

Town of Athens Zoning Board of Appeals
 2 First Street, Athens, NY 12015
 Meeting Minutes: March 14, 2024

The meeting for the Town of Athens Zoning Board of Appeals was called to order at 5:55 pm at the EJ Arthur Elementary School, 51 3rd Street, Athens. The meeting began with the Pledge of Allegiance.

Board Members Present: Chairman Eric Nelson, Member Christian Ames, Member Helen Ihde, Member Chris Sprague, Member Christian Pfister was absent, ZBA Secretary Annmarie Krause.

In attendance: George McHugh - Town Attorney, Micheal Pirrone - Town of Athens Supervisor, Tara Borodin - Phinney Design Group, Ariana Deschaine - A Clear Run, CEO, Attorney Andrew Campanelli Hailee Dickson, Attorney Scott Olson - Young Summor, Scott Fischer - Planning Board Chairman. Margaret Muenkel, Russ Nadler, James W. O’Connell, William Stewart, Rob Muenkel, Barb Trembar, Jean McHecker, Becky Pine, Tammi Farrell, John Farrell, David Barnes, Mike Barnes, Gethen Owen, Anna Affatato, Melissa Vail, Ralph Vendriesco, Michael Block.

Project: Deschaine Cafe / Ariana Deschaine, 9570 Rt. 9W, Athens, NY 12015
Tax Map #104.00-5-1, #104.00-5-2, #104.00-5-22, Zoned MUC, Area Variances

A motion was made to open the Public Hearing for Deschaine Cafe.

- Motion: Member Ames
- Second: Member Sprague
- Vote: 3 Ayes - Nelson, Ames, Sprague

There were no members of the public present for this application.

A motion was made to close the Public Hearing for Deschaine Cafe.

- Motion: Member Sprague
- Second: Member Ames
- Vote: 3 Ayes - Nelson, Ames, Sprague

Chairman Nelson listed the variances the board will vote on for this application.

	Proposed	Existing	Required	Change
<i>For 9760 Route 9W Lot - Cafe - 104.00-5-1</i>				
Front Setback	11.93'	11.93'	40'	Existing and unchanged
Left Side Setback	3.44'	0'	25'	Improved existing condition
Right Side Setback	12.99'	13'	25'	Slight Reduction
Rear Setback	9.7'	4.09'	50'	Improved existing condition
<i>For 957 Schoharie Turnpike - Residential - 104.00-5-2</i>				
Front Setback	33.5'	33.5'	40'	No change
Left Side Setback	72.56'	213+/-	25'	In excess of required 25'
Right Side Setback	10.2'	29'	25'	Relief - 14.8'
Rear Setback	14.8'	42'	50'	Relief - 35.2'
<i>For Schoharie Turnpike - 104.00-5-22</i>				
Lot Size	.62 AC	.88 AC	3 AC	Relief - 2.38 AC
Lot Width	136.18'	257.94'	200'	Relief - 63.82'

A motion was made to approve the area variance application dated 9/19/1023 and amended 2/2/24.

- Motion: Member Ames
- Second: Member Sprague
- Vote: 3 Ayes - Nelson, Ames, Sprague

Project: ARX Wireless Infrastructure LLC/Verizon Wireless, Farm to Market Road, Athens, NY, Tax Map #: 105.00-1-8.11, Appeal of the vote by the Planning Board.

Chairman Nelson asked the appellant, the representative from ARX Wireless and the Chairman of the Planning Board to explain their positions in an open meeting format prior to opening the public hearing.

Attorney Andrew Campanelli, representing the appellant, began by explaining that he has not experienced what has happened in this case anywhere before. He asked if Attorney McHugh is assisting the ZBA and Attorney McHugh explained that he represents the Town of Athens. Attorney Campanelli said that only the Zoning Board of Appeals can interpret the zoning code and that he is troubled by an opinion sheet distributed by Attorney McHugh. Chairman Nelson explained that the memo distributed at the last meeting was put together by Delaware Engineering.

Attorney Campanelli explained that he represents a large number of residents near the site of the proposed cell tower. These residents were at the Planning Board meeting where they heard the decision made by that board and that it was also recorded. He explained that he filed opposition to the application showing substantial evidence of adverse esthetic impacts. Evidence included letters from residents and real estate brokers. These showed that the value of the nearby homes would be reduced. Also he stated that ARX is not a wireless carrier, but instead a site developer that builds infrastructure. When work is done by site developers a tower is usually not needed, but may be needed in the future and ARX showed no data proving need. He felt that if Verizon had huge gaps in service, then Verizon would have applied themselves for the tower.

Attorney Campanelli continued saying that a wireless carrier would do a drive test in the town to test the signal strength in the area. They would take that data to the board because it shows data that proves need and shows the best tower location. This would minimize the number of towers needed in the area. If there is insufficient capacity which is dropped calls at peak periods, a list can be obtained. He feels this was not shown by ARX and says that he gave information to the Planning Board showing there was no need.

He said that on October 26th the Planning Board took a vote on whether or not to approve the Special Use Permit and the Site Plan. There were residents of the town that heard it and it is on tape, it was voted down 5 to 1. He explained that his client could not get information from the clerks office on what transpired. The board then decided to vote again and reversed the determination. He says that normally when a vote is taken it would be filed, but there was no written decision. Even though there was no written decision, he believes what happened was the following; the board made a decision to deny based on the information presented after which the facts of the case did not change. The board then reversed themselves.

Attorney Campanelli said that the Planning Board is not able to reverse themselves. He asked the Zoning Board to look at the evidence against the cell tower application. It shows the reasons for granting this application is against the code and the legislative intent codified in the code of the Town of Athens. The reason for the Planning and Zoning Boards is to protect the residents. He believes the Planning Board understood this and that is why they voted no the first time. He feels there are many irregularities in this procedure He wants to get the written decision on this vote. He said that this is in violation of code, law and is just not right. His brief showed that he has dealt with this client before and has seen veiled threats of litigation. If the applicant is denied and they sue they can only get the permit,

but no damages. If he believes his client's civil rights were violated by not being allowed to participate in the proceedings, then that is protected by the first amendment right to petition government for the redress of grievances. That would bring a federal civil rights action under 42 U.S.C. 1983 and a suit against the Town of Athens for damages including attorneys fees. He does not like what occurred and feels the Zoning Board can look with fresh eyes, under the powers of New York State Law. This will give the Zoning Board the ultimate decision to determine if this application should be granted and whether or not the planning board can overturn their vote.

Attorney Scott Olson representing ARX Wireless Infrastructure says that this is a frivolous appeal and explained that there is an email from Attorney Campanelli to Ms. Dickson stating that these are virtually impossible to challenge.

He stated that today he prepared and signed and submitted a memorandum of opposition and supporting documentation. He has given seven copies to the board.

Attorney Olson says that this board does not actually have jurisdiction to hear this appeal. He cited §267-a(4) and says this only stands for appeals of decisions of the code enforcement officer.

Town Law § 267-a(4) Hearing appeals. Unless otherwise provided by local law or ordinance, the jurisdiction of the board of appeals shall be appellate only and shall be limited to hearing and deciding appeals from and reviewing any order, requirement, decision, interpretation, or determination made by the administrative official charged with the enforcement of any ordinance or local law adopted pursuant to this article. Such appeal may be taken by any person aggrieved, or by an officer, department, board or bureau of the town.

Chairman Nelson cited Chapter §162-24 Appeals:

To the extent permitted by federal and state law, any person adversely affected by the Board's actions with respect to an application, recertification application or revocation of a special use permit for a tower shall have the right to appeal the adverse decision to the Town of Athens Zoning Board of Appeals.

Attorney Olson explained that the critical wording is "To the extent permitted by by Federal and State Law". He provided a case called VISICIO v. Town of Wright. A Planning Board gave approval. The applicant didn't like a condition that was made and sued. The case went to the ZBA for appeal and the ZBA canceled the restriction. The neighbors sued saying the ZBA did not have jurisdiction and the appellate division of the court found that the ZBA does not have the right to review Planning Board decisions under the town law. Therefore §162-24 does not apply. It could have been used if the town were to supersede that provision of the law. This did not happen here. Chairman Nelson explained that this would need to be looked at by the town's lawyers.

Town law says that timely filing is 60 days from planning approval. The appeal would have to be filed to the Town Clerks office within 60 days. Chairman Fischer signed the approval on the 17th of November and 60 days later is January 16th. The application was filed on the 19th.

Attorney Olson also stated that the appellant has not met the burden of proof. The issue is what happened on October 26th. The planning board met and deliberated for several hours. It was not a vote on a motion to deny. The opinion letters included with the submission were not consistent. Only one was correct saying it was a vote to adopt a resolution to approve. There was never a vote or a motion to deny instead it was a vote to approve. The motion did not get enough votes and so no action was taken.

He provides the reason this is not a denial. Statutes §274-a and §274-b for site plan approval and use permits. These statutes guide you through the process. The remedy for challenging a denial is an Article 78 and not the ZBA. As far as the substance, there was information given by the appellant, but that information was not enough for a denial. Attorney Olson explained that they lowered the height to 125 feet and talked about building a silo to mitigate. The Town also hired an independent appraiser that was in no way affiliated with ARX and it showed this project would not decrease property values.

This is permitted in the agricultural district and the tower can be an unlimited height according to the Town of Athens code. The Special Use cannot be denied if the use is legal and he cited the Robert Lee Realty case.

Attorney Campanelli showed a receipt for the signed appeal of ARX on January 16, 2024 with a signature from CEO Albert Gasparini. He also explained that there is audio of the actual vote by the Planning Board. This audio will be uploaded to the Town website.

The Chairman of the Town of Athens Planning Board, Scott Fischer felt that Attorney Olson was correct in his interpretation that the vote on the application was a vote for approval and it was denied. He said that he did not follow Roberts Rules of Order which would have meant to call for the planning board to take an action to deny. Therefore, a denial vote was not taken. After the Planning Board meeting, Adam Yagelski of Delaware Engineering contacted Chairman Fischer and said they should look at the record because he believes the Planning Board did not come to a decision. A conference call was held with Town of Athens Attorney John Dowd, Attorney McHugh, MaryBeth Biancini of Delaware Engineer, Adam Yagelski and Chairman Fischer. It was an hour long phone call after which it was decided to hold another meeting and repeat the process. Chairman Fischer did not expect the vote to change, but it did flip. The Chairman made sure to do everything by Robert's Rules of Order.

On November 8th the board held another meeting to discuss all the information pertaining to the application. The application was discussed and not approved. It was then decided that there should have been notification to the public about this meeting. The meeting was stopped and a new meeting was scheduled for November 14th, with notice to the residents. At that meeting the application was approved.

Member Ames asked how the public was notified and how much notice is usually given. Chairman Fischer explained that it was through the town website and the Daily Mail. Attorney McHugh said that they like to give ten days notice and that it needs to be put in the newspaper which was not done for the November 8th meeting.

Chairman Nelson asked if Chairman Fischer changed his vote during this process. Chairman Fischer stated that he did not. Chairman Nelson asked why others changed their votes. Chairman Fischer said he did not know, but he guessed that it was because some members of the Planning Board are elderly,

have difficulty hearing and don't read the material. They voted from the heart because it is hard to have people staring at you and vote to approve. He explained that he voted to approve even though he thinks the location is horrendous. After going through everything in the application he could find no reason to deny. He used a 3rd party appraiser that stated the report from the applicant was accurate. He said he lives down the road from this location and has lost a friend because of this application, but he had a job to do and found no legal reason to deny.

Member Sprague asked about looking at other sites. Chairman Fischer explained that the Sleepy Hollow Lake Water Tower and Sewer Treatment areas are downhill and would not work because of the line of site. This was confirmed by Delaware Engineering. As for dropped calls, he lives in the area and has lots of dropped calls. Also, other land owners didn't offer to use their land for the tower, only this land owner was willing and the owner is not local.

Member Ames asked if there were any of the public at the November 14th meeting and Chairman Fischer replied that there were many .

Attorney Campanelli read the October 26th vote into the record and asked the board to listen to it for themselves.

Scott, so if we approve the motion that means the site plan is approved and special use permit is approved? We are voting to conditionally approve the application as it stands with respect to the amended resolution that we just voted on and approved. Ok, but does that mean that the site plan and the special use permit is approved? Answer, we are voting on all of that now. Ok, so that is what we are voting on. Yes, this is the vote. Yes, sorry everyone, let me rephrase. We are voting to approve the site plan application. Yes. We are going to vote in conjunction with the amended resolution that was just approved by the board. So, this is the main vote. So, can I have a show of hands to approve the site plan, to approve the special use permit in conjunction with the amended resolution that was just voted on. All in favor say aye. Aye. Ok, so one. All those against. Two, three, four, five ok five to one. Application denied.

Attorney Olson says this is not probative evidence. What people think happened is not the issue, it is a legal issue. Chairman Nelson clarified that it may have happened, but it was not technically correct. Attorney Olson explained that town law can have a default denial in some cases including not acting in a timely manor, but default denial or approval does not apply to a site plan or a variance.

Chairman Nelson granted a 10 minute recess and then opened the floor to the public.

Mike Barnes - 58 Briarwood Drive said he moved here two years ago. He purchased his home because of the views and the neighborhood. It is a large home with large windows and the tower will be about two football fields away. It will be seen through every window of his home. He feels his property value will be effected. The real estate agent that sold him the home said it would absolutely be effected. He would have had second thoughts about purchasing because of the tower. He was at the October 26th meeting and heard the denial that occurred because of all the hard work of the residents trying to stop it. He thinks this is preposterous and is offended by it all. He hopes the board looks everything over and changes direction.

Russ Nadler - 264 Flats Road lives opposite of the Barnes home. He will be deeply effected and it will not be hidden by trees. ARX did not do their due diligence and check with Sleepy Hollow. The ARX Engineer said the sewage plant location was good, but would need a variance and they just didn't bother to look into it. As for the elevations, when completed, the Sleepy Hollow site would be the same elevations as the site they are applying for now. He said the Shot clock ran out October 26th which meant the vote was supposed to happen that day and there were no more extensions. Mr. Nadler asked if a copy of the November 14th public notice in the newspaper is available.

Chairman Nelson said that not enough notice was provided and will ask the town about the date of request for the notice in the newspaper.

Margaret Muenkel - 55 Billingswood Point said that she walks each day and will see the cell tower. She asked a few questions: Is this a vote to determine the standing of the vote on October 26th because the planning board can't reverse their vote? Chairman Nelson explained that they are in fact gathering now. The Zoning Board is looking at all the information and will get legal advice and then vote on what is found. She asked if Attorney Olson was aware of Robert's Rules of Order and if so, why did he not ask the board to vote correctly an the 26th of October. Instead he said he was disappointed in the vote and said to the residents, "I'll be back." as he left the room. She asked if the board had reviewed the recordings and was disappointed that the town had not already moved these to the FTP site. She asked who made the decision to have the minutes of the October 26th meeting state that "the board took no action" when that was not what happened on the audio. Chairman Nelson asked Chairman Fischer if that statement was added after-the-fact and Chairman Fischer stated he did not know.

John Farrel - 144 Flats Road said he will view this tower from top to bottom from his house through windows. Now it will be a Silo. His property is the most valuable thing he can leave his children.

Ralph Vendriesco - Farm to Market Road said he lives across from the tower and asked why we need the tower. He asked how much the property owner was getting for the use of his property for the tower.

Hailee Dickson - 128 Flats Road said that this is about the issues that took place when making this decision. She is happy to see some change happening and about the new Town Board members. She said that this was done improperly from the very beginning and was upset that the public hearing was not reopened with all the changes being done to the application from tower to tree to silo. The vote was taken 97 days after the public hearing was closed and they were never able to be heard and the shot clock ended on October 26th. There was a lack of communication and the entire process seemed negligent. There was no lawyer for the town at the meetings and the residents were not represented. Whether the tower can go there or not, the process was not appropriate.

Attorney Campanelli asked if he can supply more information to the board within the next two weeks. Chairman Nelson said yes.

With no more members of the public asking to speak, Chairman Nelson asked for a motion to close the Public Meeting.

A motion was made to close the Public Meeting for ARX Wireless Appeal.

Motion: Member Ames

Second: Member Sprague

Vote: 4 Ayes - Nelson, Ames, Sprague, Ihde

Chairman Nelson said that the next meeting would be April 10th and that all information pertaining to this appeal must be to the board on or before April 2nd. The ZBA will check on the jurisdiction and timing issues and will listen to the audio. The written decision from November 14th is now part of the record.

Meeting Minutes: February 14, 2024

A motion was made to approve the Minutes of February 14, 2024 as written.

Motion: Member Ames

Second: Member Sprague

Vote: 4 Ayes - Nelson, Sprague, Ames, Ihde

With nothing further to come before the Board, a motion was made to adjourn the meeting.

Motion: Member Ames

Second: Member Sprague

Vote: 5 Ayes - Nelson, Sprague, Ames, Ihde

Meeting Adjourned 7:25 p.m.

Respectfully Submitted,
Annmarie Krause, ZBA Secretary