

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: AT&T

Case No. 10778 – 2011

A hearing was held after due notice on April 18, 2011. The Board members present were: Mr. Dale Callaway, Mr. Ronald McCabe, Mr. John Mills, Mr. Brent Workman and Mr. Jeff Hudson.

Nature of the Proceedings

This is an application for a special use exception for a telecommunications tower.

Finding of Facts

The Board found that the Applicant was seeking a special use exception for a telecommunications tower on a parcel east of Route 1, 100' north of Jefferson Bridge Road, near Bethany Beach, Delaware. After a hearing duly noticed, the Board made the following findings of fact:

1. The Applicant, AT&T, was requesting a special use exception to erect a 100' telecommunications tower and supporting facilities on a parcel of approximately 1.4 acres, currently zoned for commercial use, and lying immediately adjacent to 47 residential condominium units and other residential and commercial properties. Because the subject property is within 500' of residentially zoned property, approval of a special use exception is required.
2. The Applicant met some of the technical aspects of the ordinance (Section 115-194.2 of the Sussex County Code). Specifically, the appropriate setback was shown on a site plan, the monopole was designed to accommodate at least two additional carriers, and provision was made for appropriate lighting.
3. The Applicant submitted a report verifying that radio frequency emissions would be within tolerances established by federal law. As no competing report was submitted, the Board accepted as a fact that there would be no health hazards associated with radio frequency emissions.
4. However, the Board determined that the Applicant had not submitted sufficient evidence to prove other requisite elements of the ordinance. AT&T did not prove a substantial need for a tower at the proposed location, or that existing structures within a two mile radius were not available for a co-location. Specifically, a letter dated January 31, 2011 from the Town of Bethany Beach indicated that the Applicant declined to consider the possibility of an antenna on the stand pipe at the Bethany Beach Water Plant. In addition, the Town of South Bethany indicated that it had never been contacted by the Applicant with respect to the possible placement of antennas on the water tower in the Town of South Bethany. Finally, the Board found persuasive the testimony and written report of Raines Engineering with respect to alternative tower locations in the area, and the possibility of the use of alternative methods of cellular transmission, such as utility pole antennas.
5. The Board was also not persuaded as to AT&T's purported need for seamless service. The opponents' expert witness, Mr. Raines, contested that need, and given the opportunity the Applicant was unable to identify by source such a requirement. In addition, numerous individuals suggested that AT&T's cell phone service was adequate.
6. Both the Applicant and the opposition presented real estate appraisers and reports. From a general standpoint, the Board found the appraisal testimony and information from the opposition more persuasive. By way of example, the appraisal of Landmark Associates pointed out that when supply outweighs demand, deficiencies in existing inventory (such as a nearby cell tower) are accentuated. The appraisal by McCain & Associates on behalf of the Applicant confirmed Landmark's opinion as to the oversupply and the ability to avoid undesirable properties. Landmark estimated that the cell tower would result in a reduction of real estate values by 10%-20%, and the report from Handy Realty

estimated that reduction to be in the 15%-30% range. Handy also noted that there were 64 residential properties within just a 500' radius of the tower itself. The Board did not find persuasive the appraisal of the Trice Group on behalf of the Applicant, which found no measurable loss in value. It also found that the McCain appraisal noted insufficient data to utilize its preferred "matched pairs". From the opponents' expert testimony, the Board found that the use of properties in the surrounding community will be adversely affected by the proposed tower. In addition, the Board found that from the oppositions' lay testimony the use of properties in the surrounding community will be adversely affected by the proposed tower.

7. The Board also found persuasive the testimony of several individuals with respect to property values. By way of example, the evidence included a January 20, 2011 letter from Greg Cox, a realtor, who had recently purchased a unit in Sea Pines Village adjacent to the cell tower location. He did so with the understanding that the tower request had been denied, and before he learned that the matter would be reheard. He also included in his letter his personal observations that sales do not take place when prospective buyers learn of a potential cell tower. Other individuals also testified that the temporary tower in existence has created issues with property values and interfered with potential rental agreements.
8. The Board also found that an adverse effect on uses of surrounding properties can exist separate and apart from a reduction in value. Several Sea Pines Village owners testified that the lighting on towers, required by the County's ordinance, disturbed residents. Others were concerned with the noise from generators in the event electricity was lost, maintenance work, potential fires, and increased lightning strikes. Another witness pointed out that the tower was significantly higher than trees in the area and was aesthetically out of character with the surrounding community.
9. The Board expressed significant concern with the fact that the tower was located on the same property as gasoline pumps and gasoline storage. The Board noted the possible catastrophic results in the event of a lightning strike with gasoline storage tanks and pumps located within close proximity, as well as the well-known but informal "warning" that using cell phones near gas pumps was dangerous. The Board also found persuasive the video evidence submitted by opponents showing fires taking place on cellular towers, and again noted the danger of having the cell tower on the same property as gasoline storage.
10. In addition to the individuals appearing and testifying in opposition, the Board received more than 65 letters in opposition, as well as a petition opposing the Application signed by more than 300 persons. Although the ordinances regarding special use exceptions do not make provision for any specific number of individuals claiming to be adversely affected, it was impossible for the Board to disregard the large number of individuals opposing the tower, most of whom live nearby, and who believed the tower would adversely affect in some fashion the use of their own properties. As a result of the significant and substantial evidence presented and submitted in opposition to the application, the Board found that the Applicant had not met its burden of proving that the proposed use would not affect adversely the uses of adjacent and neighboring properties.

By motion made and duly seconded to deny the application by AT&T, the Board unanimously denied the special use exception by a vote of 5 in favor of the motion and 0 opposed.

Decision of the Board

Upon motion duly made and seconded, the application was denied. The Board members voting in favor of denial were: Mr. Callaway, Mr. McCabe, Mr. Mills, Mr. Workman, and Mr. Hudson; voting against denial – none.

**BOARD OF ADJSUTMENT
OF SUSSEX COUNTY**

Dale Callaway

Dale Callaway
Chairman

Date May 26, 2011