

THE FAYETTE COUNTY ZONING BOARD OF APPEALS met on July 25, 2011, at 7:12 P.M. in the Fayette County Administrative Complex, 140 Stonewall Avenue West, Public Meeting Room, First Floor, Fayetteville, Georgia.

MEMBERS PRESENT: Vic Bolton, Chairman
Bill Beckwith, Vice-Chairman
Larry Blanks
Tom Mahon
Brian Haren

MEMBERS ABSENT: None

STAFF PRESENT: Pete Frisina, Director of Community Development
Dennis S. Dutton, Zoning Administrator
Joe Scarborough, Interim Director of Permits and Inspections.
Robyn S. Wilson, ZBA Secretary/Zoning Coordinator
Deputy Derek Brown

Welcome and Call to Order:

Chairman Bolton apologized for being late, called the meeting to order, and led the Pledge of Allegiance. He introduced the Board Members and Staff and confirmed there was a quorum present.

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1. Consideration of the Minutes of the Public Hearing held on June 27, 2011.

Larry Blanks made the motion to approve the Minutes as circulated. Bill Beckwith seconded the motion. The motion unanimously passed 4-0-1. Members voting in favor of approval were: Chairman Bolton, Bill Beckwith, Larry Blanks, and Tom Mahon. Member abstaining from the vote was: Brian Haren.

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Dennis Dutton read the procedures that would be followed for presentation and opposition for petitions.

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2. Consideration of Petition No. A-584-11, Timothy E. and Elaine S. Powers, Owners, and Attorney Michael Maxwell, Agent, request a 12 foot Variance to reduce the south side yard setback from a minimum of 50 feet to a minimum of 38 feet to allow an existing accessory structure to remain. This property is located in Land Lot 156 of the 4th District and is zoned A-R. The address for the subject property is: 258 Matthews Road, Fayetteville, GA 30215. This petition was tabled on June 27, 2011, due to the lack of a full board.

Attorney Mike Maxwell, Agent, presented handouts to the ZBA. Said handouts are attached hereto and made a part hereof. He stated he was requesting a variance for a constructed structure located within the 50 foot side yard setback on property zoned A-R. He provided background information concerning the need for the variance approval so Mr. Powers can proceed with the building permit application and inspection for his structure. He noted before Mr. Powers began the construction of the structure, he examined the permitting regulations (Zoning Ordinance) for his property and tried to determine if the type of structure he was going to erect was described as needing a building permit for construction. He said upon review of the types of structures that are described which require a building permit you will find this structure is not described. He referenced pages 17, 18, 20, 23, and 24 of the handout as follows:

Building. Any structure having a roof supported by columns or walls and intended for the shelter, housing, or enclosure any person, animal, process, equipment, goods or property of any kind.

Cabana. An open or partially enclosed structure used in conjunction with a pool or lake/pond commonly containing a changing area, and/or seating area, and/or a restroom.

Covered Patio or Covered Deck, detached. An open or partially enclosed structure consisting of a roof with supporting posts/columns commonly containing a seating/dining area, and/or outdoor kitchen, and/or spa/hot tub.

Gazebo. A freestanding, circular roofed structure open on all sides, but enclosed by a railing, and used for outdoor seating in residential zoning districts.

Pavilion. A freestanding roofed structure generally supported by poles and open on the sides with a permanent foundation that is used for picnic/social gatherings.

Pole Barn. A large structure for the storage of farm products, feed, or the housing of farm animals or farm equipment, supported by poles, in agricultural zoning districts.

Porte Cochere. An extension of the roof projecting over a driveway at an entrance of a building and sheltering those getting in or out of vehicles. Also called a carriage porch.

Attorney Maxwell stated after Mr. Powers' review, Mr. Powers determined he did not need a building permit because it was not described as a structure that needed a building permit. Attorney Maxwell said he himself had discovered if the structure is not described in the building code, it cannot be built. He remarked until recently, outdoor kitchens could not be constructed in Fayette County because they were not described in the building code. He commented Fayette County has adopted the position that if a structure or activity is not described in the building codes or regulations, it cannot be constructed or it cannot be done. He said this seems like government gone amuck. He stated Fayette County tells you what you can construct or do if County bureaucrats determine it is not described as allowed and you cannot build the structure.

Attorney Maxwell said the next event occurred when a County Inspector was riding down Mathews Road one day and noticed this structure which is over 1,000 feet from the road and partially obstructed from view by Mr. Powers' house and a vegetated covered fence. He referenced page 32 of the handout regarding the sworn testimony given by Joe Scarborough gave before Judge Fletcher Sams which states the following:

Question: "Did you have occasion to learn about a structure at 258 Matthews Road in Fayetteville?"

Answer: "Yes sir, I did. Actually, it was one of our inspectors that had driven by and recognized an unpermitted structure on the property and he reported the violation."

Attorney Maxwell then referenced page 34 of the handout regarding the cross examination by Attorney Whitlock which states the following:

Question: "Mr. Scarborough, you testified in the beginning, I believe, that you got a call from somebody from your department that noticed something?"

Answer: "One of our inspectors had driven by and seen this structure and called the office to determine – to ask the office manager or one of the permit techs if there was a permit on file for a pavilion, which there was not in our records. So at that point an inspection – Notice of Violation inspection ticket was printed up for me."

Attorney Maxwell said how this building code violation was discovered is not how I have been told violations are normally discovered. He stated the normal procedure is that a citizen normally makes a complaint about a violation and a County employee, either a building inspector or marshal to investigate and the process begins of enforcement of the Fayette County codes. He remarked this is not the case of a neighbor concerned about encroachment on a setback has occurred and they are seeking a remedy. He reported this violation was observed and prosecuted by a County Inspector riding around looking for violations. He said this point would become important later in the presentation. He asked since the inspector noticed the violation, why didn't the inspector begin enforcement procedures against other citizens who have obvious violations? He remarked this was a rhetorical question which may need to be answered at a later date.

Attorney Maxwell said the next event happened when Mr. Scarborough came back to Mr. Powers' property to investigate the violation and to issue a Stop Work Order. He stated unfortunately, this event did not turn out well for Mr. Powers. He commented Mr. Powers met the Building Inspector accompanied by the Fayette County Marshal at the edge of his yard and refused to allow them on his property without either a search warrant or some other order from the a judge to allow them to legally enter his private property. He pointed out the confrontation escalated to a point to where a number of Fayette County Sheriff's Deputies arrived and Mr. Powers was arrested and charged with four (4) counts of committing crimes against Fayette County. He referenced pages 35 and 36 of the handout which is a copy of the violation issued by the Fayette County Marshal's Office for violations. He pointed out the four (4) counts, two (2) counts for obstruction of an officer right of entry and two (2) counts for not having a permitted structure and the existing pool. He said Mr. Powers went to court and after two (2) hearings, all charges were dismissed except the one (10 violation of not obtaining a building permit for the structure in question. He remarked Judge Sams ordered Mr. Powers work with Fayette County and get a building permit.

Attorney Maxwell referenced page 37 of the handout with statements from Judge Sams which state the following:

Court: "Mr. Powers, it is the building's owners' responsibility to obtain the final certificate of occupancy (CO.) I find that on Case 2010SN-18 that was not accomplished through the swimming pool. That counts for two (2) counts."

"And I believe that the pole barn that was constructed does require a permit, according to county ordinances. It did and still does and must be permitted, which is probably going require you to get an engineer to approve what is there and to bring in some plans that show approval of the construction."

Attorney Maxwell said Mr. Powers attempted to work with County Officials but was informed by a letter from the County Attorney that no one would meet with him or attempt to work out his problem or hear his concerns. He referenced page 39 of the handout regarding a letter from Tim Powers to the Fayette County Board of Commissioners which states the following:

"I hereby request an appeal hearing before the Fayette County Board of Commissioners per Fayette County Code 5-551, Right to Appeal."

Attorney Maxwell referenced page 40 of the handout regarding a letter from the County Attorney to Tim Powers which states the following:

"Dear Mr. Powers,

Fayette County has received your letter requesting an appeal hearing from the Fayette County Board of Commissioners. Your case was heard and decided upon by the State Court of

Fayette County. Since your appeal request is based on a Court's decision, your appeal rights would have been through the State Court's appeal process. The Fayette County Board of Commissioners has no authority to hear an appeal of a decision rendered by the State Court.

Therefore, there will be no date or time established by the Fayette County Board of Commissioners to hear your appeal."

Attorney Maxwell said Mr. Powers was rebuffed and tried to work it out. He stated he wanted to work with someone and this is how he attempted to do that before I (Attorney Maxwell) was retained.

Attorney Maxwell said the next event that occurred was Mr. Powers received a notice he had a hearing before the new State Court Judge Carla McMillian to have a hearing to reinstate a suspended sentence. He pointed out the sentences were suspended in July and Mr. Powers had until January 1, 2011, to work with the County. He remarked Mr. Powers tried to in December but was rebuffed and he froze because he did not know what to do. He noted Mr. Powers received a summons in February, 2011. He confirmed a hearing was held and Judge McMillian ordered Mr. Powers begin serving his sentence in the Fayette County jail. He noted another hearing was held in the Judge's chambers and an extension was granted for the time for Mr. Powers to report to jail. He said Mr. Powers was to work and get a permit and he and Mr. Powers were trying to work through the permit process. He noted the hearing was held with himself, Assistant Solicitor Joe Myers, and Judge McMillian. He said this fact was important because hearing evidence presented in a case before a judge in Georgia is governed by the Attorney Code of Conduct. He confirmed one attorney cannot go to the judge at a different time in private and present an argument or evidence without the other side's attorney present and if they do this is called ex-parte communication and creates a violation of the Attorney Code of Conduct and a violation of the Judge's Code of Conduct. He said to his utter amazement, this violation did occur. He referenced pages 41, 42, and 43 of the handout at a hearing before the judge Mr. Maxwell asked Judge McMillian the following:

Maxwell: "Your Honor, may I – during our conference, you offered to go on the record about your communications with the County Attorney. Are you still willing to go on record for that?"

Court: "Yes."

Maxwell: "Could I ask that the County Attorney be sequestered because he's part of this?"

Court: "All right. On February 24, 2011, counsel for Mr. Powers and the State, represented by Mr. Joseph Myers, had a conference with the Court concerning this case; and it appeared that Mr. Powers had not reported to jail as directed by the Court in a hearing the day before, so we had a – we had a hearing on that.

At that time the Acker case was presented to my attention by the State for consideration and in due caution – all due caution, the Court extended the time for Mr. Powers to report to jail to give time for counsel and the Court to review the case and the file.

Shortly after that conference, after counsel was excused, the Court received a call from Mr. Scott Bennett, the Attorney for Fayette County, who had – who expressed that he had heard that the...that the jail sentence had been – that the jail – time to report to jail had been extended to the following week. Mr. Bennett's position was that the...the County thought that the original sentence out to be imposed, which was the sentence that was imposed by Judge Sams and which was imposed by me."

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Attorney Maxwell said the County Attorney violated the Code of Ethics by calling Judge McMillian's private number, which I don't have and I can't call her and say can't we work through this, but the County Attorney does and he overstepped his bounds. He noted Mr. Powers may have a complaint that can be filed against the County Attorney and Judge McMillian if he so chooses in a future date. He confirmed Mr. Powers reported to the jail at the time directed and served a number of days in jail. He said he filed an appeal to the Georgia Court of Appeals and had Mr. Powers released on an appeal bond.

Attorney Maxwell stated he has attempted to help Mr. Powers obtain a building permit and complete the process of getting the final inspection and clear up this whole matter. He confirmed he was not issued a building permit because the County Officials required a detailed engineering drawing of the structure which he was not sure if they required on other structures of this type but Mr. Powers was required to go through this expense. He remarked after the Engineering plans were submitted, Mr. Powers was denied a building permit because the structure was erected in the required setbacks of his property. He confirmed Mr. Powers was requesting a variance of 12 feet so that he may possibly obtain a building permit and comply with Judge Sams' original order. He said the first issue to address is should the ZBA grant a variance for a self-imposed hardship. He remarked Mr. Powers is not at complete fault. He commented he was surprised Fayette County took the position that if it is not described in the codes it cannot be built. He stated an ordinary person could think a structure not described in the code can be built and does not require a permit. He said Fayette County allows the citizens to only build a structure described in the code; remember the outdoor kitchen described earlier. He remarked you can ask County Officials if children set up a lemonade stand and start selling lemonade, are they in violation of the Building Code and building uses; yes they are if they do so in a residential area. He said the list could go on and on describing problems with the Fayette County Zoning regulations. He pointed out you can only have three (3) dogs and until this Friday, you cannot have bees in a residential area.

Attorney Maxwell said it was his assertion that Fayette County bear some fault in this problem because the code is not specific and clear on the issue and an ordinary citizen will have difficulty understanding this position. He stated there are additional reasons this is not a self-imposed hardship such as the contour of the land and the existing utility lines make the construction of this structure only possible in this current location. He remarked if it is determined that Fayette County is even the slightest fault in this problem or the existing land contour and utility lines prevent the location of the structure in a different location, you overcome the hurdle of a self-imposed hardship.

Chairman Bolton asked Attorney Maxwell to wrap up his presentation.

Attorney Maxwell said the next step is to examine if the ZBA has ever granted variances before. He referenced page 51 of the handout regarding the Variance ledger for 2008 which states the following:

Allow expansion of existing church, Reduce front yard setback to 82 feet, Reduce rear yard setback and buffer to 17 feet, Reduce east side to 87 feet – Approved

Request an 11 foot Variance to reduce the east side yard setback from 50 feet to 39 feet,
Request a 37 foot Variance to reduce the rear yard setback from 75 feet to 38 feet –
Approved

Chairman Bolton informed Attorney Maxwell the ZBA is familiar with the petitions.

Attorney Maxwell remarked the ZBA had approved zoning setbacks in other areas, specifically pages 59 and 60 of the handout regarding the variance of another petitioner which was granted. He referenced page 71 of the handout regarding the variance for encroachment of a pool in the side yard setback, approved by the ZBA. He also referenced pages 80 and 89 of the handout showing setbacks

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that have been approved in the future. He pointed out Mr. Powers' request is similar to these applications for approval of a variance, the contour of the land and utilities. He said the structure is 39 feet from the property line and needs a 12 foot variance. He referenced pages 95 and 96 of the handout regarding Mr. Powers' Request for Zoning Variance which states the following:

“This request is for a reduction of the required side yard setback from 50 feet to 38 feet in the Fayette County Zoning regulations as applied to Mr. Powers' property. This represents a 12 foot reduction in the required setback for this property.”

Variance Summary

“Mr. Powers was unaware that he was required to get a building permit for the structure that he erected on his property. This structure was not clearly described in the Zoning Ordinance adopted by Fayette County. After the structure was erected, Mr. Powers was cited for a violation of the Fayette County Zoning regulations.

A hearing was held before Judge Fletcher Sams, State County Judge, and it was ordered that Mr. Powers work with the Fayette County Building Department and obtain a building permit and complete the inspection and approval building process.

Mr. Powers attempted to do so.”

Justification of Request

Attorney Maxwell stated there are six (6) criteria which must be considered.

Chairman Bolton advised Attorney Maxwell he was not going to let him go through the justification because they were presented to the ZBA in their packet and they have read the six (6) justification responses which the ZBA used to evaluate a petition. He added the ZBA was mailed a packet from the County with contained the details. He asked Attorney Maxwell to wrap up his presentation with any other unique information.

Attorney Maxwell referenced letters from the neighbors who have no objection to the approval of the variance in the handout. He confirmed Mr. Powers would comply with all other requirements. He referenced an aerial which shows how the structure is screened in the handout. He noted an adjoining piece of property is zoned R-40 which only requires a 15 foot side yard setback instead of a 50 foot side yard setback. He asked why the abutting property was zoned R-40 and the subject property is zoned A-R.

In conclusion, Attorney Maxwell requested approval of the variance and added he would be happy to take any questions at this time.

Larry Blanks asked if there was a letter from the property abutting the encroachment.

Attorney Maxwell replied he tried to contact them and there is no letter from them in the handout; however, they are not present tonight.

Chairman Bolton asked if there was anyone to speak in favor of the petition. Hearing none, he asked if there was anyone to speak in opposition of the petition. Hearing none and with no rebuttal required, he closed the floor from public comments.

Bill Beckwith asked what the purpose of the structure is.

Attorney Maxwell replied the purpose of the structure is for an accessory structure for a pool so people can stand under the shade and to have a swing which you don't have to have a permit to erect a swing set.

Bill Beckwith referenced the definition of a building which states:

Building. Any structure having a roof supported by columns or walls and intended for the shelter, housing, or enclosure any person, animal, process, equipment, goods, or property of any kind.

Bill Beckwith confirmed the existing structure fits the description for a building.

Attorney Maxwell said you try to read the codes and try to figure it out.

Bill Beckwith replied the definition seems very clear.

Chairman Bolton referenced Attorney Maxwell's statement regarding the building inspector finding the structure was evidence of government gone amuck. He pointed out the inspectors should look for violations. He said the ZBA hears lots of cases where someone stumbles across violations, such as the Tax Assessor's Office when they evaluate property every so many years. He added it is not abnormal for the ZBA to hear cases by virtue of a county employee who notices something that appears to be different and calls the office to investigate.

Brian Haren asked the location of the septic system and drainfield lines.

Attorney Maxwell replied the septic system and drainfield lines are located in the front yard.

Brian Haren asked if the pool complies with the 50 foot side yard setback.

Dennis Dutton replied the pool setback was measured from the water's edge until 2008, and now the pool setback is measured from the pool decking.

Brian Haren said he walked around to the Presley side of the property and clearly the structure is more than a gazebo because there is a mansard roof with PVC drainpipes coming out of the roof. He asked what the intent of the drainpipes was.

Attorney Maxwell replied the mansard roof make the structure look good and the PVC pipes are for runoff.

Brian Haren asked if there was a poured slab underneath the structure.

Attorney Maxwell replied there are pavers underneath the structure.

Larry Blanks said he had looked at the aerials and asked if the pavers had been on the property for a while.

Attorney Maxwell said instead of pavers, you probably were looking at the solar panels.

Chairman Bolton commented Attorney Maxwell had given a lot of information; however, about three-fourths (3/4) is outside of the ZBA's purview such as the hearings before the State Court. He said he was disturbed over the history because it came across like there was a cooperation issue. He stated government has requirements to keep people safe. He remarked if the structure/use is not covered in the ordinance, you need to contact the county because just because it is allowed in Montana, it may

not be allowed in Fayette County. He pointed out staff is constantly changing the code to accommodate new and different technologies which come along. He noted it was not accurate to say if you don't see it in the ordinance then it is permissible to build it. He remarked it should be understood that a building permit be required for something of this magnitude.

Bill Beckwith pointed out Attorney Maxwell agreed to the definition for a building and it should be obvious a building permit was required. He added the situation should have been evaluated.

Attorney Maxwell replied Mr. Powers realizes now a building permit should have been retained and are going through the process of getting a building permit. He pointed out an administrative variance may be approved for five (5) feet. He reiterated other structures had been approved to be constructed in the setback and some were existing structures. He added Mr. Powers should not be treated any different.

Larry Blanks asked if there were any other restrictions on the structure itself if a variance was approved.

Dennis Dutton replied the structure would be required to comply with the building codes; however, as far as a zoning issue, if it is defined and used as such then the structure can be utilized whether it is a covered patio or a pole barn. He added the use must be clarified.

Brian Haren asked if the lot is a nonconforming lot of record.

Dennis Dutton replied, "No sir."

Brian Haren pointed out that a lot of the petitions circled in the handout in terms of past decisions were for properties that were nonconforming lots and the homeowners had no other options to construct a building. He added there was a lot of buildable land on the subject property and the gazebo did not have to be located where it was placed. He remarked a solar panel might have needed to be relocated to keep the gazebo in compliance with the zoning laws.

Attorney Maxwell replied the Federal Government provides a government subsidy for installing solar panels but one of the requirements is that the solar panel not be moved once it is erected for 20 years or you lose the tax credit.

Tom Mahon remarked he had served on the ZBA for 27 years and a similar application was presented to the ZBA which was denied because they found a remedy by working with their neighbor and acquiring more property. He said this is a self-imposed hardship dealing with 12 feet on over seven (7) acres which could have been remedied in advance so you are asking to break the law.

Attorney Maxwell replied he did not have the benefit of reviewing what happened years ago.

Chairman Bolton stressed there is a standard used by the ZBA which is not random and each case is considered on its own merits. He added the ZBA does not make arbitrary decisions and they do make gut wrenching decisions.

Attorney Maxwell said the ZBA granted setbacks for others.

Larry Blanks remarked a 12 foot variance could be approved if it is warranted and has been approved in the past. He added staff is very experienced and anyone can walk in their door without an appointment and ask questions.

Chairman Bolton said the ZBA could only consider the merits of this case. He added if you have a structure on your property and the inspector wants to look at it and you refuse to give him access it

doesn't exactly give the sense that everything is in order and this sends a message you don't want the County staff to see what has been done.

Bill Beckwith remarked he was not convinced that the ordinance was reviewed and seems to be a disregard of the ordinance because it was built in the setback. He added granting a variance on something that should have been clear is not the proper thing to do.

Bill Beckwith made the motion to deny the petition. Brian Haren seconded the motion. The motion for denial unanimously passed 5-0. Members voting in favor of the denial were: Chairman Bolton, Bill Beckwith, Brian Haren, Tom Mahon, and Larry Blanks.

Bill Beckwith made the motion to extend the time limitation for compliance of an existing violation, including the removal of the building itself and the substructure on the ground, from 10 days to 30 calendar days. Larry Blanks seconded the motion. The motion in favor of the extension unanimously passed 5-0. Members voting in favor of the extension were: Chairman Bolton, Bill Beckwith, Brian Haren, Tom Mahon, and Larry Blanks.

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3. Consideration of an Appeal from the actions of the Zoning Administrator regarding the denial of a Telecommunications Tower Application, Charlie G. Taylor, Owner, and Matt Allen, Managing Member of Highwood Towers, Agent. This property is located in Land Lot 105 of the 7th District, fronts on Farr Road and Dogwood Trail, and is zoned A-R. The address for the subject property is: 123 Farr Road, Tyrone, GA 30290. This petition was tabled on June 27, 2011, due to the lack of a full board.

Attorney Ellen Smith, Agent, presented handouts to the ZBA. Said handouts are attached hereto and made a part hereof. She stated Highwood Towers is appealing the Zoning Administrator's decision to deny their application for administrative approval of a wireless telecommunication facility. She said on or about February 9th or 10th, 2011, Site Concepts, Inc. (SCI) submitted an application to obtain administrative approval of a wireless telecommunication facility at 126 Crabapple Lane. She remarked on February 24, 2011, Highwood Towers submitted an application to obtain administrative approval of a wireless telecommunication facility on property less than one and one-half (1.5) miles from the SCI site at 123 Farr Road. She noted both applications were for a 180 foot tower and would support multiple carriers. She remarked the basic question is whether or not the Zoning Administrator made a correct decision that SCI is a "planned tower" under the Zoning Ordinance. She noted the sole reason for denial of Highwood Towers is that it violated the one and one-half (1.5) mile separation distance between an existing or planned tower. She confirmed the Zoning Ordinance defines a "planned tower" as any tower that is in the approval process or has been approved but not yet constructed. She remarked it is sort of a race with competing tower facilities. She advised the wireless industry has worked tirelessly with the zoning staff and appreciates your zoning staff for working with the industry to locate wireless facilities in the county. She noted the requirements are taken seriously and the wireless industry tries to meet them when at all possible, because it affords administrative approval and without having to go through the public hearing process. She pointed out Highwood Towers respectfully submits that the SCI tower cannot be a planned tower as defined under the Zoning Ordinance because it should not have been considered to be in the approval process before the Highwood Towers was. She said specifically the county's own records and the first document, a material transmittal, contains documentation it was faxed on February 24, 2011, which states the SCI Site Plan administrative approval is denied (page 1.) She added on the second page, it lists all of the deficiencies (page 2.) She pointed out the heading states: No application will be accepted until it is determined sufficient (page 2.) She stated this is the County's own record showing that SCI's application was determined insufficient at the time Highwood Towers submitted its application. She confirmed the Zoning Ordinance states prior to submittal for an administrative site plan approval, applicants shall be required to submit a copy of the

Determination of No Hazard to air navigation from the FAA and a copy of the carrier's FCC license. She pointed out these deficiencies were indicated throughout the consideration of the application (page 3.) She noted the FAA determination is usually four (4) pages which indicate this tower at this location, at this height, isn't going to be a problem for air traffic. She confirmed this is an objective requirement under the Zoning Ordinance which must be submitted prior to submittal for administrative site plan approval. She pointed out the Zoning Administrator has no discretion to vary from this requirement and there is no dispute that the SCI application did not include these documents at the time of submittal. She added the Zoning Administrator does have a 30 day provision to comply with a separate set of federal regulations to look at an application and determine whether or not it is sufficient; however, that provision does not say we are still going to let another applicant with an insufficient application be a place holder or that that application is a planned tower under the Zoning Ordinance. She reported there were a number of other deficiencies and Highwood Towers has been communicating their concerns to the County since February. She advised Highwood Towers had filed a previous appeal which the County Attorney denied as moot and replied that the County's unwritten policy, with respect to applications, is that the first application received takes priority over subsequent applications. She added she would usually agree with this policy. She added she would state first completed applications should take priority over subsequent applications; otherwise, the policy encourages someone to race in with bare bones, often time misleading and not correct information just to get a place holder and hold it. She stressed the place holder is extremely important to Highwood Towers. She said the Zoning Ordinance provides that if an application is approved, then that application stands as a planned tower for 24 months which was revised in May, 2011, to reduce the standard to 12 months. She remarked if the SCI application is deemed to be accepted on February 9, 2011, it gets to hold the place for 24 months after May 13, 2011. She confirmed the tower could never be built but could hold the place until May 13, 2013; which means it holds a three (3) mile radius and prevents others from covering this area which can't be the intent of the County with respect to this. She remarked the County should encourage complete good faith application submittals. She said she could not say she had never supplemented an application or after an application was filed in good faith, there might be a good reason to move a site a little to deal with a neighbor who complains or to take some other action. She added this would be in cohesion with the County to try and get a location for a tower that is in the best possible site; however, in this situation, this is not what occurred. She explained what occurred was there were objective clear requirements like the FAA letter which was not submitted as required. She confirmed Highwood Towers got its FAA letter on February 3rd or 4th, 2011, which is public record which means other competing tower owners can rush to beat another tower to the punch. She added this can't be a good policy for the County to inspire. She said the Zoning Ordinance should ensure that when an application is submitted, the Zoning Administrator has all of the required documents to make a determination as to the validity of the application. She noted as of May 13, 2011, when the SCI application was approved and Highwood Towers was denied, SCI still did not have its FAA letter. She confirmed SCI's FAA letter was dated May 17, 2011, four (4) days after it was approved by the County (pages 4-7.) Attorney Smith respectfully requests the ZBA to consider this appeal and added that staff does work with the applicants and she did not want to squash that by this appeal.

Chairman Bolton asked if there was anyone to speak in favor of the appeal.

Andy Gonzci of 191 Crabapple Lane stated he had resided at this location for over 30 years. He said his wife was also present tonight and she is the Executrix of the estate of her mother who has owned property on Crabapple Lane for over 36 years. He commented he was in favor of the appeal. He noted he was not necessarily in favor of the Highwood's tower but he was in opposition to building a tower on Crabapple Lane which is directly across the road from their properties. He added his main concern was the degradation of the value of the property by having a tower in what is a residential area. He pointed out there are nine (9) homes on Crabapple Lane which is a half mile stretch of dirt road. He expressed concern about the tower being 100 feet above the existing tree line and also ingress/egress to a 1,000 square foot area that would house this tower. He stated it would

potentially be the source of people going onto the property dumping trash and garbage and kids being in there when they shouldn't be. He commented life on a dirt road is different from life in a subdivision because there are numerous cases of litter. He added there was a Target shopping cart on the side of the road tonight and earlier this year, they had a bomb placed in their mailbox. He stressed this is not a protected area and he is concerned about activities there because people can go there and be hidden from the road. He expressed concerns about trucks damaging the dirt road during construction and what maintenance of the road may cost the County along with providing additional police protection. He added he had not seen a patrol car on Crabapple Lane in the last 25 years and this probably will not stay the same with the construction of the tower and the clearing it may provide. He said he thought there could be a better location for a tower than a strictly residential area and asked the ZBA to consider that.

Chairman Bolton asked if there was anyone to speak in opposition of the appeal.

Attorney Kyle Williams, Agent for SCI, submitted a Notice of Constitutional Objections, which is attached hereto and made a part hereof. He said SCI has the approval and is a planned tower. He said the code says what can be done and what can't be done. He stated the code sets forth the folks who look at these applications, who review these applications, who weigh these applications, who work with the applicants to get information back and forth, which is the process. He pointed out the discussion tonight has turned into a public hearing to determine if SCI satisfied the staff's concerns in reaching a determination on the application. He added he contends they have. He said SCI's application was still approved and the certification is still certified. He confirmed SCI has not been asked for any additional information which has not been subject to review. He said Highwood Towers has sour grapes because they were beaten to the punch and they want to open up SCI's application to a public hearing for a vote. He reported the code did not allow that and staff has already made the determination that SCI met the qualifications. He pointed out Highwood Towers makes arguments to the ZBA that SCI does not have FAA approval but remember this is Highwood Towers making these statements. He stressed SCI has been approved and have vested rights and should be allowed to continue. He added the code does allow a process for Highwood Towers to obtain a variance from the Planning Commission and the Board of Commissioners if they think their tower can meet the qualifications to be within the one and one-half (1.5) mile radius of the SCI tower. He respectfully requested the ZBA to deny the appeal.

Hearing no further comments, he closed the floor from public comments.

Tom Mahon said it appears the conflict is based upon the time of submission and whether or not the application was complete at the time of submission. He stated the first tower to make application should be sufficient notice and going back and forth with information needed, which is the process. He remarked the Zoning Administrator acted appropriately.

Bill Beckwith asked Dennis Dutton if once an application is completed, it is sufficient for the application process or how did you render the decision.

Dennis Dutton replied an application takes time to review. He said the County departments are allowed 14 days to review an application. He stated if there are deficiencies, a checklist is sent to the applicant. He said once everything is satisfied by all the County departments, the site plan can be approved.

Bill Beckwith asked Dennis Dutton when an application is considered to be in the process.

Dennis Dutton replied once the application is received whether it is complete or not.

Brian Haren asked when the 30 day time period starts.

Pete Frisina replied staff has 30 days to review the application; however, there is no time limit for the applicant to respond. He added staff has 150 days under the federal regulatory process adopted in December, 2010, to act.

Attorney Smith asked if she could address the ZBA.

Chairman Bolton replied the floor was closed from public comments unless she was recognized by one (1) of the ZBA members. He said the ZBA is asked to evaluate things that are not at the purview of the ZBA. He stated the ZBA can't evaluate the intent of the heart of people so we have to evaluate what the ordinance says and whether or not what took place falls within the structure and guidelines of the ordinance. He pointed out the ordinance had been amended; however, the ZBA must go by the ordinance in effect at the time of this filing. He commented it is meaningless if the first applicant was attempting to get there first with an incomplete application, even if they filed one (1) document that said we want to apply. He said if the Zoning Ordinance allows for that then that applicant has the right to enter into the process. He remarked he had worked for the telecommunication industry and he was familiar with how competitive locating tower sites are. He stated if the applicant files it first in the way that the ordinance reads at that time, that gives them a certain standing in terms of having filed an application, even if it is incomplete. He noted the staff has 30 days to review the application and staff can't review 50 documents while you stand there because of the detail. He said it is like going to the theatre and dropping off your wife to go buy tickets while you park to beat someone who is parking their car. He remarked there is a process. He clarified there is nothing in the ordinance which states staff can kick out a tower in process.

Dennis Dutton replied this was correct until the ordinance was amended.

Chairman Bolton said unfortunately they could take as long as they wanted to get in the documents.

Hearing no further comments, Tom Mahon made the motion to deny the appeal. Brian Haren seconded the motion.

Larry Blanks stated the couple who spoke in opposition may want to take this opportunity to speak with the telecommunication tower company tonight and express their concerns.

Chairman Bolton apologized on a point of procedure by forgetting to allow rebuttal by Attorney Smith.

Tom Mahon withdrew his motion. Brian Haren withdrew his second.

In rebuttal, Attorney Smith said she appreciated the ZBA's consideration. She stated she generally agrees the 30 days should start when an application is submitted; however, the application should have some meat to it. She also agrees staff does have to read the document but this is a harsh ruling for an applicant who is going to be prohibited from building a tower under the administrative approval process for two (2) years which is part of the reason the County changed the ordinance. She remarked she appreciated the ZBA's time but could see the writing on the wall.

Chairman Bolton clarified there is a process for Highwood Towers.

Dennis Dutton replied Highwood Towers could file a Public Hearing Application Request for Communications Tower Use to be considered by the Planning Commission and the Board of Commissioners.

Tom Mahon made a motion to deny the appeal. Brian Haren seconded the motion. The motion for denial unanimously passed 5-0. Members voting for denial of the appeal were: Chairman Bolton, Bill Beckwith, Larry Blanks, Tom Mahon, and Brian Haren.

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ZBA Public Hearing

(Note: On July 26, 2011, it was discovered by the Planning and Zoning Department that the Appeal

from the actions of the Zoning Administrator was not advertised in the legal organ for the County thus allowing the applicant an opportunity to be reheard. Fayette County Attorney, Scott Bennett, notified Attorney Ellen Smith, Agent for Highwood Towers, of this situation.)

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Chairman Bolton asked if there was any further business.

Dennis Dutton advised there would not be a public hearing held in August.

Brian Haren requested staff not to include such information in an analysis as if the applicant is denied he will be going to jail. He said this information is not needed because it could color the ZBA's decision. He stated he knew this was public record but he has better things to do than review the court records. He remarked it was not a piece of information he needed to make a clear decision. He asked in the future that this type information be excluded.

Tom Mahon disagreed with Brian Haren because it is part of the history because even the attorney made sure the ZBA knew this information. He added this information was not brought up by the ZBA.

There being no further business, Tom Mahon made the motion to adjourn the meeting. The motion unanimously passed 5-0. Members voting in favor of adjournment were: Chairman Bolton, Bill Beckwith, Larry Blanks, Tom Mahon, and Brian Haren. The meeting adjourned at 8:39 P.M.

**ZONING BOARD OF APPEALS
OF
FAYETTE COUNTY**

Respectfully submitted by:

**VIC BOLTON
CHAIRMAN**

**ROBYN S. WILSON
SECRETARY**