

# TOWN OF KIRKWOOD ZONING BOARD OF APPEALS

March 16, 2020

A Public Hearing was held on March 16, 2020 at 7:00 p.m. at the Joseph A. Griffin Town Hall, 70 Crescent Drive, Kirkwood, NY on the application of Up State Tower Co., LLC and Buffalo-Lake Erie Wireless Systems Co., LLC d/b/a Blue Wireless regarding property located at 110 Williams Street in the Town of Kirkwood known as Tax Map No. 162.15-2-11 and located in a Business One District, for an area variance from Town Zoning Law Section 913(B) to permit a tower setback distance of approximately 122.56 ft. to the southerly property line where 181.5 ft. is required and a Special Use Permit to construct and operate a 160 ft. (with a 5 ft. lightning rod) public utility telecommunications facility to be used by Blue Wireless and potential future carriers.

Present: Duane Travis, Chairman  
Mike Maciak, Member  
Ed Egan, Member  
Cyndi French, Member  
Bruce Nemcek, Member

Other Present: Keegan Coughlin, Attorney  
Marc Latini, Associate Member  
Chad Moran, Code Enforcement Officer  
John Mastronardi, Town Engineer

Chairman Travis called the meeting to order at 7:00 pm.

## **APPROVAL OF MINUTES:**

Motion by Cyndi French and second by Mike Maciak to approve the minutes of the January 20, 2020 meeting as submitted. All voted in favor. Motion carried.

## **PUBLIC HEARING:**

Chairman Travis read the notices of public hearing and commented that we have the affidavits of posting by the Town Clerk on the sign board, the affidavits of publication in the Press & Sun Bulletin and the Country Courier, and affidavits of service by mail to property owners within 500 feet. The Broome County Planning Department 239 was prepared and comments were received. Chairman Travis read the following into the record: The Planning Department has reviewed the above-cited case and has not identified any significant countywide or inter-community impacts associated with the proposed project. We have the following comments: SEQR Full EAF project description should include the variances and the case file was routed to the following agencies: NYS Department of Transportation, Broome County Department of Public Works, Department of Health, Information Technology, Office of Emergency Services, and Department of Aviation. NYS DOT and DPW and Broome County Health Department had no comments. The comment from Broome County Planning and Economic Development asked that a copy of the decision be submitted within 7 days of taking action. A long EAF was filed and as a result we will have to answer questions on the form.

Chairman Travis opened the public hearing at 7:07 pm.

Mr. Matthew Kerwin, an attorney for Barclay Damon in Syracuse, representing Up State Tower and Blue Wireless was present.

Mr. Coughlin asked Mr. Kerwin if he was okay with amending the Part 1 of the SEQR to include the area variance and Mr. Kerwin agreed.

Mr. Kerwin explained the project to the Board. Up State Tower is the tower company and they are in the business of constructing towers to accommodate co-locations by wireless providers through much of southern New York and northern PA. They have an agreement in place with Blue Wireless, who is an FCC licensed wireless provider, similar to AT&T, Verizon, and Sprint, in that they have a license from the FCC to provide coverage within the county, particularly within the town. They have a gap in service they are trying to address. They were before the Planning Board last month.

Mr. Kerwin, referring to drawings, explained this is a 160-foot monopole telecommunications tower. Blue Wireless would be the carrier on that tower. Their antennas would be located at center line at 160 feet, meaning the center of the antennas would be at 160 feet. The antennas would stick out above the tower about 3 feet and the antennas are roughly his size, 6 ½ feet tall. On top of the tower itself would be a lightning rod for safety purposes. Mr. Kerwin, referring to drawings, showed the board where the Five Mile Point Speedway was located and what part they will be leasing. Access to the site will be from Williams Street, from a new access road. Bruce Nemcek asked if it mattered where the elevation is on a given set of property for a tower like that or does it really matter when you have 160 feet, does it matter if you have a low spot on the property versus a high spot and Mr. Kerwin explained that elevation comes into play because it dictates the height of the antennas. Bruce Nemcek asked if antenna heights were quite variable and Mr. Kerwin stated it depends on what your service gap is. A small gap in service you wouldn't need an antenna as tall. Cyndi French asked where the variance issue is, the setback and Mr. Kerwin explained to the south. In terms of setbacks from neighboring properties and property lines the center of the tower would be roughly 199 feet from the property line to the east, 122.56 feet to the south, 367 feet to the west, and almost 1020 feet to the north. They are requesting a variance from the setback of the southern property line based on the needed height of the tower and the language in the code they need a variance of 180 + feet. Ed Egan asked if it tipped over would it land on their own property and Mr. Kerwin stated it would and he will talk about the break point design.

Mr. Kerwin, referring to drawings which are included in the file, explained that typically a cell tower will have the tower itself, a fenced area around the tower for safety and security purposes and within that fenced area are different leased areas for the carriers on the tower and their equipment. In this case this tower is designed to accommodate a total of 6 carriers. The tower appears to be a solid structure but it is hollow in the middle to accommodate cables and everything that runs from the base to the antennas on the tower.

Bruce Nemcek asked if the entire area was concrete and Mr. Kerwin explained it is gravel. Mike Maciak asked if they just installed one down on Court Street, next to McDonalds and Mr. Kerwin stated yes and that is a 120-foot tower. Ed Egan asked if FCC and FAA were involved and Mr. Kerwin explained FAA does have jurisdiction over markings and lighting. Depending on the height of the tower and the location of the tower to air fields or air strips in the area they could impose restrictions they would have to comply with relative to whether the tower requires a light or has to be painted or both and, in this case, they don't need either. That is covered in Exhibit 14.

Mr. Kerwin, referring to drawings which are included in the file, showed the board what the tower would look like. It shows what their antenna would look like and also the proposed antennas of possible future carriers co-locating. The information that is being presented is specific to Blue Wireless. Ed Egan asked if this was for telephones and Mr. Kerwin stated it is for cell phones and wireless devices with 4G service.

Mr. Kerwin explained that whenever any carrier, in this case Blue Wireless, identifies a gap in network service their engineers will evaluate the network, identify that gap and determine where best to propose a new site. They will develop a search ring or search area. In this case they developed a search ring. He indicated on the drawings where the search ring is located and where they were looking to place the tower. Mr. Kerwin explained to the Board the process of finding a site for the cell tower, either on an existing structure if available or a new site all while following the town's code. There were no other suitable towers in their search area. They did evaluate some town properties but nothing would work for this. There were no industrial properties or rural properties within their search area. Had any of those worked for them they would have looked into that. They don't have the power for eminent domain. They have to work with willing landlords that want to lease their property or sell property to them. In this case they have a willing landlord, Mr. Harpell, a site that works from a coverage standpoint, and except for a setback variance it is suitable from a zoning standpoint.

Mr. Kerwin, referring to Exhibit 6, Radio Frequency Memorandum, explained that this was prepared by Blue Wireless radio frequency engineers. This talks about the service gap they are trying to address. They have a service gap that not only includes 4G in building coverage but 4G in vehicle coverage. Those signals are different. As the signal weakens over time it transitions from in building coverage to in vehicle coverage. Mr. Kerwin reviewed for the Board the propagation maps, which are included in the file. He also reviewed with the Board propagation maps with lower elevations, 140 ft. and 120 ft. By lowering the antennas, the coverage footprint shrinks.

Cyndi French asked where the proposed future tower will be and Mr. Kerwin stated he didn't have the exact address for that. Ed Egan commented there are other towers around here, he can call any place and he doesn't have any problem and asked why do you need it. Mr. Kerwin explained this is specific to Blue Wireless service. If you have another carrier this isn't going to address it. Each carrier has their own network on which they provide coverage. Cyndi French asked the one that is proposed at the bottom is that showing what that is going to be or what you have right now and Mr. Kerwin explained that is proposed future coverage.

Mr. Kerwin went on to say clearly there is a gap in service and they think this site addresses that gap. Cell towers are going to be visible. Referring to more drawings which are included in the file, Mr. Kerwin explained there are photo simulations in which they flew a balloon at the site of the tower. Twenty-nine photos were taken from different areas around the site, which are in Exhibit 15, showing where the balloon was visible or not visible. The closest residence is 670 feet away from the site.

Mr. Kerwin reviewed with the Board Exhibit 4, Public Utility Standards, which is included in the file.

Bruce Nemcek asked how long do they lease the property for and Mr. Kerwin stated there is an initial term and subsequent renewal terms and in this case it is an initial term of four years with nine 5-year renewal options. Bruce Nemcek asked what the service life is on the tower and Mr. Kerwin explained newer towers are 30-40 years. They are inspected pursuant to federal inspection requirements every five years. Ed Egan asked what is the diameter of the tower, at the bottom and Mr. Kerwin stated typically 8-10 feet at the base and tapers up to 3-4 feet at the top.

Hearing no other comments, Chairman Travis closed the public hearings at 7:42 pm.

Mr. Coughlin explained there is a Full EAF for this project because it is questionable as to whether it is a Type I or Type II. For our purposes we are going to go through the full questions. The applicant has filed out Part 1 and we made one edit to it to include the requested area variance in the Part 1 description of the project pursuant to the County's recommendation. Part 2 is a series of questions that you have to answer based on how Part 1

was filled out. At this point Mr. Coughlin reviewed Part 2 of the Full Environmental Assessment Form with the Board and their answers are included in the file.

Bruce Nemcek asked if there was a generator in the event of a power outage and Mr. Kerwin stated they use a battery backup at the equipment compound itself. Mike Maciak asked how many batteries and Mr. Kerwin wasn't sure of that.

Motion by Ed Egan and second by Cyndy French to declare a Negative Declaration for the purposes of SEQR.

Roll Call Vote:	Mike Maciak	Yes
	Ed Egan	Yes
	Cyndy French	Yes
	Bruce Nemcek	Yes
	Chairman Travis	Yes

Motion Carried.

Chairman Travis stated it is his understanding that the construction of the tower is built so that the top will collapse into it. Mr. Kerwin, referring to Exhibit 13 explained that the tower is designed with a breakpoint at 145 ft. In the event of a significant storm event the tower would fail at that point. Chad Moran asked if there was a disconnect from the cable as well and Mr. Kerwin explained it typically bends and buckles. He has never seen this happen because he has never seen a tower fail. There is no hinge, no cuppling, or a bolt that would break. It would bend and buckle if it were to fall. Cables would probably come down with the tower. Ed Egan asked when will this be built if everything is approved and Mr. Kerwin stated if everything is approved and a building permit is obtained they would have to order the tower and get the site prepped once construction starts it takes about 2 months. Ed Egan asked if it would be this year and Mr. Kerwin stated that is the plan.

Chairman Travis explained this went to the Planning Board last month and they were asked to make a determination as to whether it was viable to do this or not. They voted to go ahead with the project but they had some concerns that needed to be addressed, which are as follows:

1. Where Article 9 requires a certification that those certifications be provided.
2. That the geomorphologic study be completed and given to the ZBA prior to approval or at the ZBA's discretion it could be a condition of approval.
3. No building permit would be issued until it is received and approved by the ZBA.
4. The indemnification and insurance required by Article 9 be unaltered and a condition of the approval.
5. The property owner should sign the application.

There was a discussion regarding certifications needed. The plans are stamped by an engineer. The Geomorphologic Study certification would be provided as part of the building permit. Tower foundation drawings and tower design drawing are all stamped and certified. Mr. Kerwin stated he does have the owner's signature.

Mr. Coughlin explained for the Board's purposes, Article 9, #18 states certification that the NIER levels at the proposed site are within the threshold levels adopted by the FCC. That study would satisfy that from his perspective upon the information there is no engineering certifications. He would interpret that as being the certification required.

The Board has the property owner's signature, all certifications that are required with the Geomorphologic Study will be a condition of the building permit. The only one left is the insurance indemnification requirement. Mr. Kerwin explained they did look at the insurance indemnification requirements, Section 924, and he stated it is an unusual requirement in the sense that the insurance requirements asks them to name the town as an additional insured. This isn't on town property. They do realize it is part of the Town Code. If it is a condition of approval then it is a conditional of approval. The same can be said for Section 925, which he thinks is overly broad by requiring their client to indemnify the town going forward for anything and everything. It is a provision they have never seen. In terms of that kind of provision being applied equitably throughout the town, they are not aware of any other applicants besides other telecommunication providers facing that provision. Mr. Coughlin stated he believes renewable energy is too. His understanding on the Town's logic on that is it would only occur in the event the town was a party to something that resulted from a disaster on the site with regard to the tower. The town is not looking for indemnification for anything the town does but indemnification in the event they are sued in relation to an event at the tower site. If you wanted to amend the indemnification language to make that more clear that is something that can be done.

Mr. Coughlin stated the insurance indemnification would be a condition as well as the geomorphologic study. Referring to Section 923 Mr. Coughlin asked if they were okay with the annual certifications being provided to the Town and Mr. Kerwin stated they have no issues with that. Mr. Kerwin asked if that would be triggered by a request from the Town and Chad Moran stated they usually send it out. Mr. Coughlin asked about the security bond and Mr. Kerwin stated they will provide that.

Mr. Coughlin explained there are some code violations on the property with respect to the property owner and he assumes it doesn't impact the leased portion but there has been a recommendation by the Code Enforcement Officer to have some of those things cleaned up as a condition of approval. It isn't directly related to the project but it is related in the fact that it is on the same tax parcel. Mr. Kerwin stated he wasn't aware of that and they see it as an issue between the town and the property owner and they don't want to get in the middle of it.

John Mastronardi stated he and Chad went through the application and it is very thorough and it addressed everything in Article 9 that was requested and required.

Mr. Coughlin explained the Board could approve the area variance given the fact that they have the breakpoint and it is not terribly significant from that side because it is only an extra 60 feet and given the changing of standards for a public utility company they may have met the actual area variance test.

Motion by Cyndi French and second by Ed Egan to approved the area variance for the south side of the property as requested.

Roll Call Vote:	Mike Maciak	Yes
	Ed Egan	Yes
	Cyndi French	Yes
	Bruce Nemcek	Yes
	Chairman Travis	Yes

Motion Carried.

Motion by Cyndi French and second by Mike Maciak to grant the special use variance with three conditions placed on granting the building permit:

1. The required bond under Article 9 is secured.
2. The Town of Kirkwood is named as an additional insured.
3. The insurance and indemnification requirements of Article 9 and the Geomorphologic Study certified by an engineer be provided prior to the granting of the building permit.

Roll Call Vote:	Mike Maciak	Yes
	Ed Egan	Yes
	Cyndi French	Yes
	Bruce Nemcek	Yes
	Chairman Travis	Yes

Motion carried.

Chairman Travis commented there are four projects on for next month.

Motion by Cyndi French and second by Ed Egan to adjourn the meeting. The meeting was adjourned at 8:14 pm.

Respectfully Submitted,

Mary Kay Sullivan, Secretary  
Zoning Board of Appeals