



Town of Wilton, NH
Application to the Zoning Board of Adjustment
 (Revised January 2010)
General Information, Page 1 of 3

Property Information

Describe the lot involved in the application (the lot that you want to build a building on, subdivide, conduct a business or other activity on, etc.). If more than one lot is involved, then describe them all in this space if it is convenient, or attach additional copies of this page.

Tax Map and Lot Number B-39-3 Lot Size 12 acres +/-

Street Address 303 Curtis Farm Road, Wilton, NH

Zoning District (check one):

- Residential General Residence and Agricultural
 Commercial Industrial Office Park

Relevant Overlay Districts (check any that apply):

- Research and Office Park Floodplain Conservation Watershed
 Wetlands Conservation Aquifer Protection Elderly Housing

Owner

If the application involves multiple lots with different owners, attach additional copies of this page.

Name John Marois and Kristen Marois Trustees of the Marois Joint Revocable Trust

Mailing address 303 Curtis Farm Road

Mailing address _____

Town, State, ZIP Wilton, NH 03086

This application must be signed by the owners of all lots involved in the application.

I approve the submission of this application. If an applicant or representative is named on the next page, the person named there has my permission to represent me before the Wilton Zoning Board.

Signature  Date 7/15/10
 as per letter of Authorization enclosed

(continued on the next page)

| | |
|-------------------------------|---|
| clerk use only | |
| Date and time received: _____ | |
| Received by: _____ | Amount paid: _____ |
| Case #: _____ | <input type="checkbox"/> Abutter list and labels included |



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Applicant

The applicant is the person who actually wants to build the building, conduct the business, etc. This is usually the same as the property owner, but might be a tenant, someone who plans to purchase the property, etc. If the applicant is the same as the owner, just check "Same as owner" and leave the rest of this section blank.

Same as owner

Name Florida Tower Partners

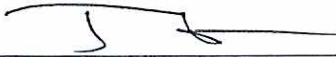
Mailing address 1001 3rd Ave West, Ste 420

Mailing address _____

Town, State, ZIP Bradenton, FL 34205

Signature of Applicant or Owner

I certify that to the best of my knowledge and belief, all information provided in this application is accurate.

Signature  Date 7/15/10
 as per letter of authorization enclosed

Representative

Fill out this section if the application is being submitted by a realtor, surveyor, engineer, attorney, etc., on behalf of the actual owner or applicant.

Name Jonathan S. Springer, Esq.


Mailing address Bosen & Springer, PLLC

Mailing address One New Hampshire Avenue, Suite 215

Town, State, ZIP Portsmouth, NH 03801

I authorize the above-named representative to submit this application and to speak before the Zoning Board on my behalf.

Signature of applicant or owner

Signature  Date 7/15/10
 as per letter of authorization enclosed

(continued on the next page)



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Contact Information

How can we get in touch with the applicant or the applicant's representative, if there are questions about or problems with the application? Provide at least one of the following. If you provide more than one, please check your preferred form of contact.

This information is for: the applicant the representative.

Daytime phone (603) 427-5500 Evening phone (603) 793-1097 (cell #)

Work E-mail jspringer@bosenspringer.com Personal e-mail _____

Proposed Use

Explain what you want to do with the property. (Do you want to build a building, subdivide a lot, have a business, ...).

Explain why you need the Zoning Board to let you do it. (The building will be too close to the lot line; the Planning Board wouldn't approve your subdivision; your lot is in a zoning district where businesses aren't allowed; ...).

Be specific. Identify the section or sections of the Zoning Ordinance that apply. If lot sizes or configurations or building placements are relevant, provide a scale drawing or plan showing all relevant information, such as lot lines, setbacks, present and proposed structures on your lot and neighboring lots, etc.

Description of proposed use and need for ZBA approval (use this page; attach additional pages as necessary):

Personal wireless service facility.
See enclosed Narrative.



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Application for a Variance, Page 1 of 2

When, because of the specific characteristics of your property, the Zoning Ordinance unreasonably restricts your use of your property without a corresponding public benefit, the Zoning Board may grant a Variance, which modifies or sets aside particular requirements of the Ordinance.

The specific section of the Zoning Ordinance to be varied: Section 15.0.3.3

The requirement in that section that you want to change, and how you want it changed:

Section 15.0.3.3 requires measurement of all trees over 20 feet to
calculate "average tree canopy height." Applicant seeks to measure only
40 foot trees and above.

To grant a variance, the Zoning Board must decide that it will satisfy each of the following five conditions. Please explain why you believe that each of the following statements is true. (Use additional sheets of paper if necessary.)

1. Granting the variance would not be contrary to the public interest: _____

See attached Narrative.

2. Granting the variance would be consistent with the spirit of the Ordinance: _____

See attached Narrative.

3. Granting the variance would do substantial justice: _____

See attached Narrative.

4. The proposed use will not diminish surrounding property values: _____

See attached Narrative.

(continued on the next page)



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Application for a Variance, Page 2 of 2

5. Literal enforcement of the provision of the ordinance would result in unnecessary hardship.
Complete just one of sections 5(a), 5(b), or 5(c):

5(a) i. No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property:

See attached Narrative.

ii. The proposed use is a reasonable one:

See attached Narrative.

iii. The hardship is a consequence of special conditions of the property that distinguish it from other properties in the area:

See attached Narrative.

5(b) i. The property cannot be reasonably used in strict conformance with the ordinance:

See attached Narrative.

ii. The hardship is a consequence of special conditions of the property that distinguish it from other properties in the area:

See attached Narrative.

5(c) **Hardship resulting from a physical disability.**

i. The variance is necessary to make reasonable accommodations to allow a person with a recognized physical disability to reside in or regularly use the premises:

See attached Narrative.

ii. The variance is in harmony with the general purpose and intent of the zoning ordinance:

See attached Narrative.

SECOND VARIANCE REQUEST

NARRATIVE: The host property is located at 303 Curtis Farm Road, Wilton, NH, Tax Map and Lot Number: B-39-3 (“the Property”). The Property is owned by John and Kristen Marois, as Trustees of the Marois Joint Revocable Trust. The applicant is Florida Tower Partners, 1001 3rd Avenue, West, Suite 420, Bradenton, Florida, 34205 (“the Applicant.”) The Applicant is seeking permission to construct and operate a personal wireless service facility on behalf of New Cingular Wireless PCS LLC (“AT&T Mobility”) a federally licensed telecommunications provider. AT&T Mobility is seeking to provide coverage to the Town of Wilton where presently there is a significant gap in coverage for AT&T Mobility. The Property is twelve (12) acres in size, and has good tree cover and other vegetation in the vicinity of the proposed compound. The Property is located in the General Residential and Agricultural (RA) District. Pursuant to Section 15.1.1 of the Wilton Zoning Ordinance (“the Ordinance”), a personal wireless service facility is permitted in this zone.

Section 15.3.4 of the Ordinance limits the height to twenty (20) feet above the “average tree canopy height” within a one hundred fifty (150) foot radius of the mount. When calculating the “average tree canopy height” an applicant must include “all trees over twenty (20’) feet in height”, per Section 15.0.3.3.

The Applicant has previously filed with the Wilton ZBA a variance request seeking a variance from Section 15.3.4, thus seeking a variance from the 20 feet above the average tree canopy height provision.

The Applicant, in the course of undertaking the balloon test and preparing for the July 13th ZBA hearing realized that, when conducting its tree survey on the Property, the survey crew did not measure all trees over 20 feet high but rather measured all trees over 40 feet high. As

stated in its first variance request, using that methodology, the height of the “average tree canopy height” is 63 feet.

The Applicant has conducted a balloon test on the site, and will be submitting the balloon test report to the ZBA. The Applicant respectfully believes that the results of the balloon test show that, even at the requested height of 114 feet, and even using the methodology of only measuring trees over 40 feet high, the visibility of the proposed facility is very limited. The reason that the visual impact is negligible is that the height of the actual tree canopy is far higher than the “average tree canopy height,” as set forth in the first variance request. As stated in that variance request, the actual tree canopy on this site consists of trees over 80 feet in height. There are 55 trees which are 80 feet or higher (a number of which are over 85 and even 90 feet high.)

Measuring trees under 40 feet in height will do nothing here to help screen the tower as those trees do not contribute to the actual tree canopy (and, due to the existing heavy tree growth and dense vegetation, will also do nothing to screen the compound). Requiring a measurement of all trees between 20 feet and 40 feet will simply cause unnecessary delay and cause unnecessary expense to the Applicant, with no real benefit to the Town or any of the abutters. For these reasons, a variance from Section 15.0.3.3, requiring all trees over 20 feet high to be measured, is needed.

1. Granting The Variance Will Not Diminish The Surrounding Property Values.

The Property is heavily wooded in the area of the Site. The Site was situated so as to take advantage not only of the tree cover but also the topography, as well as the orientation of the houses. The Site has been placed so as to take advantage of the topography, so the monopine will not break the top of the ridge line and be silhouetted against the sky. Further, Section 15.1.4 requires a ground mounted personal wireless service facility to be “designed so as to be camouflaged to the greatest extent possible”, and for that reason the Applicant is proposing the monopine design. Only about twenty feet or so of the top of the fake tree will extend above the actual tree canopy, thus camouflaging it to the greatest extent possible and reducing (if not eliminating entirely) any potential visual impact. The monopine will have no lights on it. The proposed use is a passive use, and does not generate noise, smoke, fumes or any significant vehicle traffic. For all of these reasons, the Applicant does not believe there will be any diminution of surrounding property values.

2. Granting The Variance Will Not Be Contrary To The Public Interest.

The provision of personal wireless service has become a pervasive fact of modern life, and represents a technological breakthrough in how people communicate with each other. There is a profound public interest in being able to send and receive such communications. Increasingly, the general populous is relying upon wireless service for their telecommunication needs. The facility here will provide coverage to an area that has poor service at present. The introduction of this service will benefit not only those members of the public who reside or regularly transact business in Wilton but also those who are traveling in the area as well.

The New Hampshire courts have said that a variance is contrary to the public interest or injurious to the public rights of others if it unduly conflicts with the Ordinance such

that it violates the Ordinance's basic zoning objectives. One way to ascertain whether granting the variance would violate basic zoning objectives is to examine whether it would alter the essential character of the locality. Another approach used by the courts is to examine whether granting the variance would threaten the public health, safety or welfare. Here, the evidence shows that granting the variance would not alter the essential character of the locality or threaten the public health, safety or welfare. AT&T Mobility's facility minimizes the adverse impact on the surrounding neighborhood and the Town as a whole. The proposed facility is naturally shielded by existing tree growth and as a result of the topography of the area it will not be easily visible from neighboring properties. The facility would not generate any objectionable noise, odor, fumes, or traffic. The facility will not be dangerous to public health or safety because it will comply with all FCC requirements relating to radio frequency emissions and all New Hampshire building code requirements. Moreover, the facility will actually benefit the public by alleviating a significant gap in coverage and improving wireless communications services to the residents, businesses, commuters and emergency personnel in the area.

3. Granting The Variance Will Not Be Contrary To The Spirit Of The Ordinance.

New Hampshire courts have recognized that the requirement that the variance not be contrary to the public interest is related to the requirement that the variance be consistent with the spirit of the ordinance. Therefore, for many of the same reasons, the variance will not violate the spirit of the Ordinance. The "Purpose and Intent" section of the Ordinance (15.0.1) state that the "express purpose" is to permit such facilities while ensuring compatibility with the visual and environmental features of the Town. There will be little or no impact upon abutting properties, or upon the Town's resources. The use is extremely passive in that little or no demand is made upon the Town's services, and also little or no impact in terms of traffic, noise, pollution, or

visual impact. The facility will accommodate up to three additional telecommunication carriers, and the Applicant will agree to allow co-location upon the monopine at commercially reasonable rates and terms to other telecommunication carriers.

4. Literal Enforcement of the Ordinance Will Result in Unnecessary Hardship.

A. No Fair and Substantial Relationship Exists Between the General Public Purposes of the Ordinance Provision and the Specific Application of That Provision to the Property.

One of the express purposes of the telecommunications section of the Ordinance is to permit licensed carriers to locate facilities. There is little question that another purpose of the Ordinance is to minimize visual impact of these facilities. However, the provision at issue, which is the requirement that all trees over 20 feet in height be measured, bears no fair and substantial relationship to those purposes. Using such trees for purpose of the tree survey creates an artificially low “average height”. In order for any such facility to be effective, the antennas must have a clear “line of sight”, and therefore be above the tree canopy. The Ordinance allows antennas to be above the tree canopy, and requires heavy tree cover and vegetative buffer in order to provide a visual buffer, but the artificially low “average” virtually guarantees that the antennas will not be able to clear the actual tree canopy, and many of the trees in the survey do not contribute to the visual buffer. For these reasons, no fair and substantial relationship exists between the general public purposes and the specific application of the “average tree canopy height” provision to this Property.

B. The Proposed Use is a Reasonable One.

The proposed facility is a reasonable one for the Property. It is a permitted use under the Ordinance. The property at issue is large, and is situated in the area where coverage is needed. The Property has a long, rectangular shape, which allows the facility to be placed

towards the rear, allowing the facility to be located in an area with good topography, while at the same time using the hill as a back drop.

Please note, pursuant to RSA 674:33, if the ZBA finds that the two foregoing elements of “unnecessary hardship” are not met, an unnecessary hardship can still be deemed to exist if, owing to special conditions of the property that distinguishes it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it. In this case, the Property does have special conditions. It is significantly larger than many of the surrounding properties. It has an existing entrance off Curtis Farm Road, and yet the rear of the property climbs significantly allowing the facility to gain height. The size of the Property also allows the facility to be located in such a manner so as not to interfere with the direct views from other properties.

In addition, the New Hampshire Supreme Court, in the 2008 case of Daniels v. Town of Londonderry, upheld the granting of a variance to build a personal wireless service facility, including a 170 foot tower, on a residential partial located in an agricultural-residential zone. The Court stated that, in order to insure compliance with the Federal Telecommunications Act, a “broader, more inclusive view of unnecessary hardship is required”:

When an application to build a wireless telecommunications tower is designed to fill a significant gap in coverage, the suitability of a specific parcel of land for that purpose should be considered for purposes of determining hardship. The fact that a proposed location is centrally located within the [gap in coverage], has the correct topography, or is of an adequate size to effectively eliminate the gap in coverage, are factors that may make it unique under the umbrella of the [Federal Telecommunications Act]. Similarly, that there are no feasible alternatives to the proposed site may also make it unique. Thus, although a parcel of land may be similar to the surrounding properties in terms of its general characteristics, it may still be “unique” for purposes of hardship when considered in light of the [Federal Telecommunications Act].

In this case, the Property is centrally located within the coverage gap, and has the correct topography. It has adequate size, and heavy tree cover. There are no existing towers, water tanks or other tall structures which can be used to locate the antennas. The Applicant will provide RF testimony and evidence which will establish that this Site is perfectly situated (due to topography, and the coverage objectives) to provide coverage. Further, the Town has extremely challenging topography, and the proposed height is necessary in order to achieve the coverage objectives in light of the topography.

For all these reasons, literal enforcement of the ordinance provision regarding the 20 foot high trees to be measured will result in unnecessary hardship.

5. Granting The Variance Will Result In Substantial Justice.

The Applicant has attempted to observe the requirements of Town's ordinance, by using a large, heavily wooded lot and minimizing any potential visual impact by using a 114' monopine design. There are no existing structures (towers, tall buildings, water tanks or the like) in the area of the significant gap in coverage. If the current variance applicant is not allowed, a significant gap in coverage may exist and an "effective prohibition" may exist under the federal Telecommunications Act. Granting the variance will achieve the substantial justice of allowing the Applicant to provide reasonable coverage, while at the same time, protecting the Town's interests. The public will not be injured, but will benefit from the introduction of adequate service. For all these reasons, granting the variance will result in substantial justice.