

October 15, 2020, 4:30pm

**Franconia Zoning Board of Adjustment
Meeting Minutes**

ZBA Members Present: Peter Grote (Chair), Susan Retz, Brian Williams.

Others Present: Jenny Monahan, Allan Clark (Building Official), Kim Cowles.

A meeting of the Franconia Zoning Board of Adjustment (ZBA) was held on Thursday, October 15, 2020, at the Franconia Town Hall.

The meeting was called to order at 4:35 pm by Chair Peter Grote and a quorum was declared.

The members began by reviewing the minutes from September 27th. The Chair had an issue with the sentence "*Collocation*" means the placement or installation of new PWSFs on existing towers or mounts..." and felt that there was a missing word or words. However, the minutes were not resolved as the members were in disagreement with the Chair on some definitions. The Chair asserts that the existing antenna on the building is a mount and says that a tower is like a mount and the applicant has either a mount that is attached to a building on which there is a dish or he has a tower that can have a dish mounted to it. The Chair said that according to the law, the tower itself is a mount.

Brian Williams asked Building Official Allan Clark what his interpretation is and Allan stated that the town's legal counsel agrees with him in that the tower is a new tower, not a modification or collocation and RSA 12K is not applicable. He said that the town's tower ordinance must be followed and variances for setbacks and height are needed as well as a waiver for the fall zone requirement.

Susan Retz said she felt that the applications going to the ZBA first is incorrect and the application should have gone to the Planning Board first instead. She also voiced concerns about granting the height variance.

The Chair stated that under the law, 45' is allowed as a modification application and 55' is a substantial modification. The Chair said that the law dictates that a modification requires Planning Board and ZBA approvals. Brian Williams responded that his opinion is that since the tower was illegally constructed without a building permit, it could not be granted a modification. The Chair said that the illegality needs to be corrected and said a provision of the statute called an Equitable Waiver of Dimensional Requirement could be granted. He referenced a previous case where a contractor began construction before realizing that he required a variance but he volunteered that he had erred and corrected the situation by stopping construction and sought the necessary approvals.

Brian Williams said he disagreed because the original antenna and dish on the building was illegal as no approval was sought for a telecommunications device.

Susan Retz expanded on her concerns about the applicant coming before the ZBA before the Planning Board, stating that the Planning Board may require a change to the plans after a variance has been granted, and then the applicant would need to return to the ZBA. She said she is troubled by the difficulty there has been with moving the application forward. Building Official Allan Clark replied that for the case to move forward, the ZBA would need to grant the

variance. Susan Retz said she was concerned that if the variance is granted, and the applicant next goes before the Planning Board, the Planning Board may require that the applicant make changes to the tower and then the applicant would need to return to the ZBA with new applications, when the town's Wireless Tower Ordinance states that the application should be made directly to the Planning Board.

The Chair responded that he has consulted with town counsel and Steven Buckley of New Hampshire Municipal Association and they advise that the application is either a collocation application or modification application and the ZBA has no authority whatsoever under the law passed in 2003. The Chair said the tower application is a matter for the Building Official and not the ZBA. Both Susan Retz and Brian Williams disagreed and said that the tower requires variances from the ZBA. The Chair stated that if the board feels that way and votes that he will agree with that. He feels that the board currently needs to either vote to close the case or to continue the case.

There was further discussion about the correct process for the applicant and what the applicant needs to proceed.

The Chair suggested that in order to address the violation of erecting the tower without a building application or proper approvals, the applicant request an Equitable Waiver of Dimensions. Once this is granted, he can start the application process anew using the correct procedure. Susan Retz said that she disagreed with the applicant being treated as if he had done something wrong and thought that the variance applications should be heard rather than doing the dimensional waivers.

There was still disagreement over the application process for the applicant. Building Official Allan Clark said the ZBA has no authority over the tower, only the Planning Board does, but the Planning Board has no authority to waive any zoning requirements (the two variances and a fall zone requirement waiver).

Susan Retz said she was still not comfortable with the proximity of the tower to the school's property, and the applicant's attitude about that part of the school's property not being used. Building Official Allan Clark said that granting the variances would only allow the applicant to be heard by the Planning Board to seek a waiver from the fall zone requirement. He said that if the variances won't be granted he will issue a cease and desist order forcing the applicant to remove the tower.

Building Official Allan Clark outlined the process that he believes the applicant needs to take for a potential approval: the applicant first needs variances for the reduced setback and exceeding the height restriction from the ZBA. He would then go to the Planning Board and request Site Plan approval, which the Planning Board could only grant subject to the ZBA granting a waiver for the fall zone. If the ZBA did not grant the waiver for the fall zone requirement, the applicant would have no other option except to forfeit the project or relocate the tower.

The Chair said that he and the Building Official have contrasting opinions about the project and the Chair feels that the project qualifies as a collocation or modification of a facility. He said that means that the ZBA or the Planning Board have no authority over the project, only the Building Official does. The Building Official disagreed.

The Chair said that as a member of the board he would have a major problem with voting for a variance because in his opinion it would be a violation of the ordinance and that the applicant has a vested interest in his equipment and to remove it would do irreparable harm to his investment. The Chair said that it is his opinion that if the variance were granted it would be

breaking the law. Building Official Allan Clark said he does not interpret the law in that way and asked the Chair to outline his interpretation of the steps for the applicant.

The Chair suggested that to help clear the issues for the applicant, he should apply for two Waivers of Dimensional Requirement—one for height and one for the setback. Once the waivers were granted by the ZBA the applicant could proceed with the application's next steps as outlined by Building Official Allan Clark.

Susan Retz and Brian Williamson were still in disagreement with the Chair and Susan reviewed the definitions of "collocation" and "modification" aloud, emphasizing that both a collocation and modification require that the tower is already existing. The Chair said that his opinion is that the application is a modification. Susan Retz then read the letter from town counsel that states that if someone wants to build an entirely new tower, they need to seek all new approvals from the ZBA and Planning Board, and then obtain a building permit.

Town Administrator Cowles suggested that a motion be made to grant the variance for the setback and if that is granted to make a motion for the height restriction.

Susan Retz made a motion to grant the variance for the setback from the side yard for less than 20 feet. Brian Williams seconded the motion. Susan Retz and Brian Williams voted in favor and the Chair was opposed. **Motion fails.**

Brian Williams and Susan Retz told the Chair that refusing to grant the variance could have legal implications for the town. The Chair said that was not a consideration for the ZBA.

The Chair said a legal issue can be avoided if the board solves the problem by granting an Equitable Waiver of (2) Dimensional Requirements. The Chair said the applicant should come and correct his mistake by requesting the waiver. The Chair said he would have no issue with giving the applicant the opportunity to request the waiver but would have an issue with granting the variance. He said he had legal concerns with granting the variances.

Susan Retz said the applicant needs a building permit to erect the tower and cannot be granted without the variances. Peter said a building permit is needed but he can get one under RSA 12k without the variances.

Brian Williams reiterated that the outcome right now is that Building Official Allan Clark will advise the applicant that he needs to remove the tower from the property.

Susan Retz asked the Chair if the board took a vote on the Equitable Waiver of Dimensional Requirements, would he vote to approve. The Chair said that he would.

At the Chairs request, Secretary Jenny Monahan printed copies of the waiver for the members and dispersed them.

The Chair read the equitable waiver statute aloud and then there was a discussion about what should be done. The Chair said that if Susan Retz made a motion to grant the Equitable Waiver of Dimensional Requirements, he would vote yes. Brian Williams said he would vote no, and he thinks a variance is the way to proceed.

The Chair made a motion to grant the applicant an Equitable Waiver of Dimensional Requirement, but as no one seconded the motion there was no vote.

The Chair said he would review the matter with counsel.

Susan Retz made a motion to rescind the previous motion to grant the variance for setbacks. Brian Williams seconded the motion with all voting in favor. **Motion passes.**

Susan Retz made a motion to table the applications until the next meeting. The Chair seconded the motion with all voting in favor. **Motion passes.**

With no further discussion, the meeting was adjourned at 5:45 pm.

Respectfully submitted,

Jenny Monahan
Secretary, Franconia Zoning Board Adjustment