

Clearwater Township
Zoning Board of Appeals
Regular Meeting of April 8, 2019
As approved June 24, 2019

Call to Order, Pledge of Allegiance:

Chair Snyder called the meeting to order at 7:04 p.m., and opened with the Pledge of Allegiance.

Roll Call of Members and Recognition of Visitors:

ZBA members present: Bergmann, Lawicki, Fields, Snyder.

ZBA member absent: Gerlach

Public: Gianine Casassa, Greg Hanlin, Kimberly Hanlin, Peter Wendling (attorney for Clearwater Township), Ben Herrick (attorney for Tillman Infrastructure), Tom Backers, Carol Backers, Mike Bieniek (LCC, applicant and agent for Tillman Infrastructure), Sandra Jasinski (attorney for LCC), Larry Opalewski (attorney for American Tower), Charles Klingbeil, James Bargy, Denise Bargy, Jason Lome (court reporter).

Approval of Agenda:

Correction of “public hearing” to “regular meeting” under item 1. .

MOTION by Bergmann, second by Lawicki, to accept the agenda as corrected. Motion carried.

Call for Disclosure of Conflicts of Interests:

Chair calls for members of the ZBA to disclose any real or potential conflicts of interests. All members declared none.

Approval of Minutes:

MOTION by Bergmann, second by Lawicki, to accept the minutes of February 19, 2019 as presented. Motion carried.

Old Business:

Deliberation is resumed on the variance request by Mike Bieniek, heard at the February 19, 2019 public hearing, regarding a 170’ telecommunications tower to be located on a 100’ by 100’ lease parcel on the property having the address of 5378 Townline Road, Williamsburg, and the tax id of 4-004-033-007-15.

Chair Snyder reviewed the procedures to be followed in the process, including the requirement that each review standard must be met for the requested variance to be approved. Attorney Wendling has provided the ZBA with findings of fact to be considered for each of the review standards. The Board will review each standard and consider the positive and negative findings of fact, and will vote on each standard.

General findings of fact as drafted by Attorney Wendling include that the property is located in the Recreational Zoning District of the township; that its size meets the standards for the

district; that the applicant proposes to construct a telecommunications tower on the property; that such a use is permitted in the district with a special land use permit; that the proposed tower height is 170'; that the tower site is 100' from the M-72 right-of-way, 275' from an existing home to the southeast, 225' from an existing home to the northwest, and 400' from another existing home to the northwest; that the Zoning Ordinance specifically defines the term "practical difficulty" within Article V Definitions.

Standard A:

The property is subject to exceptional or extraordinary circumstances or conditions that do not apply generally to other properties in the same zoning district (e.g., unique dimensional, topographical, and/or structural conditions) thus presenting the possibility of a practical difficulty for this particular property.

Discussion on the standard – Fields commented that the Zoning Ordinance defines a practical difficulty as being specific to the particular property, whereas the applicant's claim of practical difficulty relates to the requirements of the network of telecommunication towers. There is a defined physical area, called the "search ring," within which the RF engineers specify that the tower must be sited in order to meet the requirements of the network. Fields questioned the claim that the township had turned down the applicant's interest in siting on township property. Bieniek explained that, in fact, he had reached out to the township several times, but never got a response; that is what was meant by the claim that the township was not interested. Fields asked if Bieniek could supply documentation of those efforts to contact the township. He said he would try. Herrick further explained that a property owner would not be approached if it was obvious that the property would not be suitable for siting because of its size and the placement of residences or other things on the property.

The positive and negative findings of fact pertaining to Standard A were read aloud and are hereby incorporated into the record and attached to the permanent copy of these minutes as [Att A].

Roll call vote:

Lawicki – yes, based on the positive finding provided by the township attorney;

Bergmann – no, based on the negative finding provided by the township attorney;

Fields – no, based on the definition of practical difficulty applying to the specific property rather than to the nature of the region and telecommunications network, and based on the negative finding provided by the township attorney;

Snyder – no, lowering the height of the tower would reduce the variance needed, as indicated in the negative finding provided by the township attorney.

The board finds that Standard A is not met.

Following the failure of Standard A, Fields asked Attorney Wendling whether the remaining standards should be reviewed. He responded that yes, the board should go through all standards so as to have a complete record because the record may be reviewed on any appeal. If only one standard has been reviewed, the record is not complete. A court could remand the matter back to the ZBA to complete the process. It is best to go through all the standards.

Attorney Herrick stated that the applicant would stipulate to the written findings of fact that have been provided by Attorney Wendling, making it unnecessary to read through them. A copy of the written findings has been provided to the applicant. The reading is also for the benefit of the public present.

Standard B:

The requested variance is necessary to alleviate a situation which qualifies as a practical difficulty; i.e., without the variance the owner is deprived of a minimum practical legal use of his/her property such as is possessed by residents of other properties in the same zoning district. (The possibility of increased financial return is of itself not sufficient to warrant a variance.)

The positive and negative findings of fact pertaining to Standard B were read aloud and are hereby incorporated into the record and attached to the permanent copy of these minutes as [Att B].

Roll call vote:

Bergmann – no, based on the negative finding provided by the township attorney

Lawicki – yes, based on the positive finding provided by the township attorney

Fields – no, based on the negative finding provided by the township attorney

Snyder – yes, based on the positive finding provided by the township attorney.

This vote is a tie.

The board turned to Attorney Wendling for guidance in handling this tie vote. He said we could frame it as a formal motion, in which case the tie would mean the standard failed; or, we could suspend the proceedings. There is a missing member to the ZBA and it is the prerogative of the applicant, if the applicant so wishes, to proceed in the future with the full ZBA board present during the decision-making process.

After some discussion, the applicant did ask for the matter to be tabled, giving them time to review the possibility of seeking a shorter tower, and having the full slate of the ZBA present for the hearing. Attorney Wendling noted that would be a *de novo* hearing based on a new set of requests. A formal motion is required.

MOTION by Fields, second by Lawicki, to table this matter until the next regularly scheduled meeting or a special meeting if requested and financed by the applicant. Motion carried.

The deliberations are suspended until the next meeting. These remaining standards were not reviewed:

Standard C:

The requested variance is the minimum variance necessary to mitigate the practical difficulty.

Standard D:

The practical difficulty resulting in the need for the requested variance was not created by any action of the current property owner.

Standard E:

The requested variance will not be detrimental to adjacent property and the surrounding neighborhood.

New Business:

There was none.

Report of the Planning Commission Representative:

Fields – reported that the Planning Commission is working on language for a Mass Gathering Ordinance for the township. The Planning Commission has sent an inquiry to the Michigan State Attorney General to provide the definitive boundary of Kalkaska County and Clearwater Township specifically where it meets the waterways of Torch Lake and Lake Skegemog, and to determine the extent of the township’s jurisdictional authority at its water boundaries.

Closing Public Comment:

Opalewski – made the general comment regarding variances that they are, indeed, specific to the property, not a particular use.

Kimberly Hanlin – invited the ZBA members to come to her home and see how close that tower is to her residence. She is carrying her first child and is afraid that the tower threatens the health of that child.

Adjournment:

MOTION by Lawicki, second by Fields, to adjourn. Adjournment at 8:18 p.m.

Next Meeting: July 8, 2019

Respectfully submitted,



Tina Norris Fields
Secretary pro tempore

- A. The property is subject to exceptional or extraordinary circumstances or conditions that do not apply generally to other properties in the same zoning district (e.g., unique dimensional, topographical, and/or structural conditions) thus presenting the possibility of a practical *difficulty* for this particular property.

FINDING WHICH WOULD SUPPORT THE STANDARD

1. The Board finds that due to the regulations contained in Section 24.09.A.11, spacing requirements from residences, that the situation involving the property is exceptional, extraordinary and does not apply generally to other properties in the same zoning district due to the fact that there are three residential homes on other parcels surrounding the property. Thus, the Board finds that the distances from the tower base to these three residential homes is unique and extraordinary in that these distances only apply to this property given its size and the locations of these residential structures. Further, the Board finds that the regulation contained under Section 24.09.A.11 makes it physically impossible for the applicant to meet the required 510' setback from both the M-72 right-of-way as well as the Townline Road right-of-way. The Board finds it is equally physically impossible to meet the 510' setback from the three existing dwellings on the parcels northwest and southeast of the property. The Board finds that Section 18.03.J allows for telecommunication towers, facilities and alternative structures. The Board further finds that the property in question dimensionally meets and exceeds the minimum lot size within the Rec District. As such, the Board finds that given the location of the existing homes in conjunction with the setbacks required from a public right-of-way under the Zoning Ordinance, the situation presents the possibility of a practical difficulty. As such, the Board finds that there are exceptional as well as extraordinary circumstances applicable to this property which generally do not apply to other properties in the same zoning district which are also dimensionally lawful and which meet, at a minimum, the lot dimensional requirements within the Rec District. (Exhibits 1, 6, 7, 12 and 17a-r)

FINDING WHICH WOULD NOT SUPPORT THE STANDARD

1. The Board finds that the property is not subject to exceptional or extraordinary circumstances or conditions that do not generally apply to other properties within the same zoning district. The Board finds that the variances requested could be either largely eliminated or substantially reduced by moving the base tower site or by lowering the height of the tower which would still allow for the use while substantially reducing the variances requested and/or even eliminating the need for one or more of the requested variances. The Board further finds that there are no topographical features on the parcel either as a result of sloping or other physical features which would prevent a different location for the tower base while still providing adequate access to the base off of Townline Road. Thus, the Board finds that there are no conditions existing that would establish the possibility of a practical difficulty for this particular property. (Exhibits 1, 3, 5, 6, 12, 17a-r, 21a and 21b)

- B. The requested variance is necessary to alleviate a situation which qualifies as a practical difficulty; i.e. without the variance the owner is deprived of a minimum practical legal use of his/her property such as is possessed by residents of other properties in the same zoning district. (The possibility of increased financial return is of itself not sufficient to warrant a variance.)

FINDING WHICH WOULD SUPPORT THE STANDARD

1. The Board finds that the property meets the minimum acreage requirement in the Rec District. As such, the Board finds that the property qualifies to be used in a manner as allowed by the permitted uses under Article XVIII, Recreational District, Section 18.02, as well as having the right to apply for a permitted use subject to a special use permit under Section 18.03. The Board further finds that under Section 18.03 permitted uses subject to special use permit, subparagraph J, that telecommunication towers and facilities and alternative structures are allowed subject to a special use permit. The Board finds that due to the application of Section 24.09.A.11, setbacks for telecommunication towers and facilities and alternative tower structures, that the location of three residential homes within the vicinity result in the creation of a unique character of the land when applying the regulations under Section 24.09.A.11 for the proposed use. The Board essentially finds that the locations of the three existing homes are setback barriers which although required by regulation constitute the same setback impediments as a severe cliff would as stated in the definition of practical difficulty in Article V of the Zoning Ordinance. The Board further finds that in Section 24.09.A.11 as applied to the dimensionally lawful parcel creates a regulatory practical difficulty with respect to setbacks from both M-72 and Townline Road right-of-ways. As such, the Board finds the variance alleviates a practical difficulty which would otherwise deprive the applicants of the ability to apply for a special use permit for telecommunication towers and facilities and alternative tower structures which is an allowed use by special use permit within the Rec District. (Exhibits 1, 3, 5, 6, 12 and 17a-r)

FINDING WHICH WOULD NOT SUPPORT THE STANDARD

1. The Board finds that the requested variance does not qualify as a practical difficulty as defined under Article V of the Zoning Ordinance. The Board finds that given the variety of uses both by right and by application for special use permit in the Rec District, the owner of the property or those leasing the property have the ability to establish a variety of legal uses of the parcel as provided under Article XVIII, Sections 18.02 and 18.02 of the Zoning Ordinance. The Board further finds that the property does not contain any substantial physical features which would prevent the base of the tower from being moved from the proposed location to another location on the property resulting in the possible elimination of one or more of the variances as well as a substantial reduction in the variances requested. The Board finds that given the variety of uses allowed in the Rec District that there are more than a minimum practical legal uses of the property allowed by right and by special use in the Rec District. The Board finds that the requested variance is not necessary to alleviate a situation which qualifies as a practical difficulty. (Exhibits 1, 3, 6, 7, 12 and 17a-r)