

**LITCHFIELD ZONING BOARD**  
**TOWN OF LITCHFIELD, NEW HAMPSHIRE**  
**SEPTEMBER 9, 2009**

**DRAFT**

**ZBA Members Presiding Over Meeting (Indent if Absent):**

Richard Riley, Chairman

Laura Gandia, Vice Chairman

John Regan

Albert Guilbeault

Tom Cooney, Clerk

Gregory Lepine (alternate)

John Devereaux (alternate)

Eric Cushing (alternate)

John Brunelle (alternate)

**I. Call to Order**

- Richard Riley calls the meeting to order at 7:10 pm. Meeting was published in the HLN and posted at Town Hall.
- Laura Gandia takes attendance.
- Richard Riley appoints Greg Lepine to the Board.

**II. New Application**

Case Number: 2009-03

Applicant's Name: Susan and Kevin Powers, 10 Cutler Road

Location of Property: 240 Derry Road, Tax Map 2, Lot 29

Applicants seek to appeal the administrative decision regarding BCI communications and their request to erect a cell tower on the Tabernacle Baptist Church property located at 240 Derry Road, Tax Map 2, Lot 29. The Applicants want to appeal the Code Enforcement Officer's determination that the location where the proposed tower will be erected is not encroaching into the buffer for a natural wetlands, but is in fact a drainage swale and therefore is not an issue per RSA 1207.03 which states: "The Wetlands Conservation District buffers shall be encouraged, but not required next to manmade vegetated swales, roadside drainage ditches, sedimentation /detention basins, agricultural/irrigation ponds, and wetlands on prior converted cropland except as described by nearby wetland and surface waters."

Mr. Riley stated that the notice of the public hearing was listed in the Hudson/Litchfield News. Aug. 8, 2009.

Mrs. Susan Powers, 10 Cutler Road, presented the application to the Board.

Mrs. Powers: Thank you for hearing us. Mr. Lynch originally made the determination that BCI Communications needed to apply for a variance based on the wetlands map that showed the

wetlands adjacent to the area. In the meeting of July 8, 2009, Mr. Lynch stated that after he and Mrs. Joan McKibben walked the property, he concluded that the map regarding the wetlands was wrong, and that the original finding was in error. He further stated that they determined that this area was not wetlands, but a swale. Mr. Lynch cited Section 1207.3 of the Town Ordinance, which states that this is not considered a wetlands area. This would only come into play if the wetlands were deemed incorrectly delineated. In order for the delineation of wetlands to be changed, Town Zoning Ordinance 1203.00 states: Where it is alleged that an area has been incorrectly delineated as a wetlands, or that an area not so designated meets the criteria for the wetlands designation, the Conservation Commission shall determine whether the area has been correctly delineated. The Conservation Commission shall make their judgment under this section only upon the determination by a certified Wetlands Scientist and the basis of additional on site investigation or other suitable research that the information contained on the wetlands map is incorrect. The evidence shall be acceptable only when presented in written form by said scientist to the Conservation Commission. Any necessary wetlands delineation procedures shall be conducted at the expense of the landowner or developer once an area has been determined to be a wetlands under this section, the area shall become part of the wetlands conservation district. If either Mr. Lynch, Mrs. McKibben, or a certified wetlands scientist, is able to determine that the information on this wetlands map is incorrect, and if so have they followed proper procedure in order for the area to become part of the wetlands conservation district.

Mr. Riley: Is that the end of your testimony? Would you like that answered?

Mrs. Powers: Yes. I also have one more question. If it is determined that it is a swale, where exactly does the wetlands end and the swale begin? That's everything.

Mr. Riley: Are there any questions from Board members?

Ms. Gandia asked if there were any wetlands maps in their application. Mr. Riley stated that there were maps provided in case 2009-02 and he would go get the file. Ms. Gandia asked if the wetlands were on the map.

There was a brief discussion regarding the wetlands mapping and whether the lines between the wetlands and drainage swale were clearly marked to show where one ended and the other began. Mr. Lepine asked if anyone had walked the site. Mr. Riley stated that he had. There was no one here tonight representing the Conservation Commission or the Code Enforcement Officer, Mr. Lynch.

There was discussion regarding the Wetlands Map being available this evening. Mr. Riley located the maps that were part of Case 2009-02 to review. Mr. Riley reported that a day or two before the Board heard Case 2009-02, Mr. Lynch had walked the site with Joan McKibben from the Conservation Commission. They both agreed that it was not a wetlands saying instead it was clearly a swale. The question was raised whether they made that determination by looking at maps, or by the site walk alone.

Mr. George T. Chianis is present representing T-Mobile.

Mr. Chianis: What had happened was, BCI is the contractor for T-Mobile, LLC. I was assisting BCI in their zoning and in securing a site for a wireless communication facility at the Tabernacle Church. In a meeting with town officials Joan McKibben stated that BCI, representing T-Mobile, would have to come before the ZBA. I read the by-laws, went out to the site, made an appointment Monday morning, July 6<sup>th</sup>, with the Building Inspector/Code Enforcement Officer, and I said you're mistaken, that's a man-made swale. He took it under advisement and when we came to the meeting on Wednesday July 8<sup>th</sup>, he informed me that he and Joan went out there, looked at a map, it was a man-made swale. That's all I could determine.

Mr. Riley: So you think that they actually looked at some map and the map said it was a swale.

Mr. Chianis: I don't think that the Code Enforcement Officer/Building Inspector would change his view, without some concrete evidence to be able to do that. I've done over 300 zoning applications for wireless communication facilities, and we want to see the evidence.

Mr. Riley: I appreciate that. I think that in this case, and certainly in fairness to the applicants, we need the Code Enforcement Officer to tell us exactly how he made his determination and if he's not here to do that then that's a problem.

Mr. Regan: So Kevin has already stated his position, we're kind of assuming that he looked at a map in order to make the decision that he made on July 8.

Mr. Riley: Kevin made his first determination that it was in a wetlands area, then he corrected himself.

Mr. Regan: So why would you think that when you came here tonight he would have any differing opinion?

Mr. Riley: Because I don't know for sure that he actually said that he consulted any map. Do you?

Mr. Lepine: I went out there and looked at the site. There is no wetlands where the ball field is, there's a little dry area that has been filled in with a drainage pipe by the swale that goes into another field. The wetlands is over behind the church, you have to walk around, behind the church to be able to be near the wetlands. We can certainly locate that. You don't have to be a wetlands soil scientist to look at that, all there is, is that drainage ditch. You'd have to go behind the church to see where the wetlands is, so they can certainly locate the tower 50 feet away from the wetlands.

Mr. Regan: So what you're saying is, to answer that question, "where does the swale end and the wetlands begin", the wetlands apparently begins before the 50 feet away from the proposed tower. I do recall that when Kevin Lynch was correcting himself, he said he originally made the determination based on maps that he consulted. So what maps was he consulting the first time around, versus what maps he consulted the second time around?

Mr. Lepine: He was considering the swale wetlands, that's what you were told. He went out there and looked at the site. There is no wetland where the ball field is, and then a little dry area that has been filled in with a drainage pipe with a swale, it goes into another field. We're

talking 50 feet. The wetland is over behind the church, you have to walk around, behind the church to get over near the wetlands. You can certainly locate that, you don't have to be a wetlands scientist. All there is, is that drainage ditch through there. You don't have to go quite a ways behind the church to get to where the wetlands is, so they can certainly locate the tower 50 feet away from the wetlands. If they were putting in a ball field, that's different.

Mr. Guilbeault: So your point, what you're saying is that to answer their question – where does the swale end and the wetlands begins, the wetlands apparently begins before the 50 feet away from what they are proposing.

Mr. Riley: I do recall that when Kevin Lynch was correcting himself, he said he originally made his determination based on maps that he consulted. So (like John) I also want to know what maps he was consulting the first time around, versus what maps he consulted the second time around.

Mr. Lepine: He was considering the swale wetlands. That was what he was doing, so the swale line was here.

Mr. Guilbeault: If he was fine. The only thing that I'm stuck on is, if you have a wetlands that drains into a swale, where does the swale side and the wetlands side end.

Mr. Riley: That's what the map would tell you. The bottom line is when you look at the map, look at where the wetlands delineations are. I can't answer that. It's a good question, but I don't think we can answer that without consulting with Kevin Lynch and possibly the Conservation Committee.

Mr. Dave Cook, Cutler Road: Where the wet comes from, it comes from across Route 102, down behind the convenience store, down behind Page road to Cutler Road, across Cutler Road, down behind the church, it crosses the lawn to get to the property of the church, and goes down to the brook out back. Now I can't believe that it's man made, that's an actual flow of water when you look at that whole area. I don't know whether any of you people have ever walked that or not. Because at one time to get to the back of the property of the church, there was this brook there that they had a dam and a bridge over the water. The church has filled a lot of that in. That land that was wet, what they filled in, evidently they probably shouldn't have been doing that.

Mr. Riley: I don't know, but again, I think the issue in front of the Board is fairly narrow. What we need to look at and get to is what is the official map that delineates the wetlands and is the proposed tower location encroaching into the delineated wetlands. That is the real question. Whatever happened, who filled what, we need to get at that map, and we need to understand if that tower is in the wetlands buffer. The Code Enforcement Officer is saying that he originally thought it was, and now he corrected himself, and says no – what I thought were wetlands was actually a swale. Clearly it is in our by-laws that manmade swales are not considered wetland areas. So if he consulted a map, and it shows that that is a man made swale and not wetlands, in other words, the delineation is over here and the swale is over there, then his correction would have been the right thing to do. But if, in fact the map shows the area in question as a wetland, then I think that what the applicants here are presenting to us as an argument has some validity to it as well. Meaning that there is a process that needs to be followed, that says

look, the map says it is wetlands, you're saying it's a manmade swale, a scientific study needs to be done. So that's what I think I'm hearing right now.

Mr. Riley: Mr. Lynch and the Conservation Committee did do a site walk, so maybe what appeared to them was obvious, but the real question before us is, is there a map that says it's a wetland area or not - that's the question.

Mrs. Powers: Mr. Riley, your statement about section 1207.03, just because it's a manmade vegetated swale, doesn't mean that the Conservation District can't say, on the side of caution, how close the buffer is.

Mr. Riley: That may be true, however, in this particular case the Conservation Committee did agree with Mr. Lynch's decision. They didn't have any concerns, otherwise you wouldn't have had both of them coming to that meeting last month and saying, no, we erred, it's not a wetland area. I do recall that the Conservation Commission was represented.

Mr. Elton Jarvis, 22 Cutler Road commented that there were laws which were intended to protect the wetlands, and the State should have qualified individuals who could decide whether or not this land should be protected or not.

Mr. Riley: Yes, but part of what we need to include in that statement is where the burden of proof lies. That's very important because that's who has to pay the bill.

Mr. Jarvis: It would be the landowner.

Mr. Riley: Yes, but that's if the Code Enforcement Officer is making a determination that is contrary to what our map says. We don't know whether they are doing that or not. If the map shows that the proposed tower location is not encroaching into a wetland area, then the Code Enforcement Officer was correct in changing his determination. If you want to say, I don't care what the map says, I still think this is a wetland area, then you would have to do that study on your own. Does that make sense?

Mr. Jarvis: It may make sense, but it's contrary to what she just read.

Mr. Riley: No, what she read, it's very true that if the map was to say it is a wetland area and a Code Enforcement Officer or a Conservation Committee wants to say, look the map is wrong, it's not a wetland area, then the burden is on the conservation committee to bring in a scientist to make an official determination.

Mr. Chianis commented that when he had come in with the application for the cell tower, he came in with a full set of plans, and they had hired a soil scientist who came out to make a determination about the distance from the wetlands and what they had to do to apply for on the zoning application. He added that because of the size of the plans there was some difficulty in reading them. That application included plans drawn up by A & E Firm and stated that the area in question was a manmade swale.

A lengthy discussion followed. Mr. Powers asked when the soil scientist had been out to see the site.

Mr. Riley: I'm not sure that's really relevant here. I think you brought a very specific question before this Board; which is "did Mr. Lynch make a determination that can be backed up by a map that says this is not a wetlands, or not. Because if the map says it is a wetlands, and they made a determination that the area in question is instead a man made swale, then you've pointed out that there is really a process that should have been followed, and from my recollection, that process could not have been followed in the sequence of events that took place. At the July meeting Kevin didn't say that they brought a scientist in and that's why he overturned his statement. So for me, all I want to know is, is there anybody out there right now that has a map that clearly shows this is a wetlands area. Because if there is not, then I don't think we can rule on your application at this point without further consultation with both the Conservation Committee and the Code Enforcement officer at this point. Neither of which are here this evening.

Ms. Gandia: We keep going around and around, and I personally feel that I can't make a decision without checking with and until Mr. Lynch telling us what exactly his decision was and what it was based on.

Mr. Riley: Would you like to make a motion?

*Laura Gandia proposes a Motion to postpone Case No. 2009-03 until October 14, 2009 and requests that Mr. Lynch be here to show us how he made his decision. Mr. Guilbeault Seconds the Motion. There was no discussion. Vote is 5-0-0. MOTION CARRIES.*

Ms. Gandia explains to the applicants that they will have to come back next month. Mr. Lynch will need to bring map to justify his decision and how he came to make that decision. There will not be another notification that needs to be made on this application, it is just a continuation of the existing case.

Mr. and Mrs. Powers thanked the Board for their time.

### **III. Miscellaneous Business**

Ms. Gandia advised the Board that the Legislature has revamped the variance laws and codified 5 criteria that were put into statutes. This should make the criteria for a variance clearer. Forms will need to be changed to statutes to reflect the new statutes by January 1, 2010. Applications need to be updated by December so that any applicants who come forth in December would need the new forms. Any case heard on January 12, 2010 would come under the new statutes.

Mr. Riley has received some new information from FEMA, which he will scan and distribute to the appropriate Boards.

There was a brief discussion regarding the proposed Ethics Committee and the impact it could have on all boards and the various committees. Mr. Riley informed the Board that he has extended an invitation to the chair person for the Ethics Formation Committee to meet with the ZBA at 6:30Pm on Wednesday, October 14 and is waiting for confirmation that they can attend.

### **IV. Adjournment**

*Mr. Lepine MADE A MOTION TO ADJOURN.  
Ms. Gandia Seconds the Motion  
VOTE: 5-0-0. MOTION CARRIES.*

The Zoning Board Meeting adjourned at 8:00 PM.

*Respectfully submitted,  
Margaret J. Dabrowski*

DRAFT