



## TOWN OF SOUTHPORT

1139 Pennsylvania Avenue  
Elmira, NY 14904

*Minutes Approved  
by Board of Appeals  
December 18, 2019*

### ZONING BOARD OF APPEALS

#### INFORMATIONAL HEARING

#### **MATTHEW KERWIN, BARCLAY DAMON, O/B/O, UP STATE TOWER CO, LLC & BUFFALO-LAKE ERIE WIRELESS SYSTEMS**

*(a/k/a "Upstate" and "Blue Wireless")*

**WEDNESDAY, NOVEMBER 20, 2019**

**7:00 PM**

Minutes of the informational hearing of the Zoning Board of Appeals, Town of Southport held at the Southport Town Hall, 1139 Pennsylvania Avenue, Elmira, New York on November 20, 2019 at 7:00 p.m. The informational hearing was held to provide an update on the Application of Up State Tower Co., LLC and Buffalo-Lake Erie Wireless Systems, represented by Matthew Kerwin, Barclay Damon, 125 Jefferson Street, Syracuse, NY 13202, concerning an area variance to construct a telecommunications tower at Morley Place, Town of Southport, NY (*Tax Map #109.07-5-45*), Site: ELM-765, zoned Industrial, but does not meet the current code in Section 525-109(D)(1)(a)(2)-Setback Requirements.

#### Item No. 1 - Call to Order

##### **Attendance**

Board Members Present: Justin Faulkner  
Deborah Eames  
Edward Steinhauer  
Shawn Crater, Alternate Member

Board Member Absent: Susan Silvers

Others Present: Leslie Connolly, Town Attorney  
Peter Rocchi, Town Code Enforcement Officer  
Bonnie Balok, Secretary-Zoning Board of Appeals

Attorney for Applicant: Matthew Kerwin, Esquire, Counsel ("Upstate") ("Blue Wireless").

#### Item No. 2 - Approval of Minutes of June 19, 2019

*(Last Meeting of ZBA)*

Chairman Faulkner advised the next item on the agenda is the approval of the June 19<sup>th</sup> meeting minutes. It was noted at that meeting, Ms. Eames and Mr. Crater were absent from the June 19<sup>th</sup> meeting and therefore could not vote on the June 19<sup>th</sup> minutes. Further, Ms. Silvers was not present at the current, November 20<sup>th</sup>, meeting. Based upon this detail, there was no quorum. Approval of the June 19, 2019 minutes was tabled until the December 2019 meeting.

#### Item No. 3 – New Business - Update on Application

of Upstate Tower Co, LLC and Buffalo-Lake Erie Wireless Systems to construct a Telecommunications Tower

Town Attorney Connolly advised the applicant submitted their proposal to the Planning Board; because of the mandated thirty (30) day period of time, the meeting was held on November 4 just before the thirty (30) day period of time would have expired. After the Planning Board meeting, the Board forwarded a Notice of Incomplete Application to the applicant. The reasons for the incomplete application were the Planning Board still did not receive a clear statement as to what the construction route would be and failure applicants' to provide to its RF Engineer so that he could conduct his analysis of the feasibility of alternative locations. The Planning Board thought the propagation maps were important to them to understand the proposal.

The applicants responded, they did not appear for that meeting. The Planning Board sent information today to the applicant's counsel advising the confirmation as to the route the construction vehicles will be taking was still outstanding and that applicants should provide a clear statement and resubmit the application in accordance with the new local laws and telecommunication facility application form. The Planning Board acknowledged that they have received propagation maps that they can read.

Attorney Connolly explained the Town recently passed a new telecommunications law and also new laws regarding the new fees that could be charged for consultants to the Town Board, Planning Board and ZBA. A lot of the fee language came out of the litigation the Town is currently involved in with Upstate Wireless. The Town has requested, in compliance with the new application requirements, that the applicants, when they provide confirmation of the construction vehicle route, submit their application pursuant to the newly passed Code provisions. The Town has provided the applicant's counsel with the new application form and a draft of the telecommunications ordinance. This was previously provided to the applicants in the hope that they would volunteer all the information that was sought so that things could keep moving forward, but the applicants did not do so. The Town is now waiting for them to provide the truck route and also to provide escrow amounts so that the Town can retain its RF engineer and visual impacts consultant and ensure that legal counsel gets paid. The Planning Board also reserved its right to ask for more information. That is where we stand right now.

Attorney Connolly also advised in regards to the original application, which is in front of the ZBA right now, pursuant to the new Town Code, the Town has increased the height limit of telecommunications towers to two hundred feet (200'), and so the applicants would no longer need a height variance. They still will need a variance for the setback requirements should they move forward with this site.

Discussion took place concerning a decommission bond. Attorney Connolly advised the applicants have agreed to provide a decommission bond in the application they submitted in October of this year. Further, the ZBA cannot consider a variance until all the items are provided as required under Town Law.

Discussion also took place concerning a consultant looking at the alternative sites. Attorney Connolly advised that is why we are seeking escrow funds from the applicant to provide for an RF engineer to talk technical language with the applicant so we can be informed whether that other tower really can't work.

Discussion continued with respect to the setback variance; distance from Clemens Center to base of the tower, it is not going into the DOT right-of-way. Concern was expressed if the tower were to fall over after the ZBA approves a variance, would that cause a problem for the Town? Attorney Connolly explained when the Planning Board puts out its request to be lead agency, for SEQR purposes, because we are not sure if the DOT is going to have to approve or not approve some sort of response, what could be done is to send the information to DOT for comment. We can confirm with an engineer about the way a tower collapses and if they do in fact collapse on themselves.

Discussion brought forth the concern about the twenty foot (20') breakaway at the top and if the tower is designed to collapse on itself, why would a twenty foot (20') breakaway be needed. Attorney Connolly suggested that would be another question to ask the engineer.

Matthew Kerwin, Legal Counsel ("Upstate") ("Blue Wireless") advised he just received the letter from Attorney Connolly today explaining the application still remains incomplete. Attorney Kerwin advised they disagree because we have provided the information about the roads to be used which are Morley Place and Pennsylvania Avenue for access and that means for construction access as well. Further, with respect to other aspects that were raised, in terms of providing a complete application. Attorney Kerwin stated he didn't know

if the ZBA was aware, on November 12 we provided a letter to the Town Board, Clerk and Town Attorney setting forth our concerns with the laws that were being considered. Our concerns were numerous but despite setting forth those concerns; the Town went ahead and chose to disregard them. Further Attorney Kerwin expressed his concern as to whether or not the law has been filed with the Secretary of State to make the law affective. Attorney Kerwin explained they were told because of the adoption of the laws we needed to comply with them; we didn't do that because we were not sure if the law was going to be enacted. The law does not become affective until that happens. With that as a backdrop, regarding some of the other concerns that were raised, we submitted a complete packet here with large propagation maps to all boards, including the ZBA. In the analysis of surrounding sites, in light of our search area, the use of exiting towers in the area is not feasible for coverage objective. With respect to other properties in the area, we did that by looking at current properties available under the Code that allow towers-Industrial and the only other property would be AR; the only AR property is one-half mile away from our site, which from a coverage standpoint would shift our coverage one-half mile away and would detrimentally impact what we are trying to cover here which is listed in Exhibit 6 of the application.

Attorney Kerwin further explained they focused their analysis on the Industrial properties and in terms of the relief they are requesting from the Town, the ZBA in particular, the current proposed property and all the other properties they analyzed would put them in the same position, adjacent to Route 14, surrounded by CN and CR properties. Attorney Kerwin advised, they think they have addressed, as best as they can, the use of existing towers. There is a tower at the Fire Department, but it is too short. They determined one hundred and seventy feet (170') is acceptable. The application is being deemed incomplete based upon a law that was not in affect when they originally applied.

Attorney Connolly advised the application wasn't deemed incomplete because it didn't comply with the new law, it was incomplete because the propagation maps were still illegible and the Planning Board could not accurately assess whether alternatives had been evaluated because they didn't have the basic information. An applicant does not have any vested right in zoning. To say that the zoning can't be changed and that applicants are not bound by the new law that may have not been filed overlooks the fact the Town has passed the law and that the Town fully intends to file the same with the Secretary of State. The applicant has been afforded a copy of the new laws so that things could move forward. The applicants chose not to do that. Attorney Connolly further advised, in regards to the validity of the new laws, that's not within her purview, that's the purview of the Town Board Attorney.

Inquiry was made about reaching out to Chapel Lumber and the machine shop in the vicinity for a second time. Attorney Kerwin advised he would have to check to see if a second inquiry had been made. All those properties present the same lot size problems.

Attorney Connolly explained the ZBA can grant a variance based upon contingency of the Planning Board's approval of the application. Further, the maps were not provided until November 13<sup>th</sup> well after the Planning Board had made their decision that the application was incomplete. The only new information provided to the ZBA, at this hearing tonight, is the Propagation Maps, Exhibit C.

Mr. Steinhauer made a motion, based on the need for the Planning Board to review the propagation maps and application, the need for the ZBA to review the propagation maps just received tonight and the need for the SEQR to be initiated, to table this until December 2019. Seconded by Mr. Crater.

