

MINUTES OF DECEMBER 9, 2013

The regular meeting of the Sussex County Board of Adjustment was held on Monday, December 9, 2013, at 7:00 p.m. in the County Council Chambers, County Administrative Office Building, Georgetown, Delaware.

The meeting was called to order at 7:00 p.m. with Chairman Callaway presiding. The Board members present were: Mr. Dale Callaway, Mr. John Mills, Mr. Brent Workman, Mr. Jeff Hudson, and Mr. Norman Rickard, with Mr. James Sharp – Assistant County Attorney, and staff members, Mr. Lawrence Lank – Director of Planning and Zoning, and Mrs. Jennifer Norwood – Recording Secretary.

Motion by Mr. Mills, seconded by Mr. Hudson, and carried unanimously to approve the Agenda as circulated. Motion carried 5 – 0.

Motion by Mr. Mills, seconded by Mr. Rickard, and carried unanimously to approve the Minutes and Finding of Facts for the October 21, 2013 as circulated. Motion carried 5 – 0.

Motion by Mr. Mills, seconded by Mr. Workman, and carried unanimously to approve the Minutes and Finding of Facts for November 4, 2013 as circulated. Motion carried 5 – 0.

Mr. Sharp read a statement explaining how the Board of Adjustment meeting is conducted and the procedures for hearing the cases.

PUBLIC HEARINGS

Case No. 11297 – Stephen Yarmola – east of Route 24, and being west of White Pine Drive approximately 2,350 feet northeasterly of Route 24 and also being Lot 74 within Pines at Long Neck Development. (Tax Map I.D. 2-34-23.00-783.00)

An application for a variance from the side yard setback requirement.

Mr. Lank presented the case and read a letter of support from the Pines at Long Neck Homeowners Association. Mr. Lank also read a letter of opposition from a next-door neighbor into the record.

Stephen Yarmola was sworn in and testified requesting a variance of 2.5 feet from the ten (10) feet side yard setback requirement for an existing screen porch. Mr. Yarmola submitted exhibits to the Board to review. Mr. Yarmola testified that he originally spoke to his neighbor about placing his hot tub on the Property until his concrete pad was completed; that the neighbors permitted him to use their property; that once the concrete pad was complete he obtained a building permit to construct a screen porch on the existing concrete pad; that the porch will provide shelter and privacy to his hot tub and fitness equipment; that during the construction of the porch the neighbors were unhappy with the look of the porch; that at the time the porch was not yet painted to match the dwelling; that the porch now matches the rest of the structure; that the setback requirement was correctly listed on his building permit; that his first

survey, dated January 9, 2012, showed that the existing deck and screen porch were 10.5 feet from the side yard property line; that he lined the new screen porch up with the existing structure; that a second survey, completed on September 16, 2013, showed the encroachment; that the Homeowners Association is in support of the Application; that his lot is an odd shaped lot; that the variance is necessary enable reasonable use of the Property; that the variance does not alter the character of the neighborhood; that the porch will enhance the dwelling; that the variance is not detrimental to the public welfare; that the variance sought is the minimum variance to afford relief and that the variance is the least modification of the regulation at issue; that he measured for the porch based on the January 9, 2012 survey; that he moved into the Property in January 2012; and that he was unaware of the encroachment until after construction because he thought he was within the building envelope.

The Board found that no parties appeared in support of or in opposition to the Application.

Motion by Mr. Hudson, seconded by Mr. Mills, and carried unanimously that the case be taken under advisement. Motion carried 5 – 0.

At the conclusion of the public hearings, the Chairman referred back to this case. Mr. Hudson stated that he would move that the Board recommend approval of Variance Application No. 11297 for the requested variance based on the record made at the public hearing and for the following reasons:

1. The Property is unique in shape and the two (2) surveys create a unique situation;
2. The Property cannot otherwise be built in strict conformity with the Sussex County Zoning Code;
3. The difficulty was not created by the Applicant;
4. The variance will not alter the essential character of the neighborhood; and
5. The variance sought is the minimum variance necessary to afford relief.

Motion by Mr. Hudson, seconded by Mr. Rickard, and carried unanimously that the variance be **granted for the reasons stated**. Motion carried 5 – 0.

The vote by roll call; Mr. Mills – yea, Mr. Hudson – yea, Mr. Rickard – yea, Mr. Workman – yea, and Mr. Callaway – yea.

Case No. 11298 – Amen Ministries – northeast of Myrtle Avenue 147 feet northwest of Delaware Street (Road 297A) and being Lots 27, 28, and 32 of Bookhammer Addition to Oak Orchard. (Tax Map I.D. 2-34-34.08-67.00)

An application for a special use exception for a transitional home.

Mr. Lank presented the case and stated that the Office of Planning and Zoning received statements from the tenants of the transitional home, three (3) letters in support of the Application, a petition in support with thirty-two (32) signatures, and one (1) letter in opposition to the Application.

Raymond Perry was sworn in and testified requesting a special use exception for a transitional home. Mr. Perry testified that, in 2007, he took in a homeless man; that he was once homeless and understands the difficulties homeless men face; that he provides a place for the men to stay and help them get back on their feet; that he uses the Property as a place for recovering addicts to start over; that he works with local churches and agencies and was not aware a special use exception was required for this type of use; that he understands the complaint was filed by the local fire department due to concern that many people are living in the residence; that he is a member of the fire department; that he contacted the State Fire Marshal and was told there were no regulations for a transitional home; that the State Fire Marshal suggested that he limit the number of people to four (4); that more than four (4) people living in the house would require substantial updates to the dwelling; that the current tenants that live in the home with him are mentally challenged or unable to live on their own; that the crime rate in the neighborhood has dropped since he has lived in the area; that he works closely with Delaware State Police Troop 4; that the police will often contact him to see if he can provide shelter to someone; that his property at times has been an eyesore to the community but the Property has been cleaned up; that the neighborhood is residential; that a six (6) unit apartment building is located nearby; that he rents the Property; that the dwelling has four (4) bedrooms; that his wife works upstate through the week and lives at the dwelling on weekends; that additional people may stay a few nights until he is able to them another place to stay; that the use does not substantially adversely affect the neighborhood; that the use will provide housing for no more than eight (8) tenants at one time; that four (4) people live in the house now (exclusive of his wife who lives there on weekends); that the house is very big; that he has room for three (3) additional people to stay a few nights; that he has been using the house in this manner for the past three (3) years; that he will install the required smoke and carbon monoxide detectors; that he is aware the State Fire Marshal may require more updates to the home; and that there may be other agency approvals needed to operate the home.

Gary Knapp was sworn in and testified in support of the Application. Mr. Knapp testified that he is a pastor at a local church; that he fully supports the work being done by the Applicant; that the Property is in keeping with the neighborhood as there are other similar structures in the neighborhood; that the home has a positive effect to the neighborhood; and that the Applicant has been an asset to the community.

Calvin Miller was sworn in and testified in support of the Application. Mr. Miller testified that he is an elder at a local church; that the Applicant has helped lessen crime in the neighborhood; and that the use is not detrimental to the community.

Matthew Miller was sworn in and testified in support of the Application. Mr. Miller testified that he is an elder at a local church; that he teaches bible study at the home on Tuesdays; that he has seen men go on to succeed in the neighborhood due to the help provided by the Applicant; and that the Applicant is serving a great benefit to the County.

Charles Minter was sworn in and testified in support of the Application. Mr. Minter testified that he has been to the Property for bible study; that he supports the Application; and that the residents must live by certain rules or they are required to leave the house.

Bryan Miller was sworn in and testified in support of the Application. Mr. Miller testified that he has personally participated in helping with the house; that he aided by having eight (8) fire extinguishers donated to the home; and that he fully supports the Application.

The Board found that fourteen (14) parties appeared in support of the Application.

The Board found that no parties appeared in opposition to the Application.

Mr. Mills stated that he would move that the Board recommend approval of Special Use Exception No. 11298 for the requested special use exception based on the record made at the public hearing because the use does not substantially affect adversely the uses of the adjacent and neighboring properties. The approval was granted for up to eight (8) people to reside in the dwelling.

Motion by Mr. Mills, seconded by Mr. Hudson, and carried unanimously that the special use exception be **granted with the stipulation that no more than eight (8) people reside in the dwelling for the reasons stated**. Motion carried 5 – 0.

The vote by roll call; Mr. Workman – yea, Mr. Rickard – yea, Mr. Hudson – yea, Mr. Mills – yea, and Mr. Callaway – yea.

OLD BUSINESS

Case No. 11296 – AT&T – east of Route 1 (Coastal Highway) 100 feet north of Jefferson Bridge (Road 361-A). (Tax Map I.D. 1-34-17.07-191.00)

An application for a special use exception for a telecommunication tower.

Continued from November 18, 2013 for rebuttal purposes only.

Mr. Sharp stated to the Board that he had reviewed a letter and CD submitted by individuals opposing the Application and stated that, since the hearing was tabled for rebuttal purposes only, the letter and CD have not been made part of the public record. Mr. Sharp further

stated that the opposition will be afforded an opportunity to rebut the Applicant's rebuttal but that any surrebuttal will be very limited in scope; though the opposition will be allowed to submit evidence and testimony which rebuts the Applicant's rebuttal.

Richard Forsten, Esquire, present on behalf of the Applicant, stated that the Applicant is requesting a special use exception for a telecommunication tower; that he wants to correct misstatements made during the hearing on November 18, 2013; that flooding in the area was due to the heavy rain in the area, not by the temporary tower; that the Applicant plans to explore increasing the capacity of the Storm Water Management Pond; that the antennas on a nearby utility pole are owned by T-Mobile; that there was, at one time, an AT&T sticker at that utility pole; that the temporary tower has been in place for three (3) years; that the sales market in Sea Pines has followed along with the sales market in the area; that there is no data to support the tower affects the sales or values of property in the area; that six (6) out of the top ten (10) sales were in the Sea Pines development; that the tower, over time, will fade in the background just like power lines and utility poles; that sixty (60) feet tall utility poles surround Sea Pines; that there are multiple commercial uses in the area; that reviews submitted by tenants never showed any complaints about the nearby tower; and that the units in Sea Pines are continually rented each summer.

Mario Calabretta was sworn in to testify about the Application. Mr. Calabretta testified that he is a civil engineer and he has worked in the telecommunications industry for fourteen (14) years; that the flooding in the area was not caused by the temporary tower; that the existing pond contains 10,000 square-feet; that to increase the elevation in the pond by one (1) inch would take eight-hundred (800) cubic feet of volume; that the tower would only increase the volume by one (1) cubic foot; that the plan for the pond is to have zero impact on its capacity; that the pond will be reconfigured to maintain the capacity requirement; that the photo submitted by the opposition does not appear to be accurate or to scale; that the tower will meet all construction and safety standards; that the Applicant will use a boring drill to find suitable soil to handle the new structure; that the proposed tower will be approximately the same distance from the pond as the temporary tower; and that the temporary tower was in place when Hurricane "Sandy" hit the area.

Mr. Forsten stated that AT&T is responsible for removing the tower if it is no longer used or needed.

Brock Riffel was sworn in to testify about the Application. Mr. Riffel testified that the temporary tower provides temporary coverage; that the promotional maps used by AT&T show good coverage in the area due to the temporary tower; that there was simply no data to support the testimony of Dr. Jeremy Raines in reference to spheres of radio waves; that he also is unaware of any experience Dr. Raines has in designing wireless networks; that he also questions Dr. Raines' statement about two (2) mile distance for coverage of all cell phones; that there are many factors to determine signal strength such as "clutter" which is caused by houses, cars and

businesses which dramatically impact frequencies; that the propagation tool and software used by the Applicant is a tool all carriers use to base their decisions; that the tool has been used in the industry for over twenty (20) years; that AT&T does not have an interference problem; that a new facility would not be the solution to an interference problem; that there are no other structures available in the area; that there is a rule in place for other carriers to pick up emergency calls made through another network but, in reality, it is often difficult for that work because different carriers use different frequencies and the user's phone must be designed to work with the different frequencies; that an AT&T phone will not work on a Verizon or Sprint network; that the sticker on the T-Mobile site which had an AT&T label was actually placed at the wrong location; that the sticker was the label for the temporary tower site; that AT&T does not have equipment that will fit on a utility pole; that smaller carriers are able to use utility poles but he has never seen any of the larger carriers use utility poles; that Verizon does not have any antennas on utility poles; that generators are being installed at all new sites; that the Applicant intends to add generators to existing sites as well; that there is a great need for generators to prevent power outages during storms; that the FCC is considering regulations requiring that all towers have generators located on site; that DAS (Distributed Antenna System) would not work in this area; that it would take roughly twenty (20) facilities to operate in the Bethany Beach area; and that the proposed one-hundred (100) feet is to provide reliable coverage in the heart of the town of Bethany Beach.

Mario Calabretta testified that the generator is a self-contained unit; that the generator will be housed in its own room within the proposed shelter; that the tower will be designed to withstand one-hundred twenty (120) miles per hour winds; and that the site experienced no issues during Hurricane "Sandy" with the temporary tower.

Tom Zolna was sworn in to testify about the Application. Mr. Zolna testified that Verizon is interested in using the proposed tower for collocation.

Bill McCain was sworn in to testify about the Application. Mr. McCain testified that since the temporary tower has been in place there has been no effect to the rental business in Sea Pines; that the tower does not substantially adversely affect the neighborhood; that he found fifty-nine (59) reviews from renters in Sea Pines; that there were no complaints in reference to the existing temporary tower; that the complaints referenced the lighting from the gas station and the odors from the crab house restaurant; that he is a member of the Appraisal Institute; that he recently attended a seminar on the effect cell towers may have on property values; that the nine (9) studies completed by the Appraisal Institute showed no evidence to quantify damage to property value due to cell towers; and that the data shows the tower does not have a negative impact to the neighborhood.

Mr. Forsten submitted to the Board copies of the reviews studied by Mr. McCain.

Leland Trice was sworn in to testify about the Application. Mr. McCain testified that he reviewed Glenn Piper's report that was prepared in 2011 and submitted by the opposition; that there was no analysis in Mr. Piper's report to Sea Pines or market trends; that Mr. Piper sent surveys to other realtors and only had eighteen (18) responses; that surveys are anecdotal data and not acceptable; that the reports cited do not support Mr. Piper's conclusion and that Mr. Piper did not look at Sea Pines sales or update his research; that one of the studies cited by Mr. Piper concludes that a cell tower does not decrease property values; that another study cited by Mr. Piper concluded that a tower could have an impact of approximately two percent (2%) on value; that he reviewed Mr. Handy's reports and he used list price versus sales price which is not evidence of fair market values for appraisers; that one unit in Mr. Handy's report which was sold for a low amount was actually sold in 2000, not 2010, as stated in the report; that Mr. Handy used two (2) distressed properties and one sale that did not show a list price; that after removing these units from the report it shows sales ten percent (10%) off list prices which is not unusual; that the reasonable man standard is not used in the industry; and that the industry uses factual data; and that he does not believe the tower will substantially adversely affect the neighboring and adjacent properties.

Richard Forsten stated that the Applicant needs the tower due to the demand; that the tower will increase coverage from twenty percent (20%) to ninety-three percent (93%) in the area; that the Applicant has the statistics to prove the necessity of the tower; and that the Applicant has met the standards for granting the special use exception.

The Board took a ten (10) minute recess.

Barbara Gerk was sworn in and testified in opposition to the Application. Ms. Gerk testified that the Applicant has not met its burden of proof; that there are other locations in the area for collocation; that the Applicant has not looked for another site since 2009; that the Applicant's application is fatally deficient; that there are three (3) other sites within a two (2) mile radius available to collocate; that AT&T operated an antenna on a nearby utility pole; that the Applicant could place antennas on utility poles; that the tower does and will substantially adversely affect the surrounding neighboring and adjacent properties; that the appraisers used by the Applicant are not local; that the ten percent (10%) to thirty percent (30%) drop in property value is due to the tower as noted by the opposition's experts; that the variety of uses and smells of adjacent properties is expected in the resort area; that the tower must be disclosed when selling a property and substantially adversely affects the property value; that the tower has an adverse effect on rental rates and occupancy for neighboring and adjacent properties; that there are numerous hazards to consider at the site of the tower; that the existing power lines, gas station and the tower being placed within the Storm Water Management pond create dangers to the surrounding properties; that the lack of repeat renters is very unusual in this area; and that data obtained since the temporary tower's existence should not be permitted as testimony.

John Hefferly was sworn in and testified in opposition to the Application. Mr. Hefferly testified that the proposed tower is to be located in the Storm Water Management Pond.

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.

Ron Gerk was sworn in and testified in opposition to the Application. Mr. Gerk testified that Exhibit 8 submitted on November 18, 2013 shows that the tower will be fifteen (15) feet into the existing retention pond; that the tower should not be constructed in the pond; that the tower will have unstable footing and water exposure which will accelerate the deterioration of the tower; that the flooding from the pond has worsened since the installation of the temporary tower; that the Applicant does not have approval from the Department of Natural Resources and Environmental Control ("DNREC"); that there is no code which governs building a cell tower in a storm water management pond; that the site is only one (1) block from the ocean; that trees in the area were uprooted during Hurricane "Sandy"; that the Applicant has no clue how deep it will have to dig to find suitable soil; that he questions whether the Applicant will be able to meet all requirements to place the tower; that he disputes the need for a large equipment shed on the Property; that he disputes the average height of utility poles in the area; that there will be multiple sheds needed at the site and questioned where will they be located; that there is no clutter preventing the cell phone service; that the data related to the temporary tower should not be considered because that tower is not the same as the proposed tower; that he is adversely affected by the tower; and that he sees the tower every day.

Greg Cox was sworn in and testified in opposition to the Application. Mr. Cox testified that he has been a realtor for ten (10) years; that he made a living analyzing data and that data can be analyzed in any direction to suit a need; that he believes the Applicant has manipulated the data to support the Application; that the top sales in Sea Pines are some of the lowest priced units east of Route One; and that realtors show properties, not appraisers.

John Hefferly was sworn in and testified in opposition to the Application. Mr. Hefferly testified that the Applicant is using a "fog and mirror" approach to their testimony; that he questioned if the Applicant investigated the location or time of dropped calls in the area; that during high call volume situations mobile units could be used to help provide coverage during these times; that other beach towns during high call volume must have gaps in coverage; that the data presented by the Applicant is four (4) years old and unacceptable; that the Applicant has failed to consider the numerous utility poles in the area; that the standard for the need is key; that he questions the definition of reliability and if eighty percent (80%) coverage is considered reliable; that he questioned if there is enough room at the site for the other carriers to house their equipment; that DNREC must approve any construction of the tower into the pond; that the data generated from the temporary tower should not be admissible since the tower is there illegally; that he has concerns for vibrations created from the tower and the water table; that he owns Unit

35 and has had repeat renters for ten (10) years; that the tower can be seen from the pool; and that three (3) units in Sea Pines have full time residents.

Cathy Vingazo was sworn in and testified in opposition to the Application. Mr. Vingazo testified that she lives in Ocean View; that she is the leader of a consortium of a Homeowners group consisting of approximately 1,500 homeowners; that she is concerned for the hazardous area surrounding the tower site; that she asked if the State Fire Marshal has been contacted; that “repeat renters” are the bread and butter of the resort area; that she feels the poor reviews that reference the gas station include the tower even when not mentioned; that she feels there are more sites available to the Applicant; that she disputes that there is a gap in coverage for the cell tower; that the tower would cause a catastrophe if it falls down; and that the Applicant has defied orders to remove the tower and does not respect the rules.

In rebuttal, Richard Forsten, stated that the tower will not be located in the pond; that the Applicant cannot affect the capacity of the pond per the direction of the Sussex Conservation District; that the pond will be reconfigured to keep the wet portion unaffected; that no portion of the tower will be located in the pond when it is completed; that the shelters needed by other providers will only take up a small portion of the Property; and that the shelters are approximately the size of one (1) parking space.

Barbara Gerk submitted exhibits to the Board for review.

Motion by Mr. Mills, seconded by Mr. Rickard, and carried unanimously to **table the case until December 16, 2013**. Motion carried 5 – 0.

The vote by roll call; Mr. Workman – yea, Mr. Rickard – yea, Mr. Hudson – yea, Mr. Mills – yea, and Mr. Callaway – yea.

After the public hearing the Board realized the required seven (7) day advertisement requirement could not be met and will need to table the case to its January 6, 2014 meeting.

Public Workshop Fair Housing

Motion by Mr. Mills, seconded by Mr. Hudson, and carried unanimously to postpone the workshop until further direction from the Office of Planning and Zoning due to the late hour of the evening. Motion carried 5 – 0.

Motion by Mr. Rickard, seconded by Mr. Mills to approve the 2014 Board of Adjustment schedule as circulated. Motion carried 5 – 0.

Meeting Adjourned 11:05 p.m.