

Town of Clarence
One Town Place, Clarence, NY
Zoning Board of Appeals Minutes
Tuesday June 9, 2015
7:00 p.m.

Chairman Daniel Michnik called the meeting to order at 7:00 p.m.

Zoning Board of Appeals members present:

Chairman Daniel Michnik	Vice-Chairman Ryan Mills
Patricia Burkard	Gregory Thrun
Richard McNamara	

Zoning Board of Appeals member(s) absent: David D'Amato

Town Officials present:

Director of Community Development James Callahan
Junior Planner Jonathan Bleuer
Deputy Town Attorney Steven Bengart (arrived at 7:07p.m.)
Councilman Bernard Kolber (arrived at 7:07 p.m.)

Other interested parties present:

Arthur Fuerst	Brett Morgan	Robert Brenner, Esq
Joseph Czechowski	Charles Kelkenberg	Fred Cimato
Carmen Cimato	Carl Binner	Sal DiNatale
Tom Krug	Robert E. Wilczak	Dennis Miller
Annette Pfentner	Michael Phelps	Grant Wooley

Motion by Gregory Thrun, seconded by Daniel Michnik, to **approve** the minutes of the meeting held on April 14, 2015, as written.

Richard McNamara	Recuse	Gregory Thrun	Aye
Patricia Burkard	Aye	Daniel Michnik	Aye

MOTION CARRIED.

Motion by Gregory Thrun, seconded by Richard McNamara, to **approve** the minutes of the meeting held on April 27, 2015, as written.

Richard McNamara	Aye	Gregory Thrun	Aye
Patricia Burkard	Aye	Daniel Michnik	Aye

MOTION CARRIED.

Old Business

Appeal No. 5

Arthur Fuerst
Residential Single Family

Requests the Board of Appeals approve and grant:

- A.) A 1,152 square foot variance to allow a 1,152 square foot detached accessory structure.
- B.) An 8' variance to allow for a 24' tall detached accessory structure.
- C.) A 3' variance to allow for a 12' tall overhead door.

All requests apply to a proposed detached accessory structure at 9705 Clarence Center Road.

Appeal No. 5 is in variance to A.) §229-55(H), B.) §229-55(E) (2), C.) §229-55(I).

DISCUSSION:

Arthur Fuerst is present and explained that he and his wife like the design with the single door, he will be using it for storage for his RV, tractor, cars and pool equipment. It will not have a back garage door and it will have one cupola. Mr. Thrun asked if the structure will have a brick bottom, Mr. Fuerst said no, it will be steel from top to bottom. Mrs. Burkard asked what color the structure will be. Mr. Fuerst said it will have brown trim with red brick sides. The structure will not be used as a dog kennel. Mrs. Burkard is concerned with what the structure will look like from Clarence Center Road. Mr. Fuerst said it won't be seen from Clarence Center Road because he is putting in a berm with pine trees where the dead trees were taken out, on the north side of the structure.

Mr. McNamara asked how far the corner of the proposed structure from the property line is. Mr. Fuerst said it is at least 20 feet. Mr. Callahan explained that the requirement for an accessory structure, if wholly in the rear yard, is a 5' setback. Mr. Fuerst said there are trees on the back side of the property to buffer those neighbors. There will be no gutters or downspouts on the accessory structure, Mr. Fuerst just wants a two foot (2') overhang. He is unsure as to whether he will have electricity in the structure.

Chairman Michnik voiced his concern with the look of the structure, he suggested putting some brick on the front of it, Mr. Fuerst commented on how expensive that would be. Chairman Michnik said there is veneer facing that can be used. Mr. Fuerst said that would not match his house and veneer is more expensive than brick. Chairman Michnik said he does not have an objection to the size or the placement. Mr. Fuerst said his wife has picked materials to make sure the structure fits into the setting. Chairman Michnik said the applicant is asking for two good sized variances, then asked why the height needs to be at 24'. Mr. Fuerst said that the height variance is for 24' in the center of the structure. He needs the higher overhead door for the RV. Chairman Michnik voiced his concern about the size of the proposed structure. He suggested setting conditions to the motion in which landscaping and a berm would be required. Mr. Fuerst would agree to those conditions.

Mrs. Burkard asked how high the berm will be. Mr. Fuerst has not decided yet, but he will obviously plant trees to hide the structure, he said maybe a 4' high berm with pine trees on it. Mr. McNamara suggested a 3' berm with trees planted 12' apart and staggered so they have room to grow.

ACTION:

Motion by Gregory Thrun, seconded by Richard McNamara, to **approve** Appeal No. 5 under Old Business, with the following conditions:

- a berm of 3' (minimum) height with staggered 4' pine trees, 12' apart.
- there is to be landscaping in the front of the building to soften the look and make it tie into the rest of the structures.

Richard McNamara	Aye	Gregory Thrun	Aye
Patricia Burkard	Nay	Daniel Michnik	Aye

MOTION CARRIED.

Deputy Town Attorney Steve Bengart arrived at 7:07p.m.
Councilman Bernard Kolber arrived at 7:07 p.m.

Appeal No. 6

Charlie Kelkenberg
Agricultural Rural Residential

Requests the Board of Appeals approve and grant:
-for proposed building lot 1:

- A.) A 16.25' variance to allow for a lot split with the frontage of 133.75'.
- B.) A .48 acre variance to allow for a lot split with a total acreage of .85 acres.

-for proposed building lot 2:

- C.) A 16.29' variance to allow for a lot split with the frontage of 133.71'.
- D.) A .5 acre variance to allow for a lot split with a total acreage of .83 acres.

All requests apply to SBL# 30.00-3-39.111.

Appeal No. 6 is in variance to **A & C**) §229-40 (A), **B & D**) §229-39(B).

DISCUSSION:

Tom Kelkenberg and his father, Charlie Kelkenberg, are present. Mr. Tom Kelkenberg submitted a copy of a tax map labelled Exhibit 1 and placed in the file. He referred to lots A, B and C on Exhibit 1 and said that was all his Dad's land at one time. In 1994, he cut off one lot (C) to give to Tom. At that time, before they changed the frontage, his father made the decision to make four (4) lots in there. In 2005 when they switched to 150' frontage, the Kelkenberg's, in good faith, thought they had those three (3) lots, which would have been B and 2 lots in A. In 2008, his father sold the B lot and he was going to hold the two (2) A lots for his retirement. This is the point they are at now, he is looking to sell the A lots. Mr. Kelkenberg said his lots are bigger than 10 of the surrounding lots and there are 5 lots that are 12' bigger than his lots. The proposed lots fit in to the neighborhood. He referenced the idea of going back into his commercial property and said the problem with that is he's got the septic, the berm and the detention pond. There will be green space forever in the 150' from the back of his commercial building to their property line. He went to the neighbors and the one on the east side was advised the meeting was this evening, she always knew there were two (2) lots there and does not have a problem with the request. The neighbor to the west also

signed the neighbor notification form and said she knew there were two (2) lots there as well, both forms are on file.

Mr. Charles Kelkenberg said he has owned this property for over 50 years and has been paying taxes on it. He has lived in the Town all his life and he is not trying to degrade the Town.

Chairman Michnik asked when the applicant built his property on County Road, and how wide is that lot. Mr. Kelkenberg said it is 382' wide and was built in the early 2000's. Chairman Michnik said the different sizes that are around the property in question were probably done in different years prior to the 150' amendment and are grandfathered in.

Chairman Michnik said he is not in favor of this lot split because there was plenty of opportunity to take care of this a while ago, he went on to say that one (1) big lot is valuable. He thinks the requests are for substantial variances.

Tom Kelkenberg said, again, they thought these lots were split and grandfathered in or they would have done it a long time ago. Chairman Michnik said the lots should have been deeded as separate lots back then. He said the frontage requirement changed in 2005.

Mr. Kelkenberg clarified that the septic for his entire commercial property is behind the lot in question. When he sold the lot to the west in 2008, he had no reason to believe the other lots wouldn't sell either.

Vice-Chairman Ryan Mills arrived at 7:35 p.m.

Mrs. Burkard asked if the applicant will build the houses on the lots once they are sold. Mr. Kelkenberg does not know if he will build the houses on the lots once they are sold, or if someone else will build them. He does not currently have a buyer for the property. Mrs. Burkard asked how much a 133' lot would sell for, Mr. Kelkenberg said about \$50,000. Mrs. Burkard then asked if the full lot would sell for \$100,000. Mr. Kelkenberg said no it would sell for about 65,000, maximum. He went on to say small lots are in, townhouses are in.

Mr. Thrun does not see how the applicant will get a large value for the property whether it's on one large lot or 2 smaller lots because people will be worried about development behind them. He is concerned with the limited acreage.

Chairman Michnik referred to the two (2) surveys the applicant provided, dated 5/1/2008, and pointed out that the properties have never been deeded. When the applicant came in in 2008 these lots were not buildable at that point. Mr. Kelkenberg said when he came in in 2005 he had three (3) surveys of the lots for whatever they did at that time, and when he sold that lot, three (3) new surveys were sent to him, they just update the surveys. Chairman Michnik said when the 147' lot was sold, even though it should have been 150', the applicant knew at that point that the minimum frontage was 150', so it is a self-created issue. Mr. Kelkenberg said in 2005 when they switched he came in with three (3) surveys that could be grandfathered in, whatever you had could be grandfathered in, if you had a 100' lot they would grandfather it. Chairman Michnik asked for confirmation on this procedure. Mr. Callahan said he does not know the circumstances on this particular issue but prior to 2005 100' was amenable. Chairman Michnik said after that it went to 150'. He went on to clarify that a survey is just a survey of land, a deed is a hard record of the property.

ACTION:

No motion was made.

New Business**Appeal No. 1**

Upstate Cellular Network
Restricted Business

Requests the Board of Appeals approve and grant:
A.) A 20' variance to allow for a 120' tall commercial cellular tower.
B.) A 46' variance to allow for a 74' setback to lot line.

Both requests apply to 7377 Transit Road.

Appeal No. 1 is in variance to §173-4(D) and §173-5(C)(3)(a).

DISCUSSION:

Robert Brenner, attorney with the Law Firm Nixon Peabody, is present on behalf of the applicant. He is before the Board for a co-location on an existing cell tower at 7377 Transit Road. Mr. Brenner referred to Town Code §173-4(D) which states measurements of height shall include any extensions or other devices above the tower. He asked the Deputy Town Attorney if the lightning rod should be included in the total height of the tower, which would then make the total height 124'. Deputy Town Attorney Steve Bengart said yes. Mr. Mills amended the request to a 24' variance to allow for a 124' tall commercial cellular tower. Mr. Brenner said it would also impact variance "B" with respect to the tower setback. Based on his calculations the applicant would be looking for a 50' variance to the north, a 44' variance to the east and a 49' variance to the south. Mr. Mills clarified for the record that the applicant is actually seeking four (4) variance requests; one (1) height variance of 24' to allow a 124' tall commercial cellular tower and three (3) setback variances: a 50' variance to the north, a 44' variance to the east and a 49' variance to the south.

Mr. Brenner reviewed his submission and said the documents behind tab B outline the need that Verizon has as a public utility to provide service in this area. He referred to page 2 of this section which shows the targeted coverage area. The report outlines the technology. Page 8 of this section shows a Search Area which is where Verizon Wireless needs to construct a facility in order to satisfy the gap in coverage it has and has dubbed this the Dann and Transit Cell. Mr. Brenner submitted propagation maps, labelled Exhibit 1 and Exhibit 2, into the record. Exhibit 1 shows existing coverage and the gap in coverage for this area. The green coverage on Exhibit 2 shows what is proposed from the Dann and Transit facility once it is turned on at the 116' antennae center line, this is the absolute minimum height needed to provide coverage in the Dann and Transit cell, this will fill in the gap to the maximum extent possible. This facility will also help to off-load other facilities in the area that are currently strained.

Mr. Brenner referred to tab C of the submission and noted that Brett Morgan of AiroSmith Development prepared the site selection analysis. Mr. Morgan is present. This report analyzes the search area. Verizon Wireless seeks to collocate its facilities on existing tower facilities or other tall structures within a search area before constructing a new telecommunications tower. This is consistent with Federal Law.

Mr. Brenner referred to tab D in which the Applicable Legal Standards state that wireless telecommunication towers are public utilities and as such are entitled to relaxed zoning treatment to the

extent that they can prove that they have a need which, Mr. Brenner said, they believe the report demonstrates.

Mr. Brenner referred to tab F, Compliance with the Area Variance/Waiver Standards, and noted that they believe they comply with the traditional five (5) factor area variance test under Town Law §267. Their response to each of the factors in this section is listed. Mr. Mills asked if it is Mr. Brenner's opinion that Town Law §267 does not apply because this is considered a public utility. Mr. Brenner said it is the interplay between the relaxed zoning treatment and Town Law §267.

Mr. Brenner said behind tab G is a copy of a view shed map which identifies the site location together with three (3) photo locations. They simulated the proposed tower locations in the photos and showed a before and after photo. Mr. Brenner noted that the photos show the proposed colocation would be the least intrusive solution in the identified search area.

Behind tab H provides feedback from the TOWAIR tool, which is the FAA notice tool that Verizon Wireless uses to determine whether or not there is any interference with air traffic and whether notification to the FAA is required. Mr. Brenner said the report required that the applicant file with the FAA, Verizon Wireless does this as a matter of due course so this has been done.

Mr. Brenner referred to tab I and said the documents in this section are copies of the Verizon Wireless FCC licenses that authorize the company to do business in this area. Behind tab J is a copy of the colocation policy. Exhibit K is an FCC compliance report that is prepared by an independent third party engineering firm. This report analyzes the latitude/longitude coordinates of the proposed tower and does an emissions study in connection with the FCC. The FCC has established a threshold for emissions, and has identified that this facility would operate at below 1% of the Federal emissions threshold.

Mr. Brenner said the documents behind tab L are a Structural Integrity Analysis of the existing tower and whether it can handle the proposed extension. The report concludes that the existing tower can handle the load. The original approved plan from 2004 shows the tower base specifically designed for colocation and an extension. One of the conditions of the original approval of the Special Exception Use Permit was that the tower base be designed to accommodate future co-locators.

Mr. Brenner said tab M is a Full Environmental Assessment Form in connection with the SEQRA process. Based on Mr. Brenner's review of the code this would be an Unlisted Action under SEQRA. Tab N is a copy of the project plan set which shows that the applicant is not expanding the compound in any way. It is clear that the original approved plan intended an extension.

Mr. Brenner said the required notices were sent on May 20, 2015 to the adjoining properties within 1500'. Chairman Michnik indicated that there are certified mail receipts on file that show that notification of this meeting was sent to neighbors.

Mr. Mills asked who owns the parcel in which the tower sits on. Mr. Brenner said the owner of the parcel in which the tower sits is deeded to Kitchen Advantage, LLC. There is a ground lease in place and the current holder of that lease is SBA Communications and they are the tower owner. Mr. Mills asked if the applicant has the property owners consent. Mr. Brenner said the prime lease that was entered into between Kitchen Advantage LLC and Cingular Wireless at the time provides in §6: "Use: Tenant shall use the lease property for the purpose of constructing maintaining and operating a communications facility, any and all uses incidental there to, which facility may consist of such buildings as are necessary to house

telecommunication equipment. A free standing monopole guide or three sided antennae structure of sufficient height as determined by tenant now or in the future to meet the telecommunications needs of any tenant, its sub-tenants, licensees and sub-licensees. Any and all necessary pertinences, emergency generators and additional temporary structures and improvements necessary in emergency situations and a security fence of chain link or comparable construction that may at the option of tenant be placed around the perimeter of leased property. The defined term is collectively between the telecommunications facility.” The lease exhibit to that lease was included and shows 150’ monopole, lease signed July 8, 2004. Deputy Town Attorney Steve Bengart asked if there is wording in the lease that says Verizon has the right to bring an action before any Board for a permit. Mr. Brenner said yes there is a governmental approval section, which is section seven (7) and that says that landlord shall cooperate with tenant in its effort to obtain and maintain and effect all permits and licenses and other approvals required by governmental authorities for tenants use of the leased property and furtherance thereof that landlord agrees to sign such papers as required to file applications with the appropriate zoning authority and other governmental authorities for the proper zoning of the lease property. Lease property and tenant use are defined terms so Mr. Brenner would argue that “tenant use” goes back to that broad definition in section 6. Deputy Town Attorney asked for clarification as to whether the applicant has the right to bring the action before the Board or does the landlord need to do it. Mr. Brenner said the consent that they need, which they have, would be from SBA Communications, the tower owner, because SBA has broad rights under the prime lease between SBA and Verizon Wireless. He does not have a copy of that lease with him but is willing to provide a copy for the file.

Mr. Mills asked what the applicant would do if the variance was not granted. Mr. Brenner said they would seek an alternate candidate within that narrow search range and construct the same height with extension monopole. Mr. Mill asked if there are any alternative sights that can be co-located on. Mr. Brenner said there are no opportunities for co-location within the search area. Mr. Mills asked if there is proposed lighting at the top of the pole. Mr. Brenner said the FAA lighting threshold is 200’, the proposed extension is at 124’ so it is under the threshold. The only lighting that would be on site might be a motion censored LED light; a 26.45 watt LED light which is adjacent to the door on the equipment shelter. Mr. Mills asked if this equipment gives off any type of radiation. Mr. Brenner said there is a thorough emissions study in exhibit K which includes conclusions on page 4.

Deputy Town Attorney Steve Bengart is concerned with the ground lease and the right to do this. Mr. Brenner said SBA entered into a lease with Kitchen Advantage, SBA can do whatever they want with their property that they lease from them. There are no landlord approvals after the fact of that lease agreement for them to make any modifications.

Under the lease agreement that Kitchen Advantage and SBA entered into, SBA is allowed to make modifications to their facility in any way they see fit without any approval from the underlying land owner.

Deputy Town Attorney suggested tabling the item so that he and the applicant can discuss the issue outside the meeting. The request would be brought back to the Board this evening.

ACTION:

Motion by Ryan Mills, seconded Daniel Michnik, to **table** Appeal No. 1 under New Business, until Appeal No. 2 under New Business is completed.

Richard McNamara	Aye	Gregory Thrun	Aye
Patricia Burkard	Aye	Ryan Mills	Aye
Daniel Michnik	Aye		

MOTION CARRIED.

Appeal No. 2

Thomas Krug
Residential Single Family

Requests the Board of Appeals approve and grant:

- A.) A 1,000 square foot variance to allow a 1,200 square foot detached accessory.
- B.) A 9.3' variance to allow for a 25.3' tall detached accessory structure.

Both requests apply to a proposed detached accessory structure at 5370 Old Goodrich Road.

Appeal No. 2 is in variance to §229-55(H) and §229-55(E)(2).

DISCUSSION:

Mr. Krugg is present. There are two (2) neighbor notification forms on file. Mr. Krugg explained that is looking to build this structure to provide storage for his lawnmower, tractor and bicycles. The quality of the proposed structure is consistent with his property and keeping it nice. There will be rafters in the ceiling of the structure to store Christmas decorations. The siding will be natural wood and the brick will match the house. There will be no driveway leading back to the proposed structure. There will be electric running to the structure but no water.

Mr. Thrun asked if there are intentions of changing the upstairs of the proposed structure to living accommodations in the future. Mr. Krugg said no, it is just for storage. His wife has already planted several plants and will plant several trees around the structure, she also wants to put a garden behind it. He owns the 3 and a half acres behind his property.

Mr. Krugg said he will set up the structure for radiant heat just in case he parks a car in there in the winter. There will be minimal outside lighting because the neighbor's house is so close.

Chairman Michnik asked if the applicant could use a smaller structure. Mr. Krugg said it is only 30' by 40' on seven (7) acres of land. It is clarified that Mr. Krugg owns two (2) separate parcels but combined they total seven (7) acres. It is not his intent to combine the properties, he bought the property behind him so that no one else would build a house back there. Mr. Krugg said there will be no business operated out of the structure, it is strictly for storage.

Mr. Krugg said the structure will be built per the submitted drawings dated July 2014.

ACTION:

Motion by Patricia Burkard, seconded by Richard McNamara, to **approve** Appeal No. 2, as written.

ON THE QUESTION:

This variance can be distinguished from other variances in that this applicant has approximately seven (7) acres total, the architectural drawings depict a nicely designed structure with stone, wood and a lot of nice architectural details that help mitigate the additional size.

Richard McNamara	Aye	Gregory Thrun	Aye
Patricia Burkard	Aye	Ryan Mills	Aye
Daniel Michnik	Aye		

MOTION CARRIED.

ACTION:

Motion by Ryan Mills, seconded by Daniel Michnik, to **re-open** Appeal No. 1 under New Business.

Richard McNamara	Aye	Gregory Thrun	Aye
Patricia Burkard	Aye	Ryan Mills	Aye
Daniel Michnik	Aye		

MOTION CARRIED

DISCUSSION:

Mr. Brenner explained that the Town Attorney has some concern regarding the applicant's ability to bring the application. He (the Town Attorney) asked for additional evidence of consent and land control, the applicant will work with Verizon Wireless and the tower owner to obtain and will provide that to the Board. Mr. Brenner asked the Board to table the matter until the next meeting.

Mr. Mills referred to the analysis of the electro-magnetic fields and asked the applicant to explain what the impact might be on nearby homes or structures. Mr. Brenner said based on the report it would be a negligible impact, there will be no adverse health impacts on the surrounding area. There is one other carrier on the tower, it is AT&T.

Mr. Brenner suspects that the height request for the original 2004 request was submitted at 70', however that submission also showed the proposed extension up to 140'.

Mrs. Burkard asked what happens if the rural land around the proposed site turns into subdivisions and the applicant then has a bigger need, will they have to go to another tower. Mr. Brenner said this site is designed to accommodate high levels of demand and future growth.

Mrs. Burkard reads a letter dated May 27, 2015 from the Cimato Family, 9220 Transit Road, East Amherst, NY. The letter was received in the Planning and Zoning Office on May 28, 2015 and is on file. It reads, "To whom it may concern: The Cimato Family is the owners of such property on Transit Road near Dann Road (referred to on site plan as T.A.#29-1-6 and T.A.#29-1-7.212). We have been notified by Verizon Wireless of the proposal they are bringing before the Town of Clarence Board of Appeals. They're proposing a variance to modify the tower including an additional 50ft to be added to the height of the tower. The Cimato Family strongly opposes this additional height as the falling zone footage will be in our

property. As shown on the plans, the property limit is from the center of the tower to our property 74 ½ ft. and 80 ft. from our property. The proposed tower will be adding 50 ft. plus the existing 70 ft. totaling 120 ft. plus 10 ft. of free falling zone equaling 130 ft. As proposed they must purchase a minimum of 60 ft. of our property-otherwise we STRONGLY object to the variance. We ask that the zoning board reject their request or they must purchase our additional property from this location. Signed: Anthony Cimato.” Mrs. Burkard asked Mr. Brenner to address the concerns in this letter. Mr. Brenner said based on the design of the existing tower it can be designed so that the break point can be built in very near the point of attachment of the extension. The tower could be designed, in the unlikely event that it fails and falls, it will fall within the bounds of the parcel upon which it is located and will not cross adjacent parcels.

Mr. Thrun said he is concerned with the previous minutes of why the exception for the 150’ wasn’t asked at the time when it was originally built and why now is it being revisited, the discussion should have been a condition of that, and that is what he will wait for. He asked if there is a guarantee that the break point will break if the foundation is in disrepair and it falls over into the zone of the other residents in that area. You can’t guarantee anything but what is the certainty that it will break at that point. Mr. Brenner said these towers are routinely designed to have break points. It is rare that they fail and even rarer that the break point would fail. The towers are inspected annually.

Mr. McNamara asked if the applicant approached the three (3) adjacent landowners about acquiring property. Mr. Brenner said no.

Chairman Michnik asked who is responsible for the maintenance and inspection of the tower. The applicant said the tower owner SBA is responsible for maintenance and inspection of the tower. Chairman Michnik asked how they check to make sure there isn’t a crack in the pole, the applicant said via visual inspection. Chairman Michnik asked how the tower is designed to break at the point where it won’t fall onto the neighbor’s property. Mr. Brenner said the break points are designed to be located at the weak points in the tower. He will be happy to provide engineered drawings to the Town. It is clarified that if the tower fails it will not fail anywhere near the base of the tower because it is a monopole, it will actually bend and hang over in the event of a catastrophic failure, it will not snap off at the base as that is the strongest part of the tower, it could not hit an adjacent land owner with the break point designed into the steal on the extension, it is just not feasible. The failures that they have seen have been from something hitting the base, which is why there is fencing around it. Mr. Brenner reads from the code which states an inspection is required every tow (2) years.

Carl Binner owns Kitchen Advantage and said he was never notified of this request, which he thinks this is wrong. If this towers extension deflates, his blueprint shows a 70’ fall zone, he cannot do anything with his property in that fall zone, will this still be the same situation. If the tower falls, who is liable for it? If the fall zone is increased, and the blueprint shows something different than that, someone should have told Mr. Binner about it. Chairman Michnik asked if Mr. Binner owned the property and allowed them to install the tower years ago. Mr. Binner said yes, he had an attorney read the contract.

Fred Cimato, represents the Cimato Family, said they own approximately 140 acres surrounding this property. According to the Town Code a 30’ setback from the property line is required in the backyard for a house, if the tower fell it would go right through someone’s house. They have sewers 200’ down the road which are going to be extended to Amherst, they put the sewers in front of their property, they are ready to develop and go to Engineering with their plans, but who would want to build a house on that lot knowing that if the pole fell straight it would go right through their house. Mr. Cimato said they strongly disagree with this request, this could fall 54’ onto his property to the north, it will fall 46’ to the east. They did not

contact anyone else who has land to move this to another location where there would be no concern for fall zones or anybody else's property. Mr. Cimato said Verizon has no regard for anybody else's property. Chairman Michnik asked if any property that the Cimato's own are wetlands. Mr. Cimato said no, it is all being farmed now, and it is not in a flood zone either. You have to look at 124' all the way around the tower.

Sal DiNatale owns the property to the south of the tower and said the paperwork that he has shows the fall zone of the existing tower, not the proposed tower. In the Clarence Town Code it stipulates that over 100' in height should be located only in an Industrial research and development area and not anywhere else; so there is not proper zoning on the parcel of land they are proposing to do this on. If the tower failed it would put the tower approximately 50' into his (Mr. DiNatale's) property. As far as designing a monopole structure that would fail at a certain point, that is impossible. If there is no stress on that point and there is a base fail, it is going to fall over. There have been instances of monopole failures, it is the most common type of cell phone tower that fails and where they fail is at the base, meaning they fall over. Mr. DiNatale referred to the inspections of the towers and said the Town Code requires cell phone towers be inspected by a licensed professional engineer, an independent professional engineer and done every two (2) years and that those reports are furnished to the Town Engineer. Mr. DiNatale spoke with the Town Engineer and the Town Building Commissioner this morning and they said they have received no reports since this tower has been up. So the original tower is not complying with the conditions being given for the Special Use Permit. He is dead against this. He said this is the cheapest way out for Verizon. This is not the location for it, it needs to go somewhere else. There needs to be another solution.

Mr. Brenner addressed the concerns. He said the applicant is going to discuss the nature of the project with the landowner. The Town Attorney would like to see evidence of landlord consent so they will discuss that as well. The Board can condition the approval on the applicant designing a break point into the tower and the Town staff can review a report to their satisfaction regarding the calculations and the design of the tower that the fall area would be wholly contained within the parent parcel where the tower is proposed. Mr. Brenner said he will talk to the tower owner to see what they have been submitting to the Town, if anything, regarding the inspections. The applicant can provide a structural design letter from an engineer that discusses the wind speeds that these towers are designed to handle. These towers can withstand long durations of sustained winds in excess of 90 miles per hour, however this region does not see sustained winds in excess of 90 miles per hour. The applicant can provide certification advising what the precise wind load and conditions would be like in this exact area. Mr. Brenner addressed the comment about this being "the cheapest way out" and said that is simply not true. The reason Verizon is proposing and extension here is because the municipal ordinance requires them to, it is a preferred installation type per §173-7(D) of the Town Code.

Chairman Michnik asked if the applicant can provide a report showing what the highest wind speeds were in this area going back 30 years. Mr. Brenner said they will try to obtain that information.

Mr. DiNatale is not interested in selling or leasing any part of his property to Verizon Wireless.

Mr. Callahan explained that a 100' tower is permitted in the Restricted Business Zone, this exceeds that, he does not know if that renders it into the category of a use variance as opposed to the area variance. On the tabling of this request the attorneys are asked to obtain clarification on this issue.

Mr. Brenner said the height restriction is contained in a section entitled Dimensional Regulations so he thinks an area variance would apply rather than a use variance.

Mr. Binner asked if the Town would give him a permit to expand his warehouse into the 70' fall zone. It is clarified that is not a question that this Board will answer this evening.

Mr. Mills asked what the term length of the lease is. Mr. Brenner said the initial term in 2004 was five (5) years and there are four (4) consecutive extension terms, so it is a 25 year lease. Mr. Mills asked if both parties approval is required for the extensions. Mr. Brenner said no it was an option in the lease.

Mr. Brenner clarified what the Board is looking for: 1.) the applicant is to work with the power company to obtain evidence of landowner consent, 2.) a wind speed letter is to be provided by the applicant, 3.) an Engineers study regarding the break point on the tower showing it will stay within the 70' fall zone, should it fall. The Engineers study should also discuss the foundational point failure versus the breaking point failure. Deputy Town Attorney Steve Bengart suggested having the Engineer present at the next meeting. The Board will need to review the minutes from the original 2004 Special Exception Use Permit approval. 4.) The Board also wants to see the maintenance records.

Mr. Brenner asked the Board to table the request to provide the opportunity for the applicant to obtain the supplemental information. When the applicant has acquired the information they will request to be placed back on an agenda.

ACTION:

Motion by Ryan Mills, seconded by Daniel Michnik, to **table** Appeal No. 1, under New Business. The Public Hearing remains open.

Richard McNamara	Aye	Gregory Thrun	Aye
Patricia Burkard	Aye	Ryan Mills	Aye
Daniel Michnik	Aye		

MOTION CARRIED.

Appeal No. 3

Robert E. Wilczak
Residential Single Family

Requests the Board of Appeals approve and grant a 284 square foot variance to allow for a 484 square foot detached accessory structure at 4970 Thompson Road.

Appeal No. 3 is in variance to §229-55(H).

DISCUSSION:

Robert Wilczak is present and explained that he is replacing a shed with a garage for his car. Mr. Wilczak said he contacted his two (2) adjacent neighbors and they have no issues with what he is requesting, as such, there is documentation on file. There is also a letter from Mary and Daniel Dirrigl dated June 5, 2015, the letter is on file. The garage will have the same siding as his house, the roofing will be the same as the house as well.

Mr. Thrun asked if the applicant looked at alternatives such as having the structure attached to the house. Mr. Wilczak does not want to attach the structure to his house, it will be 15' behind his house. The existing shed is 10' by 18'. If he attached the structure it would change the look of the house and he does not want

to do that. Mr. Wilczak’s property is 330’ deep, it’s about 120’ to his property line. Mrs. Burkard said the nearby subdivision will not be able to see the structure because there are so many trees in the area, you won’t see the structure from the side of the road either because of the line of trees that exists.

Mr. McNamara suggested a height of 8’ for the garage door of the proposed structure.

Chairman Michnik asked the applicant why the site wasn’t marked. Mr. Callahan clarified that the existing shed is where the proposed garage is to be placed.

Mr. Wilczak said the existing shed will be removed. He is amenable to that being made a condition of the approval.

ACTION:

Motion by Gregory Thrun, seconded by Ryan Mills, to **approve** Appeal No. 3 as written with the amendment that the existing shed will be removed from the property by the time the garage is built.

ON THE QUESTION:

Chairman Michnik asked what is in the existing shed. Mr. Wilczak said a snow blower and storage. Mr. Wilczak will have no problem with storage of those items while the garage is being built, he has a covered deck in which he can place some of the stored items on until the garage is done.

Richard McNamara	Aye	Gregory Thrun	Aye
Patricia Burkard	Aye	Ryan Mills	Aye
Daniel Michnik	Aye		

MOTION CARRIED.

Appeal No. 4

Dennis Miller
Residential Single Family

Requests the Board of Appeals approve and grant:
A.) A 48 square foot variance to allow for a 768 square foot detached accessory structure.
B.) A 3’ variance to allow for a 2’ rear yard setback.

Both requests apply to 10840 Stage Road.

Appeal No. 4 is in variance to §229-55(D) and §229-55(E)(1).

DISCUSSION:

Dennis Miller is present and explained that the way his house and garage are situated on the property, the east line of his driveway has no access into a two (2) car garage. He has a single car garage, so he would need to move the garage to the east and on the east side of the garage there is a 36’ wide driveway to the home behind him. The main reason for the request is so he can enter into a two car garage.

There are two (2) neighbor notification forms on file.

Mr. Miller does not have drawings however the garage would be constructed similar to his house, wood framed, Hardie Board, lap siding and a single garage door. He submitted a photo of an existing building that is on the property, labelled Exhibit #1, the new structure will be similar to the one in the photo. There will be two (2) windows to the west side, one man-door and the overhead door.

Mr. Thrun asked if the applicant can move the proposed structure up so that one of the variances is not needed. Mr. Miller said it is not the front that is the problem but a side variance that is needed. Mr. Miller explained that his home has a partial basement so he will use this structure for storage as well.

Mr. Miller said the existing garage will be completely removed.

ACTION:

Motion by Patricia Burkard, seconded by Daniel Michnik, to **approve** Appeal No. 4, as written.

ON THE QUESTION:

Mr. Mills said the second component of this variance can be distinguished from other similar requests because the side is a driveway going back to a residential structure, that structure is not immediately adjacent to the proposed structure.

Richard McNamara	Aye	Gregory Thrun	Aye
Patricia Burkard	Aye	Ryan Mills	Aye
Daniel Michnik	Aye		

MOTION CARRIED.

Appeal No. 5

Annette Pfentner
Traditional Neighborhood District

Requests the Board of Appeals approve and grant:
A.) For Lot 1: a 45' variance to allow for 105' lot frontage.
B.) For Lot 2: a 35' variance to allow for a 115' lot frontage.
Both requests apply to 8375 Lapp Road.

Appeal No. 5 is in variance to §229-61.

DISCUSSION:

There are two (2) neighbor notification forms on file. Ms. Pfentner is present and said they purchased the property in 2003. There are 5.5 acres with 220' of frontage, their understanding at the time was that it was supposed to be two (2) lots. In 2004 they built a five (5) bedroom house because they have 7 kids. They built the house on the west side of the lot so they would preserve the east side of the lot for building another house when they no longer needed five (5) bedrooms. In 2006 they built a 2400 square foot storage barn. She asked the Zoning Office if they were still ok to split the property and they said yes, only 70' of frontage is needed in the Traditional Neighborhood District. They put the barn on the east side of the lot so it would stay with the future smaller house. She was advised, because she has a septic system currently, to contact the Health Department to see what the minimum lot size would be with the existing house, she was told this would be the driving factor. The Health Department told her she needed 32,000 square feet, so when they

proposed the split they made sure they had 32,000 square feet. They now only have two (2) kids at home, her mother is elderly and will come to live with her soon, so Ms. Pfentner is trying to design a house to accommodate that situation. She had a realtor look at her current house and was advised if they sold all their property now with the current house versus dividing the lot and selling the house with only three-quarters of an acre, they would only get about an extra \$50,000. In order to buy another piece of property and build another barn it would cost them close to \$200,000, which is a \$150,000 hit. She has preliminary plans for the house although she did not bring them with her to this meeting. She thought this would be a no-brainer; she planted trees in her future back yard. She was never told about the 150' frontage for non-sewered lots so now she is in a bad spot and that is why she is asking for variances. They will need more frontage on the "new house" lot because they are planning a side-load garage.

Mr. Mills asked if the applicant looked into purchasing additional property from the neighbor. Ms. Pfentner said the owner to the west is not interested in selling any of his land. The owner to the east is in the process of selling the land. There are no other options. Mr. Mills asked if the variance was not granted would the applicant sell the entire parcel. Ms. Pfentner said she would be forced to.

In response to Mrs. Burkard's question regarding Health Department approval, Ms. Pfentner said the Health Department did not have a problem with the split. She clarified that they will sell the other house with three-quarters of an acre of land.

Mr. Thrun asked what the pole barn is used for. Ms. Pfentner said her husband has a landscape business so his equipment is stored in there, items include a dump truck and a bobcat. She and her daughter have horses so there is also a pick-up truck and a horse trailer stored in the pole barn. It also holds patio furniture and a tractor.

Chairman Michnik said this is a big variance. He noted that Ms. Pfentner did not check to see if one of her neighbors is willing to sell property to her. He is not in favor of small lots. He asked when she purchased the lot and if she had the intention to split the lot when she purchased it. Ms. Pfentner said she purchased the lot in 2003 and yes it was always her intention to split the lot. He noted the code changed in 2005 and said it is not the Town's responsibility to tell her things have changed. Mr. Callahan said the minimum frontage would be 70' on a sewerred lot, the miscommunication came not knowing that this property wasn't sewerred. The property is in a sewer district. Deputy Town Attorney Steve Bengart suggested if the variance was granted a proviso be put on the approval stating that the applicant will tie into sewers when they become available. Mr. Callahan clarified that prior to the 2005 code change the property was zoned agricultural and the minimum frontage was 100' with a three-quarter acre minimum. In 2005 the Agricultural Zone went to 150' and one and a third acres and this property became Traditional Neighborhood which is 70' and 15,000 square feet with the stipulation that if it became sewerred it would default to the Agricultural requirement.

Ms. Pfentner listed various properties right down the road from her property that were built since 2005 with less than 150' of frontage, they are all zoned Agricultural Rural Residential and they do not meet the 1.33 acre requirement. Chairman Michnik said those properties may have been deeded before the law changed.

Mr. Mills asked how soon the applicant planned on constructing the new home. Ms. Pfentner said the land is in the 100-year floodplain so they have to get a letter of map revision before they can build. They are hoping to break ground next spring.

ACTION:

Motion by Gregory Thrun, seconded by Patricia Burkard, to **approve** Appeal No. 5, as written, noting that:

- the property has been changed to Traditional Family Residential.
- it was miscommunications from the department with regards to the proper zoning, septic and sewer lines. This is not a self-made issue on the applicant's point.
- at the time sewers would be available, this house would have to tie into the sewer line regardless of the cost to the applicant.

ON THE QUESTION:

Mr. McNamara said the cost to tie into the sewer line is an unknown number, it could be costly and he would not want to put that on the homeowner. Mr. Thrun is not willing to amend his motion to remove the third point.

Ms. Pfentner said she accepts the motion. It is clarified that it applies to both lots. Ms. Pfentner should make sure the buyer of the smaller parcel is aware of the condition to tie into the sewer.

Richard McNamara	Aye	Gregory Thrun	Aye
Patricia Burkard	Aye	Ryan Mills	Aye
Daniel Michnik	Nay		

MOTION CARRIED.

Appeal No. 6

Michael S. Phelps
Residential Single Family

Requests the Board of Appeals approve and grant:

- A.) A 424 square foot variance to allow for a 624 square foot detached accessory structure.
- B.) A 2' variance to allow for an 18' overall height.

Both requests apply to 8891 Michael Douglas Drive.

Appeal No. 6 is in variance to §229-55(H) and §229-5(E)(2).

DISCUSSION:

Michael Phelps is present and explained he needs more storage space for his tools, he does woodworking and builds furniture. He is a police officer with a take home police vehicle and he would like to park that out of sight. He would also like to restore a 1969 Camaro and there is no room for that in his current garage because his wife parks her car there. He would like to get rid of the existing shed that his on his property.

There are two (2) neighbor notification forms on file.

Mrs. Burkard asked about the construction materials. Mr. Phelps said the siding and roofing will match the existing house. She then asked why he needs the extra height. Mr. Phelps explained that he will put in attic trusses for loft space above the garage. Mrs. Burkard asked if there will be a business operated out of the proposed structure. Mr. Phelps said the garage will be used strictly for personal use.

Mr. Phelps said he will run electric to the structure, but no water. Mr. Thrun asked if Mr. Phelps will run the asphalt all the way back. He said yes he will run it the width of the garage back to concrete.

Mr. Mills asked why Mr. Phelps is proposing the structure so far back. Mr. Phelps said he grew up in the City of Buffalo and that's where garages were located, he does not like the way a garage looks right at the end of a driveway. Mr. Mills asked if the applicant thought about a breezeway or some connection to the house. Mr. Phelps said the location is too far for a connection and he prefers that location because it will be his space away from the house.

Chairman Michnik asked what size the proposed structure is. Mr. Phelps said it will be 24' by 26' and he may put one (1) window at the peak for light of the loft space.

Grant Wooly, of 8892 Michael Douglas Drive, voiced his concern that sometimes a hobby turns into a commercial venture and he wants to be sure that is not going to happen.

Mr. Phelps does not have a problem if a condition is placed on the approval that there will be no business operated on the property. Mr. Phelps submitted photos of five (5) other properties in the neighborhood that have detached garages similar to what he is asking for. He also included Erie County GIS print outs to correspond with the photos. All documentation is collectively on the record as Exhibit 1. The photo titled 9876 Amy Leigh is similar to what the applicant is asking for.

ACTION:

Motion by Daniel Michnik, seconded by Gregory Thrun, to **approve** Appeal No. 6, as written with the following condition:

-there will be no commercial business operated from the property.

ON THE QUESTION:

The condition is acceptable to Mr. Phelps.

Richard McNamara	Aye	Gregory Thrun	Aye
Patricia Burkard	Aye	Ryan Mills	Aye
Daniel Michnik	Aye		

MOTION CARRIED.

Meeting adjourned at 9:55 p.m.

Carolyn Delgato
Senior Clerk Typist