

Town of Berlin Zoning Board of Appeals
Rensselaer County, New York
Decision of the Zoning Board of Appeals
Special Use Permit
Hardship Variance

IN THE MATTER OF: The Application of Mariner Tower II, LLC

Lands of Douglas and Melinda Goodermote
Route 22
Town of Berlin
Village of Cherry Plain
Rensselaer County, New York
Tax Map Parcel No. 163-1-8(A)

On October 15, 2009, Mariner Tower II, LLC (“Mariner”) submitted an application to construct and operate a cell tower on property owned by Douglas and Melinda Goodermote on Route 22 in the Town of Berlin (“the Goodermote site”). Local Law 3 of the year 2002, known as the Wireless Telecommunications Facilities Siting Law for the Town of Berlin (“Telecommunications Law”) requires a special use permit to be issued by the Zoning Board of Appeals, as a precondition for the installation or construction of any wireless telecommunications facility, including a cell tower.

Mariner’s communication facility will consist of a single freestanding 150’ monopole tower encompassed by a 70’ x 80’ fenced compound area. The site plan and specifications are included at Tab 8 of the application, and the Board is approving this site plan in this decision.

Mariner's application was accompanied by the documentation specifically required by the Telecommunications Law; specifically, the applicant has provided:

- 1) a written statement that it will comply with all applicable laws and that it is authorized to do business in Rensselaer County as required by § XX -- 6 --D of the Telecommunications Law (Application Tab 6)
- 2) the information required by § XX -- 6 -- F of the Telecommunications Law, with the exception of the information specifically referenced below (the engineering report is included in Tab 6, the propagation studies are included in Tab 5, the site plan description is included in Tab 8, and other required information is included in Tab 3)
- 3) a written report which addresses the applicant’s efforts to utilize existing towers or existing buildings, as required by § XX -- 6 -- G of the Telecommunications Law (included in the application in Tab 5)
- 4) a commitment to retain a New York State licensed engineer to conduct a geotechnical evaluation to determine the subsurface soil conditions and to design the foundation and the tower itself, in accordance with all governing building codes in compliance with XX – 6 -- H of the Telecommunications Law.

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- 5) a commitment to install a subsurface ground system and to supply a copy of the test results to the Board after it is installed
- 6) Part 1 of the long form Environmental Assessment Form and a completed visual EAF addendum, as required by § XX -- 6 -- J of the Telecommunications Law (included in the application as Tab 6 and subsequently amended on January 4, 2010 and again on March 18, 2010, to incorporate changes suggested by the Board)
- 7) a visual impact assessment as required by § XX -- 6 -- K of the Telecommunications Law (included in the application as Tab 4)
- 8) explanations of how the applicant will meet and comply with the specific criteria of § XX -- 6 -- M, O, P and Q of the Telecommunications Law
- 9) an explanation of the impracticality of requiring utility lines accessing the site to be installed underground, because overhead utility poles already exist and can be used (the utility lines will be underground at the site itself in compliance with § XX – 6 – N of the Telecommunications Law)
- 10) documents showing compliance with federal aviation regulations and Federal Communications Commission requirements with respect to notice to the Federal Aviation Administration, exposure limits for radio frequency electromagnetic fields and interference with other wireless systems (included in the application as Tab 7)
- 11) a written commitment that it will comply with the specific requirements of § XX – 6 – L, R, S, T, U and Y of the Telecommunications Law.

The applicant also submitted, by letter dated January 4, 2009 (should be 2010), additional material, including a revised sheet showing the coordinates of the proposed tower, a revised site search sheet summary map, and a revised EAF, including a visual EAF.

In accordance with the requirements of § XX -- 6 -- Z of the Telecommunications Law, the applicant conducted "balloon tests" on July 19, 2009 and August 1, 2009 to assess the visibility of the proposed site. The results of those balloon tests are included in the Visual Resource Assessment in Tab 4 of the application.

The Board has retained the services of a radio frequency engineer, to prepare an independent report on the application. The Board received the written report and heard an oral report from the radio frequency engineer, Mr. Mark Hutchins, at its regular meeting on January 21, 2010. Mr. Hutchins concluded that the proposed site

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was “a pretty good one.” Mr. Hutchins stated that there was a gap in coverage and that the tower was necessary to address the problem. He stated that the requested height of 150 feet was “less than ideal but appropriate.” At the request of the Board the applicant analyzed four additional potential sites to the west of the proposed facility, which the applicant determined were not superior to the proposed site. Mr. Hutchins agreed with the applicant’s analysis rejecting three of the four alternative sites that were considered and noted that other development issues made the remaining alternative site unrealistic.

The ZBA conducted a public hearing on February 18, 2010, in accordance with the requirements of § XX -- 16 of the Telecommunications Law. The applicant submitted proof that all landowners whose property is located within 1500 feet of any property line of the lot where its proposed cell tower was to be located, were notified of the hearing.

Approximately 40 people attended the public hearing, and 15 residents spoke. Several residents, including Town Supervisor Robert Jaeger, spoke of the need for cell phone service, especially for emergencies. Several residents expressed concerns about the health consequences of cell towers. There was also discussion of the use of the proposed tower by various cell phone carriers and access to an existing tower, constructed and owned by Verizon. One speaker handed the Board a petition signed by 69 residents, 44 from the Cherry Plain area, in support of the cell tower. The Board also received a petition from 25 residents of Cherry Plain who were opposed to the tower. At the conclusion of the meeting, acting Chair, Victor Lewin, took an informal poll of the audience; 34 people were in favor of the tower and 3 were opposed.

On March 18, 2010, the Board conducted an environmental review pursuant to the requirements of the New York State Environmental Quality Review Act (“SEQRA”). The Board considered the revised Part 1 of the EAF, as well as a proposed SEQRA statement that was submitted by the applicant. After a full and comprehensive coordination of the criteria set forth in Part 2 of the Environmental Assessment Form, the Board, by resolution, directed the Board Chairman, Donald French, Jr., to sign a negative declaration, based upon its collective judgment in responding to the criteria set forth in the Environmental Assessment Form. The negative declaration, duly signed by Chairman French, was filed in the office of the Berlin Town Clerk on March 21, 2010.

Application for variance

The land-use regulations of the Town of Berlin § XX -- 13 of the Telecommunications Law imposes a setback requirement equal to the height of the tower or the applicable setback requirement in the Berlin land use regulations, whichever is greater. The proposed tower is located in an R-1 zone, and a structure, such as a cell phone tower, would have to be located at least 50 feet away from the rear yard setback under the land use regulations. However, the provisions of the Telecommunications Law require a setback equal to the height of

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the tower or 150 feet from any abutting parcel. According to the plan submitted by the applicant, the proposed tower will be only 50 feet away from the boundary of the adjacent property owner.

The applicant has submitted a request for a zoning variance, pursuant to the provisions of Article X (b) (2) of the Town of Berlin land use regulations, on the grounds of hardship. The applicant seeks a 100 foot variance from the rear yard setback requirement, because the requirements of § XX -- 13 will prevent the use of the property for the purposes of a cell phone tower. According to the application for the variance, the landowner has reviewed the proposal with the adjacent property owner, and has been told that the neighbor does not object to the proposal. Although the Board has not received any formal communication from this adjacent landowner, the Board did require that all adjacent property owners receive notice of the request for an amendment, and did not receive any negative responsive from any of them.

The applicant also requested, by letter, a waiver from Article V (d) (1) of the land use regulations, which restricts fence height to a maximum of six feet in an R-1 zone, if such a variance is required. The applicant cites § XX -- 11 of the Telecommunications Law, which requires adequate security for a telecommunications facility. The applicant apparently believes that an eight foot high chain link fence, plus an additional one foot of barbed wire, for an overall height of nine feet, is necessary to comply with the Telecommunications Law, even though a fence of that height is not normally permitted by the land use regulations.

§ XX – 24 (B) of the Telecommunications Law requires the applicant to “specifically include the town and its officers, boards, employees, committee members, attorneys, agents and consultants as additional named insureds.” (emphasis added). The Board has been advised by the applicant that the designation of the town and other entities as “named insureds” would give the town the authority to exercise certain powers over the insurance policy, which was not intended by the law. The intended purpose of the law is simply to provide the town with protection against liability in the event of any claim for damages that may arise from the construction, maintenance, operation or closure of the cell tower and that goal is fully met by designating the town and other parties as additional insureds, without designating them as “named” insureds. Accordingly, the Board has determined to interpret the requirements of this section to require that the applicant designate the parties specified as additional insureds, and to waive the requirement that these parties be “named insureds.”

County referral

On March 22, 2010, the Board, by its attorney Peter Henner, referred the Agricultural Data Statement submitted by the applicant to the Rensselaer County Economic Development and Planning Bureau, for its review. The statement was also referred to the Agricultural Farmland Protection Board. The County Planning office has reviewed this document, in compliance with § 239 (l) and 239 (m) of the General Municipal Law, and “has determined that the proposal does not have a major impact upon on County plans and that local consideration

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shall prevail.” Such a determination is explicitly permitted by § 239 (m) (4), and does not constitute a recommendation for a “modification.”

The Bureau did offer the comment that “the site lends itself nicely to have the tower resemble a “super pine” as a camouflage method.” However, this comment was not in the form of a recommended modification to the Board’s proposed action, and therefore did not trigger the requirement of § 239 (m) (5) for a supermajority of the Board. The Board has considered the Bureau’s comment, and has determined not to require the applicant to construct a “super pine” tower, because the Board has determined that such a tower will not mitigate the visual impact of the project, and because the imposition of such a requirement would impose an unnecessary hardship upon the applicant without providing any benefit to the Town.

WHEREAS, the Zoning Board of Appeals has received an application for the construction of a wireless communications facility or cell tower at the Goodermote site in the Town of Berlin, and

WHEREAS, the Board has determined that this application meets all of the requirements of the Wireless Telecommunications Facilities Siting Law for the Town of Berlin, and

WHEREAS, the Zoning Board of Appeals has determined that the applicant has submitted all of the information that it is required to submit, with the exception of the information required by §§ XX -- 6 -- F 13 and H, and

WHEREAS, the permit can be issued, subject to the condition that the applicant will submit the missing information prior to the issuance of a building permit by the Town of Berlin, and that good cause exists for not submitting this additional information until such time as the applicant applies for a building permit, and

WHEREAS, the applicant has submitted the requisite forms for the Board to complete its environmental review under the New York State Environmental Quality Review Act, and

WHEREAS, the Board has completed its environmental review, and has issued a negative declaration, finding that there are no environmental impacts that require mitigation, and

WHEREAS, the applicant has committed, in writing, to comply with all provisions of state, federal and local laws, including the provisions of the Telecommunications Law, and

WHEREAS, the siting analysis conducted by the applicant is sufficient to demonstrate that there are no reasonable alternatives to the proposed site, and

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WHEREAS, the conclusions made by the applicant have been confirmed by the Town's independent radiofrequency engineering consultant, and

WHEREAS, the Board is satisfied that the applicant has justified the proposed height of 150 feet for the tower, in compliance with § XX -- 9 of the Telecommunications Law, and

WHEREAS, the Board has reviewed the site plans submitted by the applicant, and has determined that the plans are acceptable, and

WHEREAS, the Board has determined that a chain link fence of eight feet, topped by one foot of barbed wire is necessary to ensure the security of the site and to comply with the provisions of the Telecommunications Law, and

WHEREAS, the Board has concluded that any inconsistency between the land use regulations and the Telecommunications Law should be resolved in favor of the Telecommunications Law, and therefore the six foot maximum height requirement in the land use regulations is superseded by the Telecommunications Law with respect to a proposed cell tower, and

WHEREAS, the Board has referred the application to the Rensselaer County Economic Development and Planning Bureau, in accordance with the provisions of § 239 (l) and 239 (m) of the General Municipal Law, and Rensselaer County has approved the project despite the fact that it is located in an agricultural district where a farm operation exists, and

WHEREAS, the applicant has also applied for a hardship variance from the requirements of the Telecommunications Law, imposing a setback requirement equal to the height of the tower, and

WHEREAS, the Board is mindful of the decision of the New York State Court of Appeals in Cellular Telephone Co. v. Rosenberg, 82 N.Y.2d 364, directing municipal agencies to adopt relaxed standards of zoning with respect to applications to site public utilities, and

WHEREAS, no adjacent property owner has objected to the siting of the cell tower closer to the adjacent property boundary than the distance required under the Telecommunications Law, and

WHEREAS, the proposed cell tower is located in a rural area, and although it will be only 50 feet from the property boundary, it will not be in close proximity to any residential structure,

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NOW, THEREFORE, BE IT RESOLVED: The Town of Berlin Zoning Board of Appeals hereby resolves:

- 1) to approve the site plan for Mariner's telecommunications facility at the Goodermote site,
- 2) to issue a Special Use Permit to Mariner to install, maintain and operate a new telecommunications tower consisting of the following general components: a single 150 foot monopole communications tower and all related ground equipment and utility services (power and telephone). Verizon Wireless is authorized to install twelve panel style antennas mounted to the top of the tower, microwave antennas as required for utility services, and an unmanned equipment shelter,
- 3) the total area of disturbance shall not exceed the area shown on the site plan proposed by Mariner (included in the application in Tab 8). The developed tower yard shall be limited to the 10,000± sq. ft. tower yard lease area and access road shown on said site plan, and care shall be taken to minimize disturbance of existing land beyond the development limits depicted on the site plan. Potential stormwater impacts shall be appropriately mitigated, and the stormwater management/control plan, including a silt fence and drainage ditch, as set forth in the approved site plan, shall be fully implemented by the applicant. Standard sedimentation and erosion control techniques shall be used during the construction phase to mitigate any such impacts,
- 4) the project shall be constructed in accordance with the design and layout shown on the site plan,
- 5) the issuance of this special use permit is conditional upon the applicant's agreement and compliance with all of the requirements of the Wireless Telecommunications Facilities Siting Law for the Town of Berlin,
- 6) the applicant shall obtain all other permits required by local, state and federal authorities,
- 7) the applicant's telecommunications tower shall be designed with structural capacity for co-location at multiple antenna centerlines (at least three antenna locations capable of supporting panel antenna arrays). Upon completion of construction, Mariner or the then-current tower owner will negotiate in good faith with other licensed wireless service providers for future shared use of the subject wireless communications structure. The obligation to permit access to other licensed wireless providers shall also include FCC-regulated wireless providers, in order to accommodate any wireless broadband (internet) provider utilizing unlicensed spectrum. All future co-locations shall be subject to the involved parties reaching agreement on reasonable terms and conditions, in accordance with all then-applicable agreements, customs and procedures in the wireless industry, and there being adequate structural capacity and space to accommodate such co-location. Any such co-location, with the

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exception of Verizon Wireless (referenced in ¶ 2 above) shall require additional review by the Town of Berlin Zoning Board of Appeals, in accordance with the law in effect at the time of the application,

- 8) Mariner (or the then-current owner) shall remove the telecommunication tower and all related facilities if the communications facility becomes obsolete, damaged beyond use, or ceases to be used for its intended purpose by all co-locators for a period of 90 consecutive days or a total of 180 days during any 365 day period, except for periods caused by force majeure or Acts of God, in which case, repair or removal shall commence within 90 days. In such a circumstance, Mariner (or the then-current tower owner) shall notify the Town Code Enforcement Officer within 30 days of the discontinuance of the use of the communications facility by all co-locators, and remove all communications facility equipment within 90 days of such notification, weather-permitting, in accordance with the procedures of § XX -- 28 of the Telecommunications Law,
- 9) that prior to the issuance of a building permit, the applicant shall submit the information required by §§ XX -- 6 -- F 13 and H of the Telecommunications Law, including a certification that a topographic and geomorphologic study and analysis have been conducted and that the foundation and attachments have been designed and will be constructed to meet all local, county, state and federal structural requirements for loads, including wind and ice loads,
- 10) to grant a variance from the setback requirements of § XX -- 13 of the Telecommunications Law, and to authorize Mariner to construct its facility as close as 50 feet from the adjacent property line.
- 11) to require, in accordance with § XX – 24 (B) of the Telecommunications Law that the applicant’s Commercial general liability insurance policy specifically include the town and its officers, boards, employees, committee members, attorneys, agents and consultants as additional insureds, but to waive the requirement that these parties be designated as “named” insureds.

CERTIFICATE:

I, Donald I. French Jr., Chair of the Zoning Board of Appeals of the Town of Berlin, do hereby certify that the foregoing is a true copy of the decision of the Zoning Board of Appeals made at a meeting thereof duly called and held on the 15th day of April, 2010.

Chair

Date