

**Clearwater Township**  
Zoning Board of Appeals  
Special Meeting of September 13, 2019  
As Approved October 14, 2019

**Call to Order, Pledge of Allegiance:**

Chair Snyder called the meeting to order at 7:00 p.m., and opened with the Pledge of Allegiance.

**Roll Call of Members and Recognition of Visitors:**

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

Township officials: Township Attorney Peter Wendling, Deputy Clerk Jule Moore. The Zoning Administrator is absent due to a family health matter.

Public: Greg Hanlin, Ruthann O'Brien, Sandra Wheelock, Mel Cooke, Gianine Casassa, Tom Crisi, Laura Lora, James French, Syed Hussain, Bill Pollack, Mike Bieniek, Sandra Jasinski, Lynne Buday, Tandra Greiner, Calvin Greiner, Denise Bargy, Carol Backers, Coreen Reed, Greg Stosio, Jeff.

**Approval of Minutes:**

**MOTION** by Gerlach, second by Snyder, to accept the minutes of July 8, 2019, as presented. Motion carried.

**Call for Disclosure of Conflicts of Interests:**

Chair calls for commissioners to disclose any real or potential conflicts of interests. Each member of the Zoning Board of Appeals declared having no conflicts of interests in this case.

**Public Comment for Matters Not on the Agenda:**

There was none.

**Public Hearing on Dimensional Variance Request by Tillman Infrastructure for Placement of 120' Telecommunications Tower at 5378 Townline Road, Williamsburg, Michigan 49690:**

The Applicant along with AT&T Mobility seeks a dimensional non-use variance for a parcel of land located at 5378 Townline Road, Williamsburg, Michigan, 49690 which has a tax ID number of 4-004-033-007-15. The Applicants' agent is Mike Bieniek, AICP of LCC Telecom Services, agent for Tillman Infrastructure. Mr. Bieniek's address is 10700 W. Higgins Road, Suite 240, Rosemont, Illinois, 60018. The property at issue consists of 5.05 acres. The Applicants seek a dimensional variance from the requirements of Section 24.09.A.11 of the Clearwater Township Zoning Ordinance, which reads as follows:

Spacing-Residences A tower shall not be located within two hundred feet (200') or three hundred percent (300%) of the height of the tower, whichever is greater, of a park or public right of way, or of a single-family or multiple family

dwelling unit, church, school, or other structure normally used and actually used for the congregation of persons. Distance for the purpose of this section shall be measured from the base of the tower structure to the lot line of the park, right of way, single-family or multiple family dwelling unit, church, school, or other structure normally used and actually used for the congregation of persons.

Chair Snyder introduced the matter to be heard and indicated the extent of the evidence documentation already in hand. He instructed the gathering that any person wishing to speak should print his or her name on the list that was being circulated.

Attorney Peter Wendling clarified the process, saying that everybody who wishes to speak will be provided an opportunity to do so, that the Chair can manage the time, that we have a three minute time limit, and that the Deputy Clerk will be the timekeeper. Since the Zoning Administrator is not present to do the staff presentation, the Board may want to start with the applicant making a presentation. This is a new request for a dimensional variance on a 120' foot tower versus a 170' tower, but a lot of background information has already been received. We have draft findings of fact that are available for members of the public to follow along on, making it unnecessary for the ZBA to read each one aloud. After the applicant makes the presentation, the Chair can open the public hearing and allow the members of the public to speak on the application.

**Applicant presentation: -**

Bill Pollack – the managing director for Tillman, noted that with him were people from Tillman, LCC, and AT&T. He commented that no one was here from American Tower, and that he believes they have withdrawn from the matter. He said there were three key points to be made.

- 1) The existing wood pole is not viable for continuing cellular service to this township. That decision was made by both AT&T and ATC, because it cannot accommodate the new equipment or First Net, “the new emergency service network that’s going nationwide.” Public safety is a primary concern, insuring that First Net can be implemented in this town. AT&T has canceled its lease on that wood pole effective June 30, 2020. Without a new tower, AT&T will go dark in this township at that time.
- 2) AT&T hired Tillman to build the new tower. The site LCC has selected, the Bargo property, is determined by the RF team of AT&T to be “by far the only site that is viable to provide the whole coverage that is necessary in this region.” AT&T will certify that. Attempting to build a new tower on the site of the existing wood pole would require even greater variances because that property is smaller than the Bargo property.
- 3) The original variance petition was for a 170' tower. Feedback from that original hearing has led to this new application for a 120' tower, which the RF team from AT&T has determined “would still satisfy the needs of the community.”

Mike Bieniek – with LCC Telecom, representing AT&T and Tillman Infrastructure. He introduced the people with him: Sandy Jasinski, Attorney for LCC Telecom; James French and Laura Lora, with LCC; Bill Pollack and Tom Crisi, with Tillman Infrastructure; and Syed Hussain, RF Engineer with AT&T.

This is a new application – a revision of the application we submitted for a 170' tower. When we came before you with that petition, it was stated that reducing the height of the tower to 120' or lower would be “more palatable.” AT&T has agreed that although this will not be the best possible coverage, it is “something they could live with.” As a concession, this application, submitted on July 11, 2019, is a “compromise to still allow AT&T to provide the necessary coverage ... to the area.” At issue is the spacing requirement in Section 24.09.A.11 of the Clearwater Township Zoning Ordinance, “a tower shall not be located within 200 feet or 300% of the height of the tower, whichever is greater, from a public park, or public right-of-way, or of a single family or multifamily dwelling unit, church, school, or other structure normally used and actually used for a congregation of persons. Distance for the purpose of this Section shall be measured from the base of the tower structure to the lot line.” Based on the tower being 120' tall, that would mean a minimum spacing requirement of 360'. The tower would not be taken down and rebuilt, the top 50' would be removed.

On February 13, 2017, American Tower did a structural analysis of the wood pole, at the request of AT&T when they wanted to upgrade their equipment. The foundation failed, and the structural analysis indicated that the only remedy was to replace the wood pole tower. Tillman was hired by AT&T to do what is called a “build to suit,” and LCC was hired by Tillman to the site acquisition work for them. AT&T gives the search area within which we are to look for a site. We found that this was the only potential candidate.

“In June of 2018, I received an email from the township that Adam Parzych said that we were good to go, we did not need any additional zoning. We provided drawings and the MDOT and the FAA approvals, and he gave us the go ahead.” We obtained a building permit from the county, had all the required county inspections on the site, and we built the tower in early December. On December 6, 2018, we were told to cease work. That’s how we got here.

As has been already mentioned, the AT&T antennas on the existing wood pole are being decommissioned in June 2020. Without a new site, there will be no AT&T coverage in the area.

Also mentioned earlier is First Net. This is AT&T’s nationwide public safety communications network. They are trying to cover 99% of the population. In a catastrophic event, the first responders will all have equipment that can log in to those antennas and they all will have instant access to the same records. As an example, if a tornado came through and they find a couple in a collapsed house, first responders will be able to get notice of any background conditions, such as heart problems or diabetes, so when they enter the house to help those people, they’ll know exactly what to expect. This will greatly reduce response time. AT&T is especially committed to getting First Net into rural areas because response times are not as good there as they are in urban areas, due to the larger areas first responders have to cover. The more robust signal of First Net also helps with COWs – cells-on-wheels – temporary equipment that can be brought in during emergencies such as hurricane Katrina.

Mr. Bieniek then distributed hand-outs to the ZBA members.

The first one is an alternatives analysis that discusses the different sites that were considered. One of the questions posed was “What about the Clearwater Township property?” That property is actually owned by the DNR. It is leased to the Michigan Heritage Foundation. We

approached the Foundation, and they were interested. But the DNR informed us that the deed restriction on that property reserves it for a public service, and a cell tower does not meet the criteria. All the other DNR property in the area is deemed “significant,” which means nobody other than the DNR can use it. This one parcel was removed from the “significant” designation, and leased to the Michigan Heritage Foundation, but if we attempted to go forward with our project there, the DNR could return the property to the “significant” designation and the Foundation would lose out. So, that property was a dead-end as a candidate. That left only the one candidate property.

The second one is a set of maps showing every parcel within the search ring provided by AT&T. On each one a parcel is highlighted, and the white line around it shows how far away a tower would have to be placed. Flipping through the set you can see “there’s not a single parcel within that search ring” that would allow a tower to be placed.

As part of the packet, we provided the fall-zone letter from Sabre Engineering, the tower manufacturer, done by a Michigan engineer. The letter states that at a 115 mile/hour straight wind, the tower is designed to collapse on itself. One of the concerns voiced at a previous meeting was that the tower could fall on the highway.

ZBA member Bergmann – asked if collapsing on itself would mean a cone going down.

Bieniek – responded that they have a fail point and the collapse by folding on themselves (he demonstrated this with his hands), and that the cabling acts as a hinge to hold it in place, so it doesn’t implode, it falls down onto itself.

Bergmann – asked if the structure was tested before it had any elements placed on it.

Bieniek – responded, yes, that’s the way they’re designed – and every time a carrier goes on a tower, they run another structural analysis. That is exactly how ATC came to be doing a structural analysis on the wood pole – AT&T wanted to upgrade their equipment. They couldn’t because that tower, structurally, couldn’t handle more.

Bergmann – continued, but when there are elements up there for five different companies, and wind – is it still going to collapse as you said?

Bieniek – responded, yes, that’s exactly how they’re designed. It’s designed with the platforms included as well. Every time they do a structural analysis, the wind and ice loading are always taken into account.

ZBA Chair Snyder – asked whether the owner of the property, where the existing wood pole is, had been contacted about placing a new, improved tower on that site?

Bieniek – responded, no. It’s a significantly smaller parcel.

Snyder – asked why the owner wasn’t contacted.

Bieniek – responded, because we couldn’t use that property; it’s way too small. And the existing wood pole is maybe less than 50’ from the highway right-of-way. It would have a much more severe set of circumstances. He then introduced the AT&T RF Engineer.

Syed Hussain – explained that the neighboring towers in the area are already upgraded to the current technology with 5-G and First Net. The existing wood pole tower cannot communicate with those towers using the better technology. In order to have good coverage in this town, we need to replace this tower with a new one that is capable of supporting the latest technology. The technology being used by the existing wood pole tower is going away. In order to have good coverage for the highway and the commercial and residential areas of this town, we need to have a minimum of 120' centerline at this new tower and all the latest equipment, as we have at the neighboring towers so that a person coming through on the highway, communicating or working on the phone, will not lose the call. If there is no tower here, or if the tower we have is not capable of communicating with the latest technology, the call will be dropped. It will also be impossible to initiate a call from the center of this area without a new tower using the latest technology.

While I was sitting in one of the local restaurants, I hardly had one bar and I was not able to even check my emails.

This area is forested and hilly, so, it's a challenge to put up a tower that can communicate with the neighboring towers and provide continuous coverage without gaps. The towers around this area are about three to four miles apart, and in a hilly and forested area like this, the signal can drop within a mile or so.

To provide good coverage to this area, we need to have the 120' minimum height and the technology that neighboring towers are using. Otherwise, this area will not have good coverage. Thank you.

Attorney Sandra Jasinski – the attorney for LCC with the firm Bodman. She stated that since February of this year, either she or her colleagues have attended every meeting involving this cell tower, and for earlier meetings, she has read the minutes. So, she is very familiar with the discussions that have gone on and the arguments made at the Planning Commission, the Township Board, and the Zoning Board of Appeals. She said: "When you are considering the request for the variance, I strongly recommend that you be very mindful of the Telecommunications Act. Twenty-three years ago, Congress enacted that statute, and the objective of the statute was to open markets, to remove regulatory barriers, and accelerate the rapid private sector deployment of advanced information technologies and services to all Americans." She said that "the Act does not pre-empt state law concerning construction, placement, or modifications of cell towers, but it does provide that decisions by local units of government shall not prohibit, or have the effect of prohibiting, the provision of personal wireless services."

She stated that in the event of a denial, the carrier can file a complaint in federal court within thirty days, and that it would be heard on an expedited basis. She further related that she knew from personal experience that such lawsuits are not cheap. If the Board denies the variance request, AT&T will be adversely affected and will have the right to file such a lawsuit. She commented that these lawsuits are heard by federal court judges who have lifetime appointments and are not elected.

She stated that her firm had provided a legal memorandum to our township's attorney, regarding their analysis of the Telecommunications Act and Michigan cases where the federal courts have applied the Act in the context of zoning decisions. She warned us that "the Sixth Circuit is a very carrier-friendly Circuit."

She cautioned us again to "consider the Telecommunications Act implications in this. Be very mindful that denial of the variance is going to have the effect of prohibiting telecommunication services." She characterized the opposition to the proposed tower location as "unhappy neighbors," objection from a "competitor who is not here today," concerns about diminution in property values, and esthetic objections.

Jasinski cited the case of T-Mobile Central v. Charter Township of West Bloomfield, in which case "the Sixth Circuit said that concerns from a few residents that the tower would be ugly, or that a resident would not want it in his back yard, are not sufficient reasons to deny a variance." She stated her opinion that that is primarily what we have here.

She reminded us that AT&T has canceled the lease on the existing wood pole tower, stating "on June 30, 2020, this township is going to have gaps in service – it could very well be dark."

Jasinski continued, saying that concerns over the diminution of property values because of the presence of the tower may be in error. A person contemplating purchase of a home in Clearwater Township without cell service, or a home in another municipality with cell service, is likely to choose the other municipality. She related hearing the Fire Chief report at the Township Board meeting of July 18, that the ISO rating is currently 8B. She challenged us that if we don't have sufficient cell coverage, "How is your Fire Chief going to contact the volunteer Firefighters to fight a blaze? ... How is the school going to contact a parent ... when they have problems with the kids at school?"

ZBA member Gerlach – asked "you're threatening that only AT&T wouldn't have coverage, aren't you?"

Jasinski – responded, "No, I'm not threatening that," then repeated that AT&T has canceled the lease, and that the new tower would provide the benefit for co-location of other carriers.

Gerlach – commented that she didn't hear any other carriers saying they wouldn't have coverage here.

Pollack – interjected to answer directly. "You're right that this particular wooden pole only serves AT&T. Whatever coverage is already here from other carriers ... there's no direct impact on any other cell phone tower that exists. ... However, with our tower, it would have the ability ... to house other carriers, to provide competitive offerings to the township."

Jasinski – continued "Under the circumstance, here, I would submit that absent a variance, that this is really a textbook example of the kind of case that is subject to a lawsuit under the Telecommunications Act. In fact, it's a great set of facts from the carrier's perspective, given the unrebutted facts that have been discussed by Mr. Bieniek, by Mr. Pollack, and by the representative of AT&T. There will be a service gap in coverage for AT&T, and that's enough to challenge the denial of a variance under the Telecommunications Act. ... We'd like to reserve some time to rebut whatever rebuttal comments are made by members of the public."

ZBA Chair Snyder – inquired if the applicant had finished.

Bieniek – said they had, and reiterated the request for the ability to rebut at the end of the hearing.

Snyder – indicated that there may not be enough time for that.

Bieniek – said he thought it was important for them to have that opportunity.

Snyder – said that within the next five business days, they could submit a written statement to the clerk if there is any follow-up statement they'd like to make.

Attorney Wendling – said that the applicant has finished their presentation and now we can open the public hearing. The Board can always ask questions of the applicant at any time – that is the Board's prerogative. But comments from the public must be directed only to the Board.

From the audience came the question – is there an agenda available?

Snyder – responded that there is no agenda available; there will be draft meeting minutes afterwards. Those who have indicated their desire to speak will be called upon in the order their names were received. [7:47 p.m.]

Mr. Greg Hanlin, you have three minutes.

Hanlin – stated that he had just received an email from Larry Opalewski with ATC, saying they are not withdrawing. They are asking the Board to rely on the letter they provided, indicating that ATC has the ability to improve their hard assets to 80 feet. They also maintain that AT&T has not asked them to improve the asset.

We are here tonight to discuss the five standards of the Zoning Ordinance to be applied to the variance request. We local residents believe that these standards have not been met by the applicant. Standard A – there are no special exceptional conditions or extraordinary circumstance on the parcel. “I know because I live right next door and I've been all over that property before the current land-contract owners purchased it.” He inserted here his assertion that the purpose of the Tillman's agreement with the Bargys is to get a reduced lease rate, not to expand the coverage area. He stated that the property owners had no issues clearing trees to accommodate the lease, to provide for themselves a return of some amount that will benefit them financially. Standard B – requires that the variance be necessary to alleviate a situation that qualifies as a practical difficulty. The owner is not deprived of a minimum practical legal use of this parcel. He stated that the owners are in multiple violations on their property which is intended for residential, recreational use. He maintained that the applicant and the land-contract owner are solely utilizing the parcel for profit. Standard C – requires that the variance be the minimum necessary to mitigate the practical difficulty. He stated that no practical difficulty exists due to the unique character of the land, and the applicant “should not be allowed to establish their own minimum practical use for the purpose of financial gain.” He began a sentence about them choosing to build without permission.

Deputy Clerk Moore, serving as timekeeper, called time.

Hanlin- said “Please read Mike Bieniek's email to Adam Parzych on June first.”

Snyder – called Ruthann O’Brien

O’Brien – said “I was wondering if the Chair would ask Mr. Bieniek to respond to the email that he sent to Adam. And I’d like to read it, if possible.” She read “Per our conversation, Tillman Infrastructure is proposing to erect a wireless telecommunications facility, located at 5378 Townline Road, Williamsburg, Michigan. The proposed facility will consist of an antenna-support-structure tower along with support equipment, to be located within a lease parcel, along with a utility/access easement. As we discussed, this area falls within Clearwater Township’s jurisdiction, which does not have regulations that would pertain to construction of a wireless telecommunications facility. As we discussed, so long as we provide a copy of the FAA and the MDOT approvals, we would be fine to move with building permits.” I’d like Mr. Bieniek to respond – to tell us what he meant by this email.

Wendling – reminded the Chair to just wait until all comments are made and then decide what questions are appropriate for follow-up.

Snyder – asked if Ruthann had anything else she would like to say

O’Brien – said she’d like to know why he couldn’t find the two sections in our ordinance that pertain to zoning on these issues for the telecommunications.

Snyder – called Sandra Wheelock.

Wheelock – stated “I think any approved variance should precede construction.” She further stated that according to the Planning Commission discussion earlier in the week, this is a non-essential service that they’re proposing. She said she thinks “this is more about a business expansion than providing services,” and she doesn’t think “this Board should cave to threats that are issued by people who didn’t do their due diligence” in the first place. And, lastly, she said that she lives about three quarters of a mile away, on a very high hill, with state land on two sides, and no obstruction to the whole rest of the valley – and nobody contacted her.

Snyder – called Mel Cooke.

Cooke – said he wants to know how many more meetings we’re going to have. If this zoning variance is turned down, will Tillman keep coming back with new requests for 100’ or 80’ or 70’ towers? What we heard today is a function beneficial to Tillman and AT&T, followed by a threat from a lawyer who’s going to sue us. He said he doesn’t have any sympathy for any of them.

Snyder – called Gianine Casassa, who did not wish to speak. He then called Tom Crisi, who said he was there for the rebuttal if there was time for it. Snyder then called James French.

French – said he would respond to some of the comments that been made. Mr. Hanlin mentioned that ATC could possibly raise the height of their tower to 80’. That is true, but they could not do that and pass the structural analysis. The one they already ran on the tower at 60’ failed at the foundation level. Their own recommendation is to replace the tower. AT&T did go to ATC first, when they wanted to put new equipment on the existing wood pole tower, so that they could effectively communicate with the other towers in the area. That’s why the structural analysis was run. The ATC wood pole could not meet the requirements. AT&T could not sit back and do nothing, they did have to take the next step and move forward to get the coverage updated.

"I, personally, actually looked at a lot of the parcels in the area," he said, "and there is no parcel that can meet the requirement of that separation with the exception of those DBR properties ... but the deed restriction itself doesn't allow us to actually build a tower for public use on that land." He addressed the specificity of the location requirements as an explanation of why a particular piece of property may not work as a tower site, "especially along M-72 in this specific area close to the wood pole that they need to actually replace in order to provide the necessary coverage." He began to address the safety concerns.

Deputy Clerk Moore, serving as timekeeper, called time.

Snyder – called Lynne Buday.

Buday – stated that she lives right next door to the DNR property, and "they never asked me about putting up a tower." She said that we are still here because "they have unclean hands." They didn't follow the rules; they "illegally constructed a tower without a building permit, without site plan approval, without a special land use permit approval from the township." She agreed with Mel Cooke that this is business, making money at the expense of the homeowners. She declared that they are not trying to be good neighbors, that if they were they would have followed the rules. She continued that a serious matter that hasn't been addressed is the health risk associated with the 5-G technology; the neighbors are concerned about that and having someone try to put this tower in a residential area.

Snyder – called Tandra Greiner

T Greiner – said she is for the tower because, "two miles down Valley Road, I'm unable to make or receive calls inside the home. I have to walk to the middle of the road, especially in the winter, to make a cell call, and sometimes, depending on the weather, I cannot make a call." She explained that she has an autistic grandson with whom she'd like to spend more time, but cannot do that at home because she is unable to call his parents when she needs them to come and get him. She is for the tower because "it's beneficial to my kids and my grandkids, and to people working at home."

Snyder – called Calvin Greiner.

C Greiner – said he didn't think it should come down to who is profiting. We're dealing with a "new emergency system that's going to help ambulance, fire trucks, and police officers in a state of emergency." He spoke of the possibility of someone in a rural area needing help and being unable to call for help. He said he would support the tower, even if it only helped the emergency services, but, he said it would benefit everyone, especially "there's so many people working at home." He said that two miles from the Rapid City main street, one can't get Internet service, and that a new tower would make it better.

Snyder – called Denise Bargy.

Bargy – stated that she and her husband, Jim, own the subject property. She countered comments that have been made about their being outsiders, saying they've been in this area most of their lives. They've run a remodel business in this area for over thirty years, doing work on Skegemog, Elk Lake, Torch Lake, and the Grand Traverse Bay. They bought the property,

planning to eventually build their home there. They love the property and its proximity to the recreational trails. They are outdoor people.

She said that when Tillman approached them in regard to a lease for the telecommunications tower, they “thought long and hard – and we prayed about it – before making our decision.” Among the top reasons for agreeing to the lease was that many of their clients in the area, as well as friends that live around the area, who were getting poor cell service, would benefit from it. She noted that “at the time, we had no idea that we’d be harassed and bullied as we’ve been.” But, they don’t regret their decision, because they’ve also been “overwhelmed at the kindness and support” shown them by many people who favor the tower. She noted that some of them are afraid to speak up. She concluded by saying “I implore you to keep an open mind to what you would be saying YES to – not just NO – but what you would be saying YES to – and that’s the emergency responders ... [and the children that take homework home to do online, the businesses and the families] who need and deserve this kind of technology and don’t need to be left in the dark and left behind. So, I just ask that your decision be an astounding YES for those reasons. Thank you.”

Snyder – called Tom Crisi.

Crisi – He said he’d like to expand on the email that was read earlier. The very last line reads: “Please respond to this email with confirmation that my understanding is correct,” referring to Mike’s understanding of the conversation he had with Zoning Administrator Parzych. The response from Deputy Clerk Moore said: “I spoke with Adam on the phone. He said you’re good to go. Nothing more is required for the township for you to proceed. Thank you for keeping us in the loop.”

He went on to say, since the “Let’s ask forgiveness later” conversation had been launched, that although all the necessary documentation is now available on the “completely revamped” township website, it was not all available at the time they began this process. He held up the Kalkaska County building permit they were issued to build the tower. He said “We didn’t build it to come back in and ask forgiveness. We built it in good faith, with the proper documentation and every resource we had available at the time during this process, doing our due diligence. This building permit was issued July 31, 2018. Thank you.”

Coreen Reed asked for permission to speak. Chair Snyder agreed.

Reed – said that “in multiple meetings American Tower has said they would be able to drop and swap their current wood pole, and there’d be no issues with the foundation.” She further stated that she is a local neighbor, who has ten acres and a huge hill, and who was never approached about a tower

Chair Snyder recognized the next speaker who gave only his first name and declined to give his full name. Attorney Wendling confirmed that the speaker is not obliged to give his full name.

Jeff – stated that “by what little information I know,” the Zoning Administrator has failed us. He noted that he doesn’t know enough about the matter to actually take a position on it. But, if they received a building permit from the county, he doesn’t see how they are guilty of circumventing the system. They build the tower and the neighbors are upset.

He said he thought the Zoning Administrator gave a “verbal,” and that the Deputy Clerk confirmed it. If the county did issue a permit without following the proper process, than we need to correct it so that doesn’t happen again.

Next, he spoke against the Zoning Administrator – that since he’s taken office we’re in more litigation than we have been in decades – that he should have been here tonight, since his new job description calls for his presence at these meetings – that the Supervisor should be holding him accountable – that he’s carrying out selective enforcement of the zoning laws.

Finally, he said that he didn’t care one way or the other, because he didn’t have enough information to make a decision. The tower is not in his back yard and somebody’s always going to be upset.

Finally, he admonished the Zoning Board of Appeals to remember that they work for the masses, not just the “select few, here.” As he was instructing the ZBA about correcting the things that had caused this issue, his time ran out.

Deputy Clerk Moore, serving as timekeeper, called time.

Snyder asked if anyone else wished to speak in the public comment period.

Gary Stosio – said “I just have one question: where’s Verizon’s tower, and why don’t we just put it on Verizon’s tower?”

Jeff – interjected “would one of the experts answer it?”

Snyder – Thank you for your comment and your question. Does anyone else want to speak during the public comment debate?

Bieniek – I’d like to rebut.

Snyder – No, thank you. That closes the public comment period at 812 p.m.

## **Deliberations**

Wendling – spoke to the Board in preparation for its deliberations. He noted that we have a draft set of findings of fact; for each standard there are positive findings and negative findings to consider. The findings of fact document, provided by the township’s legal counsel, is hereby incorporated into the record by reference. Mention has been made of possible lawsuits, which are always possible. The ZBA cannot make its decision based on fears of lawsuits or appeals. We must use the evidence that has been supplied, such as the engineer’s evidence regarding the tower structure design to collapse on itself – we have no evidence to the contrary. Does the Telecommunications Act come into play? Yes, in terms of evidence of lack of service as it pertains to a practical difficulty. However, we cannot consider the tower’s signal as a factor. This variance request deals only with the setback issues. We are all aware of the background of this matter, but that cannot be part of our decision. We are to look at the lay of the land, the tower, and the property. We have copies of the written draft findings of fact to provide to the public, so we don’t have to read through each one, which would be very time-consuming.

Gerlach – noted that there are some errors in the draft findings document that we should correct. The most significant one is in the final paragraph, which said that the Zoning Board of

Appeals is an advisory body. It is not. When we make a decision, if the applicant does not like it, there is no appeal to the Township Board, rather it must be taken to the Circuit Court.

Attorney Wendling acknowledged that and indicated that the applicant was aware of that fact.

Gerlach noted that it was hard to discuss when we are all strung out in a straight line. She suggested that we rearrange the tables so we could actually see one another. The first attempt at making a new formation placed some of the members of the ZBA with their backs to the public. Wendling cautioned us to make sure no one in the public was speaking and that we could be heard as we began deliberations. Jeff came forward, saying he couldn't hear us so he put a chair at our table and sat down. Gerlach asked him to leave the table and he refused. We turned to our attorney for advice. Attorney Wendling said if there was going to be a disruption, we could call for a recess until the disruption is over. Bergmann called for a recess at 8:20 p.m. To remedy the difficulty of some in the public being able to hear, we made a second attempt at rearranging the tables, putting them at angles that allowed the members of the ZBA to see each other well without having any members with their backs to the public. This action also quelled the disruption. We resumed deliberations at 8:22 p.m.

Next was recalculation of the required spacing and the variances needed.

We corrected the numbers in the first full paragraph on page 2, as follows (incorrect numbers are struck through, corrected information is in boldface):

The proposed height of the tower at the location provided by the Applicants is a 120' (one hundred twenty feet) self-supported lattice tower along with a nine (9') foot tall lightning rod for a total overall height of 129' (one hundred twenty-nine feet) to be located within a 100' (one hundred foot) area leased parcel. The required setback under Section 24.09.A.11 from any of the structures described in the spacing requirements under Section 24.09.A.11 is ~~510' (five hundred ten feet)~~ **360' (three hundred sixty feet)**. The Applicants seek a variance from Section 24.09.A.11 to allow for the placement of the tower to be 100' southwest of the M-72 right-of-way requiring a variance of ~~360'~~ **260'**; allowing the placement of the tower approximately 275' from the existing house to the southeast of the tower requiring a variance of ~~185'~~ **85'**; allowing the tower to be placed 225' from the first existing house to the northwest of the tower requiring a variance of ~~235'~~ **135'**; and allowing the tower to be placed approximately 400' from the second existing house to the northwest of the tower requiring a ~~variance of 60'~~ **no variance**

Additionally, Gerlach stated that they would also need a 60' variance regarding the distance to Townline Road, which appeared to be only 300' from the base of the tower.

Snyder pointed out that in the next paragraph, the number of exhibits received was left blank. We received thirty-one (31) exhibits. Wendling added that we received a couple more this evening as well as a couple of letters that came in. That is the reason that was left blank. The final version will count all exhibits received.

Fields asked if the general findings of fact are accepted by the Board. Gerlach asked to add the statement that to obtain a variance, the applicant must prove that a unique aspect of the property itself creates a practical difficulty.

Polling the Board, all members agree with the general findings of fact as prepared by our township's counsel with the addition of the statement offered by Gerlach.

**Standards of Review:**

- 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.

*Discussion* – Chair Snyder asked Fields, as the representative from the Planning Commission, whether there were any additional facts to bring to this discussion from their meetings. Fields said there were not. Fields commented that we seem to be looking at two different kinds of what could be called a practical difficulty. Our Zoning Ordinance looks only at the character of the property. We're with a technological issue that extends beyond our consideration of property. What's been brought to us as a practical difficulty has to do with the region and the requirements of a telecommunications network. Gerlach noted that we can't take everything in the world into consideration here. We have to take into consideration what our Zoning Ordinance says. In the future, if we want to change the way we look at variances, then we can do that but at this point in time, what our ordinance says is pretty clear, and it has to do with the character of the land. I went to look at this property and found nothing unique or exceptional about it.

*Roll call:*

Gerlach – no, nothing unique or exceptional about this property; selecting findings from page 5 showing that the standard has not been met.

Bergmann – no, based on the findings on page 5, provided by our legal counsel, showing the standard has not been met.

Lawicki – no, based on finding 1 on page on page 5, 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

Fields – no, based on adopting the findings on page 5 by reference

Snyder – yes, based on the findings on page 4, showing that the standard has been met.

***The Board finds that standard A has not been met***

- 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.)

*Roll call:*

Snyder – no, based on the negative findings beginning on page 6

Gerlach – no, based on the negative findings, showing the standard has not been met. This owner has available all the by right uses without a variance.

Bergmann – no, based on the negative findings provided by our legal counsel.

Lawicki – no, based on the negative findings on the bottom of page 6 and the top of page 7.

Fields – no, for the reasons already given.

***The Board finds that standard B has not been met***

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

***Roll call:***

Gerlach – no, as we’ve determined that no practical difficulty exists, as indicated in the findings on page 8, showing that the standard has not been met.

Fields – no, given the definition of practical difficulty, as found in our ordinance, and as laid out in the findings on page 8.

Bergmann –no, for the same reason.

Lawicki – no, for the same reason, per the findings on page 8.

Snyder – yes, based on the positive findings presented on page 7.

***The Board finds that standard C has not been met***

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

***Roll call:***

Gerlach – no, based on the negative findings number 1 on page 10.

Bergmann – no, based on the negative findings on pages 9 and 10.

Snyder – no, based on the negative findings on pages 9 and 10.

Lawicki – no, for the same reason, the negative findings on pages 9 and 10.

Fields – no, since by definition, we find no practical difficulty.

***The Board finds that standard D has not been met***

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

***Discussion*** – Gerlach stated that she believed this standard is not met because the neighbors themselves have declared they do not want the tower there. Wendling pointed out that in this kind of case, the ZBA cannot use the opinions of the neighbors as evidence. Fields stated that one of the most import points made in the cases studied, was that the townships that prevailed did so because their decisions were evidence-based – therefore, we have to stay evidence-based. Gerlach noted that we can’t say that there is danger of the tower collapsing because we have to accept the evidence provided by the engineers. Wendling pointed out that there are a number of arguments that cannot be used in a telecommunications case, such as the signal from the tower, or concerns that the tower could collapse, since we do not have any negative evidence presented to us to counter the positive evidence received. We do not have any evidence presented that this tower would negatively affect the property values in the neighborhood, and the Telecommunications Act does not allow us to consider the fears and

opinions of the neighbors, or the possible health risks from the RF signal. Fields commented that candidly, she has some opinions that she has to set aside in order to abide by the rules in making her decisions.

Roll call:

Fields – yes, based on the rules and the positive findings as presented on page 10.

Gelach – yes, agree.

Snyder – yes, agree.

Lawicki –yes, agree.

Bergmann – yes, agree.

***The Board finds that standard E has been met***

[Another word processing correction on page 5, where it says AT&T it should say ATC.]

**MOTION** by Gerlach, second by Lawicki, that based upon the general and specific findings of fact, and the evidence presented, only one of the five standards has been met, and the variance is denied. Motion carried unanimously.

This motion closes the deliberations at 9:07 p.m.

**Adjournment:**

**MOTION** by Fields, second by Gerlach, to adjourn. Adjournment at 9:09 p.m.

**Next Meeting:** October 14, 2019

Respectfully submitted,



Tina Norris Fields  
Secretary pro tempore