

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: AT&T

(Case No. 11296)

A hearing was held after due notice on November 18, 2013. The Board members present were: Mr. Dale Callaway, Mr. Jeff Hudson, Mr. John Mills, Mr. Norman Rickard, and Mr. Brent Workman.

Nature of the Proceedings

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

Findings of Fact

The Board found that the Applicant was seeking a special use exception for a telecommunications tower. This application pertains to certain real property located east of Route 1 (Coastal Highway) 100 feet north of Jefferson Bridge Road (Road 361-A); said property being identified as Sussex County Tax Map Parcel Number 1-34-17.07-191.00. After a hearing, the Board made the following findings of fact:

1. The Board found that the Office of Planning & Zoning received eight (8) letters and emails in support of the Application and sixty-eight (68) letters and emails in opposition to the Application.
2. The Board found that the Office of Planning & Zoning received a letter from the Sussex Conservation District and an email from Angela Horning about the Application.
3. The Board found that the Applicant, through counsel, submitted a binder of exhibits to the Board and that Brock Riffel, Tom Zolna, Dr. Ken Foster, Mario Calabretta, Leland Trice, William McCain, and Bryan Pepper were sworn in and testified in support of the Application.
4. The Board found that David Gerk, Dr. Jeremy Raines, Vicki York, Randall Handy, Greg Cox, Lew Killmer, Greg Miller, Barbara Gerk, John Hefferly, Lauren Marriot, Alexander Smith, and Dana Gerk were sworn in and testified in opposition to the Application.
5. The Board found that David Gerk submitted to the Board for review exhibits which support the opposition to the Application.
6. The Board found that David Gerk testified that he owns Unit 14 in the nearby Sea Pines Village and that he is mechanical engineer with a law degree.
7. The Board found that David Gerk testified that the tower will "kill the community".
8. The Board found that David Gerk testified that the Board previously denied an application for a telecommunications tower on the Property.
9. The Board found that David Gerk testified that the Applicant has the burden of proof and must demonstrate that existing structures within a two (2) mile radius of the site are not available for collocation and that there is a need for the tower in the area.
10. The Board found that David Gerk testified that he believes the Applicant can collocate and does not need the tower.
11. The Board found that David Gerk testified that the gap in coverage can easily be filled and that there are ways to deal with interference.
12. The Board found that David Gerk testified that there are multiple locations available for collocation as there are three (3) lattice towers and a water tower available for collocation.
13. The Board found that David Gerk testified that Sea Pines Village is a large rental community and that Bethany Beach has a population of 1,000 people.

14. The Board found that David Gerk testified that there is a large reduction in property values and rentals in the area due to the tower.
15. The Board found that David Gerk testified that the safety hazards due to the proposed tower are real threats and that placing a monopole in a retention pond next to a gas station, two (2) blocks from the ocean creates a hazard to surrounding properties.
16. The Board found that David Gerk testified that the tower creates a flooding issue to surrounding properties as the temporary tower has already caused the retention pond to rise and flood his property.
17. The Board found that David Gerk testified that the views of the surrounding properties are important and the tower will adversely affect those views.
18. The Board found that David Gerk testified that the tower adversely affects the uses and enjoyment of surrounding properties.
19. The Board found that David Gerk testified that any provider is obligated to take any 911 calls being made in the area that are not picked up by the individual's carrier.
20. The Board found that David Gerk testified that another seven (7) unit townhouse development has been approved adjacent to the site.
21. The Board found that David Gerk testified that a monopole structure is less stable than other style towers.
22. The Board found that David Gerk testified that potential renters are concerned about the safety hazards and nuisance factors associated with the tower.
23. The Board found that David Gerk testified that each unit that cannot be rented results in approximately a \$13,000.00 per year loss to the property owner.
24. The Board found that Dr. Raines testified that he has a PhD in electromagnetics and that he has been involved in the study of cell towers since the 1980s.
25. The Board found that Dr. Raines testified that there are numerous sources of interference which affect cell phone coverage and that interference results from jamming caused by other electronic devices such as cable television amplifiers.
26. The Board found that Dr. Raines testified that a phone signal should carry six (6) miles, but rarely does due to interference.
27. The Board found that Dr. Raines testified that he disputes that the Applicant's computer models are accurate. Dr. Raines testified that it is impossible to be that precise when the propagation path is ever changing and that predicting coverage is like predicting the weather.
28. The Board found that Dr. Raines testified that the Applicant's prediction methods are uncertain to within a factor of the square root of ten (10).
29. The Board found that Dr. Raines testified that a cell phone user can reliably expect to communicate within two (2) miles of a base station.
30. The Board found that Dr. Raines testified that he believes there are six (6) other possible tower sites within the two (2) mile radius and that, in his professional opinion, a tower is not needed at this location.
31. The Board found that Dr. Raines testified that the Applicant could use utility poles in the area.
32. The Board found that Mr. Handy testified that he has been a real estate licensed broker since 1971 and that he has been a licensed appraiser since 1990.
33. The Board found that Mr. Handy testified that he has been retained to comment on the potential impact of the proposed tower on values of nearby properties and that he updated his study about the impact of the tower on property values.
34. The Board found that Mr. Handy testified that, to perform a matched pair analysis, all properties would need to be appraised and that the only way to analyze the impact of the tower on property values is to look at the relationship between the final sales price and the listed prices.
35. The Board found that Mr. Handy testified that he looked at ten (10) sales in Sea Pines and looked at the final sales price versus the listed sales price.

36. The Board found that Mr. Handy testified that his study pointed to a range in reduction of value from ten percent (10%) up to as much as thirty percent (30%).
37. The Board found that Mr. Handy testified that common sense can determine how a tower near the units will impact the value and use of surrounding properties.
38. The Board found that Mr. Handy testified that the tower is a "major" change to the area and that the tower will absolutely substantially adversely affect the uses of neighboring and adjacent properties.
39. The Board found that Ms. York testified that she is a local realtor and has served the Bethany Beach area since 1995.
40. The Board found that Ms. York testified that the tower negatively impacts the values of surrounding properties.
41. The Board found that Ms. York testified that potential buyers see the temporary tower as they approach houses in Sea Pines Village and refuse to look at the units for sale or rent.
42. The Board found that Ms. York testified that dwellings near the tower are listed lower than comparable units due to the location of the tower.
43. The Board found that Ms. York testified that sales have been twenty percent (20%) to thirty percent (30%) lower than the listed price.
44. The Board found that Ms. York testified that the tower substantially adversely affects the uses of neighboring and adjacent properties.
45. The Board found that Mr. Cox testified that he has been a realtor in the Rehoboth area for eight (8) years.
46. The Board found that Mr. Cox testified that he purchased Unit 4 in Sea Pines below market price and that, when he showed the unit, the buyer was no longer interested after seeing the tower.
47. The Board found that Mr. Cox testified that the listing price and the sales price are very relevant and that there has been a forty three percent (43%) drop in property values on Lagoon Drive.
48. The Board found that Mr. Cox testified that there has been a twenty nine percent (29%) drop in property values on other units in Sea Pines.
49. The Board found that Mr. Cox testified that, in 2004, there was only a one percent (1%) difference in sale prices throughout the community.
50. The Board found that Mr. Cox testified that the gas station and the fast food restaurant were on the Property in 2004.
51. The Board found that Mr. Cox testified that the existence of the tower has created a larger gap in property values between units which are closer to the tower and units which are not as close to the tower.
52. The Board found that Mr. Cox testified that, since the tower was erected, there has been approximately an 18.20% drop in sales prices on Lagoon Drive compared to other streets in the community.
53. The Board found that Mr. Cox testified that he currently rents Unit 4 but has had no repeat renters and he attributes that to the tower.
54. The Board found that Mr. Cox testified that the seller must disclose the existence of the tower to prospective purchasers.
55. The Board found that Mr. Cox testified that the tower substantially adversely affects the surrounding and neighboring properties.
56. The Board found that Mr. Cox testified that the tower can be seen from his bedroom window.
57. The Board found that Mr. Killmer testified that he is a member of the Town of Bethany Beach Council and that the Council reached out to AT&T and were told "we have our tower".
58. The Board found that Mr. Killmer testified that the tower has a substantially adverse effect on Sea Pines Village and the property values, aesthetics, and safety thereof.
59. The Board found that Mr. Killmer testified that AT&T has not explored other sites.

60. The Board found that Mr. Miller testified that he has a Bachelor's Degree in Engineering.
61. The Board found that Mr. Miller testified that he purchased Unit 9 in the spring of 2013 and that he saw the temporary tower and was told it had been denied and would be removed.
62. The Board found that Mr. Miller testified that according to his exhibits AT&T does not need a tower as the website states it has the "best" coverage.
63. The Board found that Mr. Miller testified that AT&T wants to increase the data traffic.
64. The Board found that Mr. Miller testified that he disputes the "clutter" average in the area.
65. The Board found that Mr. Miller testified that AT&T could use utility poles for antennas.
66. The Board found that Mr. Miller testified that the use substantially affects his property.
67. The Board found that Barbara Gerk submitted to the Board for review exhibits which support the opposition to the Application.
68. The Board found that Barbara Gerk testified that she is the President of the Homeowners Association for Sea Pines Village and that she is a resident and will not stay if the tower is permitted.
69. The Board found that Barbara Gerk testified that there are no dead zones in the area.
70. The Board found that Barbara Gerk testified that the Applicant wants the tower to generate revenue.
71. The Board found that Barbara Gerk testified that the temporary tower has been there since 2009.
72. The Board found that Barbara Gerk testified that the site is dangerous as there are 32,000 gallons of gas on the convenience store site and that the tower is too close to the tanks on the site.
73. The Board found that Barbara Gerk testified that the backup batteries use hydrogen and lithium which are also hazardous materials.
74. The Board found that Barbara Gerk testified that flooding issues have increased since the tower has existed on the site.
75. The Board found that Mr. Hefferly testified that he has owned a unit in Sea Pines for twenty four (24) years.
76. The Board found that Mr. Hefferly testified that he is also an AT&T customer and that he has had no problems with his service.
77. The Board found that Mr. Hefferly testified that he questions the accuracy of AT&T's data.
78. The Board found that Mr. Hefferly testified that he has searched the area with his phone for a gap in coverage and found none and that he does not believe the tower is necessary.
79. The Board found that Ms. Marriott testified that she is a member of the Bethany Beach Landowners Association.
80. The Board found that Ms. Marriott testified that she submitted a letter to the Board and strongly suggests the Board deny the case once again because the use will substantially adversely affect the surrounding properties.
81. The Board found that Mr. Smith testified that the argument that a cell tower does not affect neighboring properties and you can still live and enjoy your property near this site is ridiculous.
82. The Board found that Mr. Smith testified that the site is a bad location and is surrounded by residences.
83. The Board found that Dana Gerk testified that she owns Unit 14 in Sea Pines.

84. The Board found that Dana Gerk testified that that towers can fall creating a highly dangerous situation for surrounding property owners.
85. The Board found that Dana Gerk testified that the use will substantially adversely affect her property.
86. The Board found that two (2) parties appeared in support of the Application.
87. The Board found that forty-two (42) parties appeared in opposition to the Application.
88. Due to the late hour of the night, the Board voted to continue the case for rebuttal purposes until its meeting on December 9, 2013
89. At its meeting on December 9, 2013, the Board heard additional testimony regarding the Application. The Applicant was afforded the opportunity to present rebuttal testimony and evidence and persons in opposition were afforded the opportunity to present sur-rebuttal evidence and testimony as well. The Applicant was afforded the opportunity to rebut any sur-rebuttal testimony and evidence.
90. The Board found that Mario Calabretta, Brock Riffel, Tom Zolna, William McCain, and Leland Trice were sworn in to testify in support of the Application on December 9, 2013.
91. The Board found that Barbara Gerk, John Hefferly, Ron Gerk, Greg Cox, and Cathy Vingazo were sworn in and testified in opposition to the Application on December 9, 2013.
92. The Board found that Barbara Gerk testified that the Applicant has not met its burden of proof.
93. The Board found that Barbara Gerk testified that there are other locations in the area for collocation and that the Applicant has not looked for another site since 2009.
94. The Board found that Barbara Gerk testified that there are three (3) other sites within a two (2) mile radius available to collocate.
95. The Board found that Barbara Gerk testified that the Applicant could place antennas on utility poles.
96. The Board found that Barbara Gerk testified that the Applicant's application is fatally deficient.
97. The Board found that Barbara Gerk testified that the tower does and will substantially adversely affect the surrounding neighboring and adjacent properties.
98. The Board found that Barbara Gerk testified that the appraisers used by the Applicant are not local.
99. The Board found that Barbara Gerk testified that the ten percent (10%) to thirty percent (30%) drop in property values are due to the tower.
100. The Board found that Barbara Gerk testified that the tower must be disclosed when selling a property and substantially adversely affects the property value.
101. The Board found that Barbara Gerk testified that the tower has an adverse effect on rental rates and occupancy for neighboring and adjacent properties and that the lack of repeat renters is very unusual in this area.
102. The Board found that Barbara Gerk testified that there are numerous hazards to consider at the site of the tower as the existing power lines, gas station and the tower being placed within the Storm Water Management pond create dangers to the surrounding properties.
103. The Board found that Mr. Hefferly testified that the proposed tower is to be located in the Storm Water Management Pond.
104. The Board found that Barbara Gerk testified that the Applicant has failed to meet its burden for approval of the tower and that the Applicant did not try to find other alternatives to building this tower.
105. The Board found that Ron Gerk testified that Exhibit 8 submitted on November 18, 2013 shows that the tower will be fifteen (15) feet into the existing retention pond and that the tower should not be constructed in the pond because the tower will

have unstable footing and water exposure which will accelerate the deterioration of the tower.

106. The Board found that Ron Gerk testified that the flooding from the pond has worsened since the installation of the temporary tower.
107. The Board found that Ron Gerk testified that the Applicant has no clue how deep it will have to dig to find suitable soil.
108. The Board found that Ron Gerk testified that the site is only one (1) block from the ocean.
109. The Board found that Ron Gerk testified that trees in the area were uprooted during Hurricane "Sandy".
110. The Board found that Ron Gerk testified that there is no clutter preventing the cell phone service.
111. The Board found that Ron Gerk testified that he is adversely affected by the tower and that he sees the tower every day.
112. The Board found that Mr. Cox testified that he has been a realtor for ten (10) years and that he made a living analyzing data and that data can be analyzed in any direction to suit a need.
113. The Board found that Mr. Cox testified that he believes the Applicant has manipulated the data to support the Application and that the top sales in Sea Pines are some of the lowest priced units east of Route One.
114. The Board found that Mr. Cox testified that realtors show properties, not appraisers.
115. The Board found that Mr. Hefferly testified that the Applicant is using a "fog and mirror" approach to their testimony.
116. The Board found that Mr. Hefferly testified that he questioned if the Applicant investigated the location or time of dropped calls in the area.
117. The Board found that Mr. Hefferly testified that during high call volume situations mobile units could be used to help provide coverage during these times.
118. The Board found that Mr. Hefferly testified that the data presented by the Applicant is four (4) years old and unacceptable and that the Applicant has failed to consider the numerous utility poles in the area.
119. The Board found that Mr. Hefferly testified that the standard for the need is key.
120. The Board found that Mr. Hefferly testified that he questions the definition of reliability and if eighty percent (80%) coverage is considered reliable.
121. The Board found that Mr. Hefferly testified that he questioned if there is enough room at the site for the other carriers to house their equipment.
122. The Board found that Mr. Hefferly testified that he has concerns for vibrations created from the tower and the water table.
123. The Board found that Mr. Hefferly testified that the tower can be seen from the pool.
124. The Board found that Ms. Vingazo testified that she lives in Ocean View and that she is the leader of a consortium of a homeowners group consisting of approximately 1,500 homeowners.
125. The Board found that Ms. Vingazo testified that she is concerned about the hazardous area surrounding the tower site.
126. The Board found that Ms. Vingazo testified that "repeat renters" are the bread and butter of the resort area.
127. The Board found that Ms. Vingazo testified that she feels the poor reviews that reference the gas station include the tower even though the tower was not mentioned specifically.
128. The Board found that Ms. Vingazo testified that she feels there are more sites available to the Applicant and that she disputes that there is a gap in coverage for the cell tower.

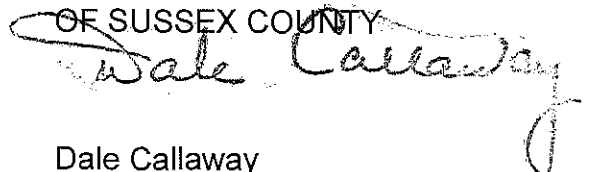
129. The Board found that Ms. Vingazo testified that the tower would cause a catastrophe if it falls down.
130. The Board found that Barbara Gerk submitted to the Board for review exhibits which support the opposition to the Application.
131. The Board tabled its decision on the matter.
132. At its January 6, 2014 meeting, the Board tabled the decision.
133. At its January 27, 2014 meeting, the Board discussed the Application. The Board considered all of the evidence in the public record, the evidence and testimony presented by the Applicant, its witnesses, and supporters and the evidence and testimony presented persons in opposition to the Application.
134. Based on the findings above and the testimony and evidence presented at the public hearing and the public record, the Board determined that the Application failed to meet the standards for granting a special use exception because the use substantially affects adversely the uses of adjacent and neighboring properties. The proposed site of the tower is located adjacent to residential properties which are used as primary residences and vacation homes near the beach. Evidence and testimony from neighbors confirm that the temporary tower has substantially affected adversely the use and enjoyment of neighboring and adjacent properties and that the proposed tower will do the same. The Board weighed the evidence from the Applicant and the opposition about the need for the proposed cell tower and the Board found that the Applicant failed to demonstrate that the proposed tower was needed. The evidence demonstrates that the Applicant's own website promotes that the Applicant has the best coverage which means that the signal "should be sufficient for most in-building coverage" in the area. The opposition presented testimony and evidence which indicates that cell phone coverage is available and adequate in the area surrounding the tower and that the tower is unnecessary. The Board found this testimony and evidence persuasive. The Board denied the Application.

The Board denied the special use exception application finding that it failed to meet the standards for granting a special use exception for a telecommunications tower.

Decision of the Board

Upon motion duly made and seconded, the special use exception application was denied. The Board Members in favor of the Motion to Deny the special use exception application were Mr. Dale Callaway, Mr. John Mills, and Mr. Norman Rickard. Mr. Jeffrey Hudson and Mr. Brent Workman voted against the Motion to Deny the special use exception application.

BOARD OF ADJUSTMENT
OF SUSSEX COUNTY



Dale Callaway
Chairman

Date March 25, 2014.