

MINUTES OF THE PUBLIC HEARING  
SUDBURY BOARD OF APPEALS  
TUESDAY, SEPTEMBER 12, 2000

The Board consisted of:

Thomas W.H. Phelps, Chairman  
Patrick J. Delaney III, Acting Clerk  
Gilbert P. Wright, Jr.  
Lauren S. O'Brien, Alternate  
Melinda M. Berman, Alternate

Notice was published in the Sudbury Town Crier on August 24 and 31, 2000, posted, mailed and read at this hearing.

Mr. Phelps, Chairman, explained the requirements necessary to substantiate the granting of a variance. He also explained that if anyone is not satisfied with the Board's decision, they have the right to appeal to Superior Court or District Court within twenty days after the decision has been filed with the Town Clerk, and that possible other appeals may exist under current law.

Joseph Della Selva, Omnipoint Communications Inc, was present to represent a petition for a variance to allow the installation of three stealth antennas with supporting cabinets within 500 feet of a residential lot line and within 1,000 feet of a school building. The property is located at 29 Hudson Road which is the Village Green complex.

Photo simulations, which were submitted with the application were presented and explained by the petitioner. The three wireless antennas are proposed to be located on the rooftop of one of the buildings. They would be installed within a fiberglass chimney. Ancillary electronic equipment will be placed on a lower rooftop which currently holds several air conditioning units and will be completely encased. There will be no view of the installation.

The parcel comprises 2.77 acres, is zoned limited business and is within the overlay district for wireless services.

Referring to the Zoning bylaw which deals with wireless services, Mr. Della Selva noted that this proposal meets the intent and purpose of the Bylaw. Specifically, the installation minimizes visual impact by way of its location. It is within the overlay district and Omnipoint will be collocating on an existing structure in a manner which is essentially invisible. Mr. Della Selva said this is a passive innocuous use which creates no noise, vibration, or odor. It will not necessitate any groundwork.

Mr. Della Selva noted that since this is not a monopole but rather an installation on a rooftop within the overlay district, it is allowed by right. However, a variance is needed since the Bylaw requires such installations to be 500 feet from a residential lot line. This parcel is completely surrounded by a residence district. It is only 325 feet deep from Hudson Road to the back property line and 350 feet across. There is no location which could meet the 500-foot setback.

The Bylaw also requires a 1,000-foot setback from a school building. Although the installation is 1,000 feet from Curtis Middle School, Noyes School and LSRHS, there is a day care center and after school business which have been on the premises since 1994 and 1995. The Bylaw came into existence in 1998. Mr. Della Selva noted that in his conversation with the Town Planner, she indicated the awareness of these two operations and did not exempt this property from the overlay district.

Mr. Della Selva was requesting the Board grant the variance. He said the installation is innocuous and will benefit the town in terms of enhanced wireless communications services along the Route 27 corridor.

Mr. Phelps asked for a more detail description of the antennas and equipment.

From the photo simulations, Mr. Della Selva pointed out the chimney structure which will mirror three other chimneys which exist on the building. He also described the cabinet structure.

In response to a question regarding stealth technology, Mr. Della Selva explained that the antenna is approximately 42 feet from the ground. It does not cover what a monopole would cover; however, a monopole cannot be installed at this site. However, Omnipoint has a "hole" in central Sudbury and is looking to cover that particular corridor; i.e., Concord Road and Route 27. He added that the installation at Feeley Field will also help in the coverage aspect.

In response to a question regarding collocation, Mr. Della Selva said he interpreted collocation to mean locating on an existing facility. He said there is no room in this installation for another carrier. However, there is a possibility that another carrier could utilize some other portion of the roof for a chimney installation.

Mr. Phelps read a memo dated September 12, 2000 from the Town Planner which offers the following comments:

1. Two purposes of the Bylaw are to (1) minimize visual impacts of this technology and (2) conceal new equipment to accommodate wireless communication needs in order to reduce the number of towers needed.

2. The installation is within the Wireless Services Overlay District.
3. Since the installation proposes no monopole, it is allowed by-right under Section V,P,3. No additional special permit from the Board of Appeals is needed.
4. The proposal appears to meet the height requirements under Section V,P,4 for such equipment and setback requirements from the edge of the roof or building.
5. The addition of a chimney is exempt from the height limitations pursuant to Section IV,A,4 of the Bylaw.
6. Are the chimneys along the roofline symmetrical in size, height, location and color?
7. Has a balloon test been done?
8. Town Planner concurs with requirement for a variance from residential lot line and school building.
9. Conditions of approval should include:
  - The color of the simulated chimney should match that of the existing chimneys
  - The equipment cabinet shall be screened entirely from view from the public way
  - Receipt of a bond to ensure removal of equipment in the future
  - Receipt of a Site Plan Special Permit approval from the Selectmen
  - Receipt of a Water Resource Special Permit from the Planning Board

With regard to the memo Mr. Della Selva commented as follows:

Although the three chimneys in existence are darker because of age, Omnipoint will match the color.

Omnipoint has no problem with a bond, Site Plan Approval or Water Resource Special Permit process.

The installation will be consistent with the roof line.

It was Mr. Della Selva's interpretation that a balloon test was only required for a monopole installation.

Mr. Delaney asked how close the installation would be from the nearest residences. Mr. Della Selva estimated it to be between 250-300 feet.

In light of the fact that there are two child care facilities within the complex, Mr. Wright, while aware that the safety factor cannot be taken into account in the Decision, asked for comments in this regard for the record.

Mr. Della Selva introduced Dr. Bill McCarthy, a Health Physicist who works at MIT, and who provides expert opinion of RF frequencies. For this installation Dr. McCarthy said the emission level would be .2% of the FCC safe limits. This measurement was taken at ground level 25 feet from the proposed installation. As a comparison, Dr. McCarthy said this would be less than the frequency from a baby monitor operating 24 hours a day.

There were no further questions from the Board. No abutters were present. The hearing was closed.

After deliberation the following motion was placed and seconded:

MOTION: "To grant Omnipoint Communications Inc., applicant, Somerset Sudbury LLC, owner of property, a Variance from the provisions of Section V,P,5,c&d of the Zoning Bylaws, to allow the installation of three (3) stealth antennas with supporting cabinets having a setback deficiency of 250 feet  $\pm$  from a residential lot line, and having a setback deficiency of up to 1,000 feet  $\pm$  from a school building, subject to the following:

1. The color of the simulated chimney shall match the existing chimneys.
2. The equipment cabinet shall be screened from view from the public way."

VOTED: In favor: 5 (unanimous) Opposed: 0

REASONS:

The Board found that the application met all four conditions prescribed for a variance by the local Bylaw and the Zoning Enabling Act, Chapter 40A.

In addition to special conditions and hardship, the Board finds that the applicant demonstrated that no substantial detriment to the public good would result from the requested construction and that the applicant demonstrated that the construction would meet the spirit of the wireless communication bylaw. The Board further finds that the proposed use would not nullify or substantially derogate from the intent and purpose of the Bylaw through the unique circumstances of a) complete concealment of the antenna structure within a false chimney matched to existing chimneys on the structure, b) complete concealment of related equipment within existing areas, c) voluntary location of a school facility within the structure and d) co-location of facilities.

The Board notes that the clear intent of the ordinance is to a) permit wireless communication structures which currently meet all the established criteria, b) leave the door open for future potential sites and c) permit the Board to exercise judgment on a case by case basis for sites which can not currently conform. The Board calls attention to case APT Pittsburgh LP v. Penn Township Butler County of Penn. Penn Township Board of Supervisors, Penn Township Zoning Board, in which the Court of Appeals for the Third Circuit Court, on November 8, 1999, upheld a town's denial of a variance to permit construction of a cell phone tower.

The Board also finds that the setback provisions of the Bylaw are not intended to address potential health hazard, and are therefore not in conflict with the Telecommunications Act of 1996, as born out by the text of the Bylaw. With regard to the various requirements of the Telecommunications Act of 1996, the Board finds:

- that the Town does not unreasonably discriminate among providers of functionally equivalent services in that it has approved petitions from at least three providers, including the applicant;
- that the Town does not prohibit or have the effect of prohibiting personal wireless services in that it has approved several facilities for the applicant, a PCS provider;

In addition, the Board finds that local needs are focused on other issues, some of which were addressed positively during the public hearing, including the lack of visual nuisance that the structure would impose upon the Historic District.

Finally, the Board finds that the applicant demonstrated reasons why the construction could be successfully disguised as a chimney in a manner reasonable and appropriate for an obvious location on a major thoroughfare.

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Thomas W.H. Phelps, Chairman

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