

**LITCHFIELD ZONING BOARD**  
**TOWN OF LITCHFIELD, NEW HAMPSHIRE**  
**OCTOBER 14, 2009**

DRAFT

**ZBA Members Attending (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 7:14 pm. Meeting was published at Town Hall and Hudson/Litchfield News.
- Laura Gandia takes attendance.
- Richard Riley appoints Eric Cushing to the Board.

**II. New Applications**

There are no new applications.

**III. Hearings**

**Continuation of Case 2009-03, Susan & Kevin Powers, 10 Cutler Road.** The applicants are appealing 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 with a natural wetlands but is, in fact, a drainage swail 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 man-made vegetated swails, roadside drainage ditches, sedimentation/detention basins, agricultural/irrigation ponds, and wetlands on prior converted cropland, except as required by nearby wetland and surface waters."

Mr. Kevin Powers stated to the Board that their application was submitted last Friday, August 7, 2009. Mrs. Susan Powers presented the application with a copy of Section 1203.00 of the Zoning Ordinance attached. This section states: "Where it is alleged that an area has been incorrectly delineated as a wetland, or that an area not so designated meets the criteria for wetlands delineation, 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(s) on the basis of additional on-site investigation or other suitable research, that the information contained on the Wetlands Map is incorrect. This evidence shall be acceptable only when presented in written form by said scientist(s) 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 wetland under this section, the area shall become part of the Wetland Conservation District. (Adopted March 1987.)"

Present are: Mr. Kevin Lynch – Code Enforcement Officer, Mrs. Joan McKibben, Conservation Commission, Mrs. Susan Powers – Applicant, and Irene Maslanka, 14 Cutler Road - abutter.

Mrs. Powers asked the Board if they would like a recap of her application. Mr. Riley noted that the draft minutes had been posted, but he asked the Board members who were not present at the last meeting if they would like a recap, and they stated they would.

Mrs. Powers: Mr. Lynch originally made a 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 swail. Mr. Lynch cited Section 1207.3 of the Town Ordinance, which states that this is not considered a wetlands area. This would come into play only if the wetlands were deemed incorrectly delineated. In order for the delineation of wetlands to be changed, Town Zoning Ordinance 1203.0 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 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 or Mrs. McKibben, or a certified wetlands scientist, are 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. I would like to know where does the wetlands begin and where does it end. Are they delineated?

Mr. Riley asked if there were any questions from the Board and there were none.

Mr. Riley asked Mr. Kevin Lynch the Code Enforcement Officer for his input.

Mr. Lynch apologized for not being present at the last meeting, because he had to be present for the mosquito spraying.

Mr. Lynch: As I stated at the last meeting, when I read the zoning, the decision was based on findings on the plan. I looked at it, it showed a wetlands delineation. When I first went out there and looked at it, it looked like a drainage swail. Aerial photos in 1972 showed a swail there. I walked the length of the swail to the end and the swail was also dry at the high point, in fact it's very dry. I looked at the section of the zoning ordinance that I referred to when I reversed my decision.

Mr. Riley: I'm going to ask you a question. When you made your original determination, you just said that you referred to the plan. That's not necessarily a town map that was the plan that was submitted by BCI Communications on their application.

Mr. Lynch: Yes, I've got the same one (plan) right here.

Mr. Lynch went on to state that this was not an uncommon practice, but the regulations were taken into consideration, Section 1207.3, page 59 of the zoning department. The wetlands conservation district buffer shall be encouraged, it says, but is not required along main roads, designated swails, roadside ditches, vitreous sedimentation basins, various wetlands that have been flagged and croplands.

Mr. Lynch pointed out that in the past the lot had probably been a hay field. It was not uncommon for these swails to be built; they were common all over Litchfield; even where the Griffin Memorial School is now there are two of them. Mr. Lynch went on to say that it was not uncommon years ago for these drainage ditches and swails to be placed on properties to handle water runoff to empty into these swails to provide dry areas for agriculture. Aerial photographs show the area in question.

Mr. Lynch: So I reversed my decision after walking that site. I further looked at the wetlands maps that the town has. Furthermore, I consulted with Joan McKibben from the Conservation Commission and Planning Board and asked them to review this as well. They responded in a letter that it was a drainage swail as intended.

Mr. Lynch asked if the members had received his e-mail regarding this matter, however, no one had received the e-mail. Mr. Lynch apologized for that oversight.

Mr. Lynch: Basically I was saying the same thing I'm saying now. The swail that we're talking about was constructed. Furthermore, I was talking to the pastor of the Tabernacle Church. He had informed me that the previous minister is in Florida right now, but he backed up what I'm saying now. He's trying to get in touch with him. Physically, I walked the whole thing. You can see the mounds of dirt on both sides, which had been constructed. The ground is the same on both sides - rock. The wetlands as shown on the map is to the East. We walked to the West, it forks, where it goes down you can see where the wetlands are down there. That area in between is not, that was a swail. I have a map showing it.

Mr. Riley: While you're getting that, back to your earlier point about doing a site walk, absolutely we appreciate that. You saying that, but I would also suggest, as it's shown here, basing a decision on an applicant's map vs. the Town map I think could get us

into trouble again. You want to make sure that you walk the site with a Town map, not just the applicant's map.

Mr. Lynch brought out the Town maps to show the Board the location of the wetlands, drainage swails, ditches, etc. Mr. Lynch pointed out the older drainage ditch on that site. He pointed out where the Power's lot was located as well as the Tabernacle Baptist Church's lot.

Mr. Lynch stated that he had made his decision based on the field walk, and looking at the area. He then pointed to the plans, which showed the areas of high ground, with the drainage in between, showing the Board where he had walked on the site. Discussion continued on the drainage in the area. Although there are swails and ditches that can hold water, it does not mean that the area is a wetlands.

Mrs. McKibben: We're not disputing that it is a wetlands, but it is in the bottom of the ditch, it's wetlands, but it's man made.

Mr. Riley: So if the tower is going here (points to plans), and if this is delineated as wetlands, based on the plans that we have today, this wouldn't be encroaching into the buffer, is that right? The question has always been, is it encroaching into what was considered wetlands? What you originally thought was wetlands, but it turned out to be a swail, based on town maps, showing it is not wetlands, and based on your site walk.

Mr. Lynch: Right.

Mrs. Irene Maslanka: At one time I had to go before the Board of Selectmen because the Tabernacle Baptist Church blocked up this swail. Why would they block the swail, if it was a swail, and it wasn't that wet?

Mr. Riley: If we could ask you to hold that thought for a few minutes, because we have to get through the process before opening it up to public input. Are you pretty much done explaining what it is you wanted to explain?

Mr. Lynch: I can't explain it any better than I already have.

Mr. Riley: Any questions for Mr. Lynch?

Mrs. Gandia: I just had a question about the process, so that I understand. You get an application that has a plan submitted with it. That plan says that there is a wetlands, so we say you can't put your cell tower there without a special exception, because there are wetlands. So they come to us, then you (Mr. Lynch) change your mind, and you change your mind because you have walked it, but are there any other maps that you looked at that now say that it is now a wetlands?

Mr. Lynch: No delineated maps that I have seen.

A lengthy discussion followed regarding wetlands delineation and drainage swails. Mr. Lynch explained that when this land was previously used as farmland, ditches had been dug to drain surface and runoff water into the ditches to keep the farmland dry. These ditches were man made, much like the drainage swails used today to keep drainage and water runoff off the property and into drainage ditches. Wetland areas have been created with drainage into ditches and swails, creating detention ponds and storm water management. Swails occurred because they were man made in poorly draining soils. Mr. Lynch added that this area has been wet, but the Town understands that there will be wet areas and the regulations allow this type of wetlands delineation to be there - to allow a buffer, and not make it a blanket wetland. By creating swails for drainage, wetlands area will be created. After time the bottom of the drainage swails will create wet areas, where wetland vegetation will grow, however, this wet area is man made, and not naturally occurring wetlands.

Mr. Lynch used the land around the Town Hall as an example. Before any building took place, the entire area was high and dry. However, when considering water runoff from the pavement drainage ditches were built. Now a few years down the road there will be wetlands vegetation in those ditches because those areas are now wet because of man made drainage. Because of the wetlands vegetation now growing in those swails, the area could be considered wetland, unless the swail is mowed and takes care of the vegetation growing in the wet areas. Because cattails are growing there, you cannot consider the area wetlands because the area was man made into a wet area, not wetlands. This is all taken into consideration when determining storm water management on lots, whether they are residential or commercial lots.

Mr. Lynch: But we're not saying to stay away from it, we encourage you to do that, because we know we allowed it to be there because it is man made. That same type of swail occurs here.

Mr. Lynch further explained that the area has well drained soil; it's just that there is a low spot and another low spot, with drainage coming through. Mr. Lynch pointed out however, that when these drainage ditches are put in, they need to be maintained, if you don't the situation will get worse.

Mr. Lynch was asked if he allowed these drainage areas to be put in, could the plans stipulate that they be maintained. The answer was a definite yes. Mr. Lynch pointed out several areas in Town where drainage swails had been put into place, but have not been maintained, creating wet areas with poor drainage.

Mrs. McKibben was asked to address the Board with input from the Conservation Commission.

Mrs. McKibben: I would like to read this letter into the record. "On September 3, the Litchfield Conservation Commission visited the property of Kevin and Susan Powers at 10 Cutler Road. We then toured the proposed site of the T-Mobile cell tower at the Tabernacle Church property. Although the National Wetlands Inventory maps do not indicate a wetland behind the residence, there is flooding on the site. This wet area continues on to what we agree is a man-made swail on the Tabernacle property. On the 1972 aerial maps the Tabernacle site was clearly disturbed farm land. As is stated in

Section 1207.03 of the Litchfield Zoning Ordinance buffers shall be encouraged but not required next to man-made swails or prior converted farm land. Please let us know if we can be of further assistance. "

Mr. Riley: Considering your knowledge in this particular area, is it the Conservation Commission's position, that in this particular case, where the buffers are encouraged, but not required, are you saying that they are not required; based on what you've seen on the site walk?

Mrs. McKibben: In this area of town it is not required if land has already been disturbed. In this case it was not incorrectly delineated.

Mr. Riley: What I'm hearing, and you have clarified it in my mind. You're not disputing that a soil scientist should go out there and say within this area it is wet. But what you're saying is this is man made and the ordinances allow us to either enforce buffers or not enforce buffers. And is it, in your opinion, in the Conservation Commission's opinion, that in this particular case, in this particular area, the buffers you would not encourage them to enforce the buffers.

Mrs. McKibben: No.

Discussion continued regarding wetlands delineation on applicant's plan vs. town maps, and which better showed where the wetlands and swail begin and end. Mrs. McKibben brought out the National Wetlands Inventory Map for the Board's review.

Mr. Riley asked if the Board had any further discussion, hearing none Mr. Riley opened up the meeting to public input.

Mrs. Irene Maslanka, 14 Cutler Road: Part of the wetland is on my land. My home was built in 1963-64; at that time the water went down Cutler Road, behind my property through the lot that goes to the church. The church had put in a barricade of stones in the swail. I went to the Board of Selectmen to ask them to tear down the stonewall. It doesn't matter - why can't they push the tower back 25 feet? I really don't care if they need 25 feet or not against the tower, have them put in the 25-foot buffer.

Mr. Riley pointed out that the Board, Mr. Lynch and the Conservation Commission have been out to the site and the Board is trying to understand the issue. Mr. Riley added that the Board has taken all the information into account and appreciate the history of this lot.

Mr. Lynch pointed out that a property owner cannot put water onto an adjoining abutter's land and perhaps this new project will need a new study. In going through the plan they may discover that it will not hurt to move the tower back 25 feet. He added that it would be up to the Planning Board to discuss, and also that it would be up to the property owner to maintain the swail to prevent future problems.

Mr. Riley asked if there was any more public input and there was none.

*Mrs. Gandia MADE A MOTION to close public input. Mr. Regan Seconds the Motion. There was no discussion. VOTE IS 5-0-0. MOTION CARRIES.*

A brief discussion by the Board followed.

*Mr. Regan MADE A MOTION TO DENY Case Number 2009-03 for an appeal from administrative decision regarding BCI Communication and their request to erect a cell tower on the Tabernacle Baptist Church property located at 240 Derry Road, Tax Map 2, Lot 29. Mrs. Gandia Seconds the Motion. There was no discussion. VOTE IS 5-0-0. MOTION CARRIES.*

It was suggested that the applicant attend the Planning Board meetings on this case to voice their concerns.

### **Communications & Miscellaneous Business**

#### **Review & Approval of Minutes for August 12, 2009 and September 9, 2009**

*Mr. Guilbeault MADE A MOTION to approve the Minutes for August 12, 2009. Mrs. Gandia Seconds the Motion. The Board votes in favor of the Motion 4-0-1 Mr. Regan abstained from voting.*

#### **Approval of Minutes for September 9, 2009**

*Mr. Guilbeault MADE A MOTION to approve the Minutes for September 9, 2009 Mr. Cushing Seconds the Motion The Board votes in favor of the Motion 5-0-0.*

#### **Review of 2009 Budget Report**

There was nothing to report on the 2009 Budget Report.

Mr. Riley informed the Board that he and Mr. Cushing would be attending the Zoning Board of Adjustment Training Day on Saturday October 17.

#### **Any other business**

There was no other business to come before the Board.

*Mr. Regan MADE A MOTION TO ADJOURN. Mr. Guilbeault Seconds the Motion. The Board votes in favor of the motion 5-0-0.*

The Zoning Board Meeting was adjourned at 9:25 PM.

Respectfully submitted,  
Margaret J. Dabrowski

DRAFT