

Permits and 282-46 with certain conditions imposed. The Board further finds that the Special Permit request, with conditions included, will not cause additional nuisance, hazard or congestion nor will it substantially harm the neighborhood or derogate from the intent of the Zoning Act.

VI. VOTE: Therefore, it was unanimously and duly VOTED TO GRANT such Special Permit predicated on the above facts with the following conditions in place:

1. The existing ladder on the tank will be no lower than 30 feet from the ground level and shall ^{KEM}not be encased.
2. Security lighting shall be provided as determined by the Inspector of Buildings. Such lighting shall not shine upon abutting property or cause distractions.
3. Access drive on site will be gated as determined by the Inspector of Buildings. The purpose is to discourage unauthorized vehicles from site access.
4. The proposed six foot fencing that will encompass the equipment shed and cable bridge to the tower will be of chain link variety including slats and with outward top extensions to deter intrusion.
5. The chain link fence will be screened with an evergreen buffer, i.e. hemlocks, etc.

Kathleen Mahoney voting to grant with 5 conditions.
 Jim Hanna voting to grant with 5 conditions.
 Joe Howarth voting to grant with 5 conditions.

DATE: 11-16-98

ASHLAND ZONING BOARD OF APPEALS
by:

Reviewed as to form:

[Signature]
 Town Counsel

[Signature]
[Signature]
[Signature]

Filed with Town Clerk on:

Date: November 20, 1998

[Signature]
~~Cindy Giles, Town Clerk~~
 Melissa Camille, Interim Town Clerk

APPEALS MAY BE MADE PURSUANT TO SECTION 17, CHAPTER 40A, M.G.L.. IF NO APPEAL IS MADE WITHIN TWENTY DAYS OF THE DATE OF FILING OF THIS DECISION WITH TOWN CLERK, THE FOLLOWING SHALL BE EXECUTED BY TOWN CLERK:

I HEREBY CERTIFY THAT TWENTY DAYS HAVE ELAPSED FROM THE DATE THIS DECISION WAS FILED IN THE TOWN CLERK'S OFFICE AND THAT NO APPEAL HAS BEEN FILED.

DATE: Dec. 10, 1998

[Signature]
~~Cindy Giles, Town Clerk~~
 Melissa Camille, Interim Town Clerk

NOTICE

BK29507PG061



RECEIVED
TOWN CLERK
ASHLAND, MA.

COMMONWEALTH OF MASSACHUSETTS
ASHLAND ZONING BOARD OF APPEALS

2009 AUG 25 AM 8:23

HEARING NUMBER:08-02 and 08-04

- I. **APPLICANT:** The applicant in this matter is Ominpoint Communications Inc. The applicant is represented by Jennifer Lewis, Esq. of Prince, Lobel, Glovsky & Tye, LLP.
- II. **APPLICATION:** The applicant seeks a Special Permit and dimensional variance to permit co-location of a personal wireless service facility on the water tower pursuant to the terms of Section 282-46 of the Code, Town of Ashland, all as described with particularity in the application and materials submitted on March 19th, 2008 [Hearing 08-02], and supplemental materials for the variance submitted on May 21st, 2008 [Hearing 08-04].
- III. **THE LOCUS:** The locus which is the subject of this application is located at 24 Tower Road, which is in a Residential A zoning district and the Wireless Communication Service District (an overlay district) as shown on the Assessor's Atlas as Sheet 13, Block A, Lot 77, in the Registry of Deeds Book 6488 page 561 owned by the Town of Ashland.
- IV. **THE HEARING:** The initial public hearing in this matter for the Special Permit was held in the Town Hall Meeting Room on Monday, May 5th, 2009 commencing at 7:15 p.m. , and was continued for additional meetings as necessary. Notice of the hearing was given to all persons deemed affected as shown on the latest tax rolls of the Town and by publication in "The Metrowest Daily News", a newspaper of general circulation in the Town, on 4/21/08 and 4/28/08. At this initial hearing the Board expressed a concern that the proposal of extending the pole height to 85 feet required a dimensional variance in addition to the Special Permit applied for. The applicant acknowledged the concern and requested an extension to file the variance request. A second notice for the hearing concerning the variance was given to all persons deemed affected as shown on the latest tax rolls of the Town and by publication in "The Metrowest Daily News" on 6/2/08 and 6/9/08. The Board of Selectmen, Town Manager, Inspector of Buildings, Planning Board, Conservation Commission, Board of Health and Board of Assessors were also notified. Sitting on the hearing were Shaun Finnegan, Randy Gruber and Ed Hart.
- V. **DISCUSSION:** The decision intent, in this matter, is based upon the Special Permit and variance applications, supporting documentation, public records of the Town, testimony and evidence brought forth at the Hearing, Official ZBA Hearing Minutes, Terms of the Zoning Code, Town of Ashland and a viewing of the locus, all of which are incorporated by reference.

The applicant argued through its counsel and radio frequency expert that there is a coverage gap in the area depicted on materials submitted during the hearing. The applicant argued that installation of the flush mounted antennas at 85' above ground level will eliminate a majority of the coverage gap, and that no other sites in the telecommunications overlay district would provide adequate coverage for to eliminate the gap in coverage.

PRINCE, LOBEL, GLOVSKY & TYE LLP
ATTORNEYS AT LAW
100 CAMBRIDGE STREET
SUITE 2200

BOSTON, MASSACHUSETTS 02114 / 08-04

- VI. **DELIBERATIONS:** This Board finds that Ominpoint's investigation of alternative sites, i.e. a second water tower site owned by the Town, complies with *Southwestern Bell Mobile Systems v. Todd*, 00-1164, March 30, 2001 (244 F.3d 51).

A number of abutters raised concerns about the radio frequency transmissions of the tower. While the Board acknowledged such concerns, United States Code Title 47 §332 Mobile services (c)(7)(B)(iv) states:

“No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission’s regulations concerning such emissions.”

The primary Town by-law the Board must consider for this case:

§ 282-46. Wireless Communication Service District (WCSD).

A.Purpose.

- (1)The purpose of a WCSD in Ashland is to establish a district in which wireless communications services may be provided while protecting, to the greatest degree possible, public health, safety, aesthetics and the general welfare of the public. Specifically, the WCSD has been created to:
- (a)Protect the general public from hazards associated with wireless communications towers, and
 - (b)Minimize visual impacts from WCSD towers on residential districts within Ashland.
- (2)For the purposes of this section, the WCSD shall provide for only those services utilizing wireless communications towers as defined in §282-99. Such services, it is envisioned, will be provided by means of said towers, including antennas and accessory structures, if any.

B. Location. The Wireless Communications Services District may be located on land owned by the Town of Ashland, regardless of zoning district, which is held in care, custody, management and control of the Board of Selectmen with the exception of school, park and other land held for future recreational and educational purposes; and other land in any zoning district, except those which allow residential uses by right, may be considered provided that tower sites are set back at least one hundred (100) feet from adjacent ways. The WCSD shall be considered as overlying other zoning districts. Any uses permitted in the portion of districts so overlaid shall continue to be permitted subject to all provisions for the district, except as may be specifically superseded herein.

C.Application Requirements. As part of any application for a permit, applicants shall submit the information required for Special Permit approval as set forth herein and the Ashland Zoning Board of Appeals Rules and Procedures, Article 5, as may, from time to time, be amended. Applicants shall also describe the capacity of the tower, including the number and types of antennas that it can accommodate and the basis for calculation of capacity, and any accessory structures.

D. Restrictions. A Wireless communications tower (including antennas and accessory structures, if any) may be erected in a WCSD upon issuance of a Special Permit by the Zoning Board of Appeals pursuant to § 282-10, § 282-11 and § 282-12 of the Ashland Code, and after advisory from the Ashland Board of Selectmen, or its designee, and the Ashland Planning Board after its consideration of Site Plan requirements of § 282-6 of said Code, and subject to the following conditions:

- (1) To the degree feasible, all service providers shall co-locate on a single tower. All towers shall be designed to structurally satisfy the maximum number of foreseeable users within a five (5) year period which is technically practicable.
- (2) New towers shall be considered only upon a finding by the Zoning Board of Appeals that existing, or approved tower sites, cannot accommodate the wireless communications equipment planned.
- (3) In no incident shall any tower be located closer than one (1) air mile to any other tower.
- (4) Tower height shall not exceed seventy-five (75) feet above existing terrain.
- (5) A tower shall not be erected nearer to any property line than a distance equal to the vertical height of the tower (inclusive of accessory devices), plus ten (10) feet, measured at the mean of the finished grade of the tower base.
- (6) To the extent possible, all network interconnections from the communications site shall utilize underground services.
- (7) Existing on-site vegetation shall be preserved to the maximum possible degree. Additional shielding, vegetation or other plantings may be conditioned, as well as painting and lighting standards set to limit visual impacts.
- (8) Traffic associated with the tower site shall not adversely affect abutting ways.
- (9) Prior to any determination by the Ashland Zoning Board of Appeals, applicants proposing to utilize wireless communications facilities on town-owned land shall provide evidence of contractual authorization from the Town of Ashland Board of Selectmen, or its designee. Any contractual agreement with the Board of Selectmen shall be preceded by a public hearing to which all abutters shall have been invited by mail at least two (2) weeks in advance.

In regards to compliance with this portion of the Town by-laws, the applicant's plan to co-locate on an existing tower, or the tower's existence, complies with conditions 1,2,3, and 5 of paragraph "D". The plan exceeds the 75 foot height prescribed in the 4th condition and is addressed in the variance discussion that follows. The plans submitted by the the applicant conform with the 6th and 7th conditions of the section to the extent possible within reasonable commercial standards. To address the 8th condition of the section, the applicant provided evidence and testimony that the existing ingress and egress to the site will not adversely impact traffic on the abutting ways. The applicant provided copies of the contract with the Town demonstrating partial compliance with the 9th condition.

In regards to the 9th condition, abutters attested that the Board of Selectmen failed to provide notice as specified:

"Any contractual agreement with the Board of Selectmen shall be preceded by a public hearing to which all abutters shall have been invited by mail at least two (2) weeks in advance."

Combining the denial of a right specifically granted in the Code with the dismal appearance of the water tank due to a need of painting, the right serving as a means for abutters to present such a concern as part of the contracting process, the Board feels compelled and obligated to protect this right. In addition, given §282-46(D) grants this Board the power to “may be conditioned, as well as painting and lighting standards set to limit visual impacts.” leads the Board to further conclude that the Town can not be held to a lesser standard than this Board has held other third party land owners in regards to its stewardship of the site.

Under the 7th condition of §282-46(D), the Board could attach the painting of the structure as a condition of the issuance of a Special Permit. However, a combination of the potential cost of such a condition and a need to remand the contract portion of the 9th condition of the section back to the Board of Selectmen, the Board will defer further review of the 7th condition. In the process to remedy the 9th condition of this section, the Board encourages the Town and applicant to consider possible options to address the visual aspect of the site.

The Board finds the applicant has also satisfied §282-10C by demonstrating a benefit to the Town of increased wireless coverage service with a land use consistent with one already present at the site without inflicting any substantial harm to the abutting properties with the increased usage.

§282-46(D)(4) of the Zoning Code states:

“Tower height shall not exceed seventy-five (75) feet above existing terrain.”

The applicant's plans depict a 10 foot extension to the pole running through the center of the water tank yielding a new height of 85 feet. The applicant argued that the “top of the water tank” constituted the “terrain” and therefore was only ~ 33 feet above the “existing terrain”. Given “terrain” derives from the latin term “*terrenus*” meaning earth, the Board disagreed and determined the applicant need a variance for a height of 85 feet.

As required by M.G.L. Chapter 40A§10, the ZBA may only grant a variance if it finds that all of the following requirements have been met:

- (1) a literal enforcement of the provisions of this chapter would involve a *substantial hardship*, financial or otherwise, to the petitioner or appellant
- (2) the hardship is *owing to* circumstances related to the soil conditions, shape or topography of such land or structures and especially affecting such land or structures, but not affecting generally the zoning district in which it is located; and
- (3) desirable relief may be granted without either substantial detriment to the public good or nullifying or substantially derogating from the intent or purpose of this chapter.

For the first requirement, the applicant provided sufficient evidence that they had a coverage outage per approved testing procedures. The second requirement ties the hardship to the topography of the land. The applicant did present sufficient evidence that there were no other sites in the Wireless Communication Service District (§282-46) that could cover the outage. The topography of the land prohibited an alternative site. A prior variance granted enabling a 140 ft tower on Ponderosa Road and certain provisions of the United States Code factor into the third requirement. USC Title 47 §332 Mobile services (c)(7)(B)(i) states:

- (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
- (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

A ruling by this Board denying the variance runs a risk of the applicant making a case that by denying this variance paragraph (II) above applies as there is no viable alternative in the district proscribed by §282-46. The Board would also need to differentiate its prior decision to grant a variance for a 140 foot pole on Ponderosa Road, something well beyond the 75 foot limit defined in §282-46(D)(4).


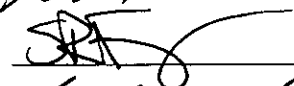
VII. **VOTE:** Therefore, it was Duly voted to:

- 1) grant the dimensional variance [Hearing 08-04]
- 2) grant the Special Permit s[Hearing 08-02] subject to the following conditions and remand action:
 - (a) Remanded to the Ashland Board of Selectmen to specifically address the failure to comply with §282-46(D)(9).
 - (b) Subsequent to resolution of (a) as specified above, a review by this Board specifically limited to visual impact of the site per §282-46(D)(7)
 - (c) The build out of the facilities substantially conforms to the plans submitted as Tab 5 of the application for the Special Permit.
 - (d) To the extent commercially feasible, all materials within the applicant's control and extending beyond the top of the water tank shall limit visual impacts with a painting preference for the color of battleship gray.
 - (e) During the installation of the antennas and subsequent maintenance, the applicant will abide by the various Town of Ashland bylaws applicable to such work, including but not limited to those governing noise in Chapter 204 of the Ashland bylaws.

Shaun Finnegan, voting to grant.
 Randy Gruber, voting to grant.
 Ed Hart, voting to grant.

DATE: 8/4/2008

ASHLAND ZONING BOARD OF APPEALS
 By:



Edward P. Hart

Filed with Town Clerk on:
 Date: August 5, 2008


Tara M. Ward
 Tara M. Ward, Town Clerk

APPEALS MAY BE MADE PURSUANT TO SECTION 17, CHAPTER 40A, M.G.L.. IF NO APPEAL IS MADE WITHIN TWENTY DAYS OF THE DATE OF FILING OF THIS DECISION WITH TOWN CLERK, THE FOLLOWING SHALL BE EXECUTED BY TOWN CLERK:

I HEREBY CERTIFY THAT TWENTY DAYS HAVE ELAPSED FROM THE DATE THIS DECISION WAS FILED IN THE TOWN CLERK'S OFFICE AND THAT NO APPEAL HAS BEEN FILED.

DATE: August 26, 2008

Tara M. Ward
Tara M. Ward, Town Clerk

NOTICE

The Grantee must see to the filing and indexing of this decision and certification in the Registry of Deeds as set forth in Chapter 40A, Section 11, M.G.L. This grant shall not be in effect until proof of filing is shown and filed with the Inspector of Buildings and the Zoning Board of Appeals.

A TRUE COPY. ATTEST

Tara M. Ward
Tara M. Ward, Town Clerk

Tara M. Ward
Town Clerk
8/26/08

Regina C. Brune
Deputy Middlesex S. Register