:	110 Chelsea Road
Tax Grid No.:	6056-03-339420
Zoning District(s):	R 40/80
Record Owner of Property:	Jeanne M. Radice
Variance of Code Sections:	§ 240-81 (G)(4)(c)[2]

A Resolution was proposed by Chairman Galloti and seconded by Mr. Lorenzini to adopt the following decision granting the application for the listed area variances:

Documents Considered

- 1) Application of Tarpon Towers II, LLC dated October 9, 2019 with Exhibits;
- 2) Long Form EAF
- 3) Opinion & Order dated January 31, 2022, Hon. Kenneth M. Karas, USDJ
VERIZON WIRELESS OF THE EAST LP d/b/a/ VERIZON WIRELESS and TARPON TOWERS II, LLC,
Plaintiffs, v. TOWN OF WAPPINGER, TOWN OF WAPPINGER PLANNING BOARD, and TOWN OF
WAPPINGER ZONING BOARD OF APPEALS,
United States District Court for the Southern District of New York
No. 20-CV-8600 (KMK)

Description of the Premises & Proposed Variance

The premises that is the subject of this application is a 28.54 Acre Parcel located at 110 Chelsea Road in an R 40/80 Zoning District. The applicant is in the business of erecting towers to provide wireless telecommunications service. The applicant seeks to erect a telecommunications tower.

The applicant is seeking to construct a 150 foot monopole telecommunications tower with an associated telecommunications facility as such is defined under § 240-81 of the Town of Wappinger Code. The applicant meets all of the siting requirements set forth in § 240-81 except those set forth at § 240-81 (G)(4)(c)(2) which provides that:

No tower or personal wireless service facility, with the exception of repeaters, shall be located closer than 750 feet on a horizontal plane to an existing dwelling unit or day-care center, hospital, nursing home, church, synagogue or other place of worship.

The following variances are required to construct the monopole tower:

- a) -Where no tower can be located closer than 750 feet on a horizontal plane to an existing dwelling unit, the applicant can provide 678 feet to 106 Caroline Drive East. Tax Grid No. 6056-03-261413. **Thus requesting a variance of 72 ft.**
- b) -Where no tower can be located closer than 750 feet on a horizontal plane to an existing dwelling unit, the applicant can provide 558 feet to 108 Caroline Drive East. Tax Grid No. 6056-03-259396. **Thus requesting a variance of 192 ft.**
- c) -Where no tower can be located closer than 750 feet on a horizontal plane to an existing dwelling unit, the applicant can provide 732 feet to 107 Caroline Drive East. Tax Grid No. 6056-03-238390. **Thus requesting a variance of 18 ft.**
- d) -Where no tower can be located closer than 750 feet on a horizontal plane to an existing dwelling unit, the applicant can provide 585 feet to 114 Caroline Drive East. Tax Grid No. 6056-03-250363. **Thus requesting a variance of 165 ft.**
- e) -Where no tower can be located closer than 750 feet on a horizontal plane to an existing dwelling unit, the applicant can provide 550 feet to 110 Caroline Drive East, Tax Grid No. 6056-03-255378. **Thus requesting a variance of 200 ft.**
- f) -Where no tower can be located closer than 750 feet on a horizontal plane to an existing dwelling unit, the applicant can provide 649 feet to 116 Caroline Drive East. Tax Grid No. 6056-03-242352. **Thus requesting a variance of 101 ft.**

SEQRA Review

The Planning Board acted as lead agency for SEQRA Review of this project under a coordinated review. On September 21, 2020, the Planning Board issued a positive declaration.

On October 16, 2020, the applicant commenced a lawsuit in the United States District Court for the Southern District of New York bearing the caption VERIZON WIRELESS OF THE EAST LP d/b/a/ VERIZON WIRELESS and TARPON TOWERS II, LLC, Plaintiffs, v. TOWN OF

WAPPINGER, TOWN OF WAPPINGER PLANNING BOARD, and TOWN OF WAPPINGER ZONING BOARD OF APPEALS under Case No. 20-CV-8600 (KMK). On January 31, 2022, United States District Judge Kenneth M. Karas, issued an Opinion and Order finding that the Town of Wappinger violated provisions of the Telecommunications Act and directed that the Town issue a decision on the application for the tower within 60 days of the Order.

Pursuant to 6 NYCRR 617.5(c)(40), the actions of any Court, including the issuing of an order to approve a land use application is a Type II Action under SEQRA. See, *Lucas v. Plan. Bd. of Town of LaGrange*, 7 F. Supp. 2d 310, 322 (S.D.N.Y. 1998). Upon the issuance of the Order of the Federal District Court, SEQRA review was concluded.

Public Hearing

The public hearing on the application was opened on June 23, 2020 by way of a virtual Zoom meeting in accordance with an Executive Order during the COVID state of emergency at which time members of the public expressed their opinion regarding the project. The Public Hearing was adjourned until July 28, 2020, August 11, 2020, and then September 22, 2020. At the September 22, 2020 meeting, the ZBA adjourned the public hearing until the November 10, 2022 meeting because the Planning Board as Lead Agency issued a negative declaration. The November 10, 2022, public hearing was not held as the litigation was commenced on October 16, 2020. On March 15, 2022, the public hearing was continued, comment was received and the public hearing was closed.

Review of Area Variance

The determination of the ZBA in granting an variance is guided by Town Law §267-b(3)(b) which states:

(b) In making its determination, the zoning board of appeals shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination the board shall also consider: (1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance.

The proposed cell tower is a public utility under New York Law and it is subject to review under public utility standards. *Cellular Tel. Co. v. Rosenberg*, 82 N.Y.2d 364, 371, 624 N.E.2d 990, 993 (1993). Under the Public Utility standard, the variance must be granted where there is a demonstrated need for the facility to fill gaps in service and there is not a major impact on the community. This is a lesser standard than is set forth at Town Law §267-b(3)(b).

Federal Telecommunications Act

It should be noted that the Town of Wappinger in limiting the placement of personal wireless facilities pursuant to 47 U.S.C. § 332(c)(7)(iv) which states:

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, or modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

This section means that the Town of Wappinger cannot restrict the location of a personal wireless service facilities because of health concerns regarding RF emissions. On its face § 240-81 (G)(4)(c) may well be considered a regulation which is pre-empted by federal law since there is no indication that the regulation is adopted for aesthetic rather than health reasons.

The applicant is required to receive an FCC license for the antennae installation and is required by the terms of the license.

The Federal Court has issued an order that the implies that the ZBA should grant an approval for this application and if it does not, the court will issue the permits.

The ZBA determines that the evidence presented results in the following determinations regarding the above noted factors.

Undesirable Change in Character of the Neighborhood

The erection of a cell tower would result in an undesirable change in the character of the neighborhood, but the change in the neighborhood is well within the standards of the public utility review criteria.

Benefit by Other Feasible Method

The applicant has demonstrated in its siting study that it cannot receive the benefit by another feasible method.

Substantial Nature of Variance

The variance requested is substantial. The largest variance requested is for 200 feet out of a total of 750 feet. The substantial nature of the variance does not negate the public utility criteria as the applicant has demonstrated the need to fill a gap in service.

Adverse Effect or Impact on Physical or Environmental Conditions

The intent of § 240 81 (G)(4)(c) seems to be to protect residents from adverse health effects from the location of personal wireless service facilities. 47 U.S.C. § 332(c)(7)(iv) prohibits the Town from considering health effects of the RF emissions. The FCC has pre-empted the ZBA from looking at that issue. There are no other impacts on the physical or environmental conditions.

Hardship Self-Created

The hardship is not self-created as the applicant has to fill in the service gaps where necessary.

Decision of the ZBA

USDJ Karas has ordered the Town of Wappinger to make a decision within 60 days of his order. The ZBA retains its authority to impose reasonable conditions. Applying the public utility standards to this application, the requested area variance should be granted.

The Application for Variance is **GRANTED**, subject to the following conditions:

1. The variance is subject to site plan approval by the Planning Board. In the event site plan approval is not granted, this variance shall expire.
2. There shall be no clearing of trees within that portion of the 750-foot radius around the tower that lies on parcel 6056-03-339420 to maintain a buffer between the tower and the surrounding houses, except that diseased, dead or dying trees may be removed upon certification by an arborist or similar professional.
3. There shall be no erection of new non-agricultural buildings within that portion of the 750-foot radius around the tower that lies on parcel 6056-03-339420 to maintain a buffer between the tower and the surrounding houses.
4. Provide a redacted copy of a lease that demonstrates that the cell tower will be removed from the property within one year after the cell tower has ceased operation for telecommunication purposes in accordance with the provisions of §240-81(K) of the Town of Wappinger Zoning Code.
5. The parties in the litigation VERIZON WIRELESS OF THE EAST LP d/b/a/ VERIZON WIRELESS and TARPON TOWERS II, LLC, Plaintiffs, v. TOWN OF WAPPINGER, TOWN OF WAPPINGER PLANNING BOARD, and TOWN OF WAPPINGER ZONING BOARD OF APPEALS under Case No. 20-CV-8600 (KMK) shall enter into a Consent Judgment filed with and approved by the United States District Court for the Southern District of New York.

The foregoing is the decision of the ZBA.

The question of the foregoing Resolution was duly put to a vote on roll call, which resulted as follows:

	Aye	Nay	Absent
Mr. DellaCorte Co-Chair	X		
Mr. Barr Member	X		

Mr. Lorenzini Member X

Mr. Shah Member X

Mr. Galotti Chairman X

I hereby certify that the above is a true and correct copy of the Resolution passed by the Town of Wappinger Zoning Board of Appeals at a Special Meeting held on March 15, 2022.

Dated: March 16, 2022

BEA OGUNTI, ZBA SECRETARY

Appeal No. 21-7740 (Interpretation) will be opened in order to be adjourned to April 26, 2022.

Appeal No. 21-7740 (Interpretation)

Ron Evangelista, et al:

The Town of Wappinger Zoning Board of Appeals will conduct an Adjourned Public Hearing on an Interpretation of Section 240-52(C), 240-21(D), 240-15, Non-Residential Schedule Definition of “Mixed Uses” of the District Zoning Regulations in an HM Zoning District. The applicant is seeking an interpretation of the Zoning Administrator, Barbara Roberti’s interpretation of the Zoning Code dated June 20, 2021. The property is located at **123-125 New Hamburg Road, 2357 Route 9D, 2361-2365 Route 9D** and is identified as **Tax Grid Nos. 6157-01-048643 (0.21 acres), 057642 (0.20 acres), 057654 (0.69 acres), 059643 (0.14 acres) & 040637 (0.55 acres)** in the Town of Wappinger. (Public Hearing: January 25, 2022) (Public Hearing adjourned to March 22, 2022)

Mr. Lorenzini:

Mr. DellaCorte:

Vote:

Motion to open the Adjourned Public Hearing.

Second the Motion.

All present voted Aye.

Mr. Lorenzini:

Mr. Barr:

Vote:

Motion to adjourn the Public Hearing to April 26, 2022.

Second the Motion.

All Present voted Aye.

Miscellaneous:

Telecommunications Code.

Mr. Galotti:

Motion to authorize the Zoning Board of Appeals Secretary to write a letter to the Town Board recommending that they consider making changes to the Telecommunications Code.

Mr. Lorenzini:

Second the Motion.

Vote:

All present voted Aye.

Mr. DellaCorte:

Motion to adjourn.

Mr. Barr:

Second the Motion.

Vote:

All present voted Aye.

Respectfully Submitted,

Adjourned: 8:32 pm

Bea Ogunti
Secretary
Zoning Board of Appeals