

**MINUTES OF THE
MENDHAM BOROUGH BOARD OF ADJUSTMENT
March 3, 2009
Garabrant Center, 4 Wilson Street, Mendham, NJ**

CALL TO ORDER

The regular meeting of the Board of Adjustment was called to order by Chair Santo at 7:30 p.m. at the Garabrant Center, 4 Wilson Street, Mendham, NJ.

CHAIRMAN'S ADEQUATE NOTICE STATEMENT

Notice of this meeting was published in the Observer Tribune on February 5, 2009 and the Daily Record on January 29, 2009 in accordance with the Open Public Meetings Act and was posted on the bulletin board of the Phoenix House.

ATTENDANCE

Mr. Palestina – Present
Mr. Peck – Present
Mr. Peralta – Present (7:35 p.m.)
Mr. Schumacher – Present

Mr. Seavey - Present
Mr. Smith - Present
Mr. Santo - Present

Also Present:

Mr. MacDonald, Attorney
Mr. Hansen, Engineer
Mr. Denzler, Planner
Dr. Eisenstein, Telecommunications Consultant

PUBLIC COMMENT

Chair Santo opened the meeting to public comment or questions on items that were not on the agenda. There being none, the public comment session was closed.

APPROVAL OF MINUTES

On motion by Mr. Seavey, second by Mr. Smith and carried, the minutes of the regular meeting of February 3, 2009 were approved as written.

HEARINGS

Kutlu, Hakan & Kimberly – Extension to previously approved use variance
Block 2401, Lot 17, 77 Hardscrabble Road

Present: Hakan Kutlu, Applicant

Mr. MacDonald, Esq. reviewed the public notices and advised that the Board has jurisdiction.

Mr. Kutlu explained that they were requesting the extension of the previously approved temporary use variance to permit two principal structures until such time that the existing home is demolished. They are expecting another child and they will need extra bedrooms so the plans were redrawn causing a delay.

Mr. MacDonald, Esq. confirmed that the extension would for one year from March 3, 2009.

Mr. Santo made a motion to approve the extension. Mr. Peck seconded.

ROLL CALL: The result of the roll call was 6 to 0 as follows:

In Favor: Palestina, Peck, Schumacher, Smith, Seavey, Santo
Opposed: None
Abstentions: None

The motion carried. The extension was approved. Mr. MacDonald, Esq. will prepare a resolution for the April 7, 2009 regular meeting of the Board.

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Markham, Richard & Susan – Hardship Variance: **Continuation**
Block 2201, Lot 10.05, 243 Pleasant Valley Road

Present: John R. Lanza, Esq., Attorney for Applicant
Richard Markham, Applicant
Steve Kollmar, Cross River Design
Gregory Yannaconne, Engineer

Exhibits: A-3: Variance Plan Revision
A-4: Landscape Plan

Mr. Lanza, Esq. advised that the applicant had prepared revisions to the proposed gate and landscaping based on the previous meeting with the Board.

Mr. MacDonald, Esq. advised that there had been letters written by residents who were both for and against the gate. There were about an equal number, but the letters were not distributed to the Board. He reminded the Board that they needed to make their decision based on the evidence presented during the hearing. He questioned the public on whether there were any interested parties present. There were no residents present to speak for or against the application.

Mr. Yannaconne presented Exhibit A-3, a revision of the Variance Plan. A copy of the plan had been presented to the Board with their pre-meeting packages. He testified that the gate is still 40 ft. from Pleasant Valley Road. The structures for the gate are 20 ft. apart to satisfy the request of the Fire Official. They are now located 4 ft. from the easterly property line and 2 ft. from the westerly property line. A turn around area has also been provided so that if someone pulls into the driveway by mistake, they can k-turn and leave.

There were no further questions by the Board, public or professionals.

Utilizing Exhibit A-4, a color rendered Landscape Plan, Mr. Kollmar testified that the structures for the gate are 40 ft. back. They have lowered the stone wing walls from 4-5 ft. to 2-3 ft., and they have incorporated more fencing that is somewhat transparent when one is driving by. The open area of the fence and gate now calculates to 51.44%. The area is now more than half open versus 30% in the previous design. The piers are each 8 ft. 9 inches to the top of the light structure. The height to the top of the pier is 6 ft. 3 inches. The gate is 6 ft. 10 inches at the center and 5 ft. 11 inches at the edges. The wing walls are 2 ft. above grade and the sides are 5 ft. above grade. They have narrowed the gate about 1 ft. on each side.

Mr. Kollmar described the landscaping as deciduous shrubs, ground cover and iris. This will serve to hide the stone wall and provide a step-down from the woods on either side creating a picture as one is driving by. The home is 1100 ft. back and the gate will stop most people for security purposes. Now people do not know it is a private resident.

Responding to Board questions, Mr. Kollmar stated that a 4 ft. gate would stop traffic, but that aesthetically it is a problem. It needs to be 20 ft. wide, and in size, the gate needs to be in keeping with the stature of the home and the surrounding area. It is straight across and not pitched back. Mr. Markham added that they are trying to achieve bringing both ends of the wing walls to the adjoining trees to create a better look. In terms of how the gate would operate manually, Mr. Markham stated that they would install a Knox Box for manual opening. In case of power outage, the home also has a generator.

Chair Santo opened the meeting to questions by the public. There being none, the public session was closed.

Mr. Markham stated that he appreciated the Board suggestions. The gate is now open to a greater degree. They have eliminated a lot of stone, and the structure is mostly fencing. They also now have a landscaping plan. In terms of the neighbor impact there is only one resident to the right that can see the gate, and that resident is supportive. The home to the left belongs to Mr. Markham.

In deliberations one Board member expressed concern that the pillars were still over 8 ft. high and the structure 40 ft. wide. It would stand out and be too big. Another stated that he would like to see it lower, but there is a 20 ft. width to consider. Other members expressed opinions that the applicant made reasonable accommodation and developed a good architectural plan. The landscaping plan helped. There is a need for security. The Board has also approved gates for similar types of homes. It blends with the character of the neighborhood.

Chair opened the meeting to the public. There being no public comments, the public session was closed.

Mr. Seavey made a motion to approve the plans as amended with conditions as expressed in the Ferriero letter dated October 24, 2009 relating to such items as emergency services, DEP permits and an as built survey. Mr. Peralta seconded.

ROLL CALL: The result of the roll call was 6 to 1 with no abstentions as follows:

In Favor: Peck, Peralta, Schumacher, Smith, Seavey, Santo
 Opposed: Palestina
 Abstentions: None

The motion carried. The application was approved. Mr. MacDonald, Esq. will prepare a resolution for the April 7, 2009 regular meeting of the Board.

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Omnipoint Communications, Inc. and New York SMSA Limited Partnership d/b/a Verizon Wireless – Use and Other required variances: **Continued**

Block 801, Lot 20, Kings Shopping Center

Present: Richard Schneider, Esq., Attorney for the Applicant

Exhibits: I-1: Appellate Division decision July 7, 1998
 I-2: Letter August 23, 1996 Mills to Judge Stanton
 I-3: Letter dated September 5, 1996 Mills to MacDonald
 I-4: Order of Dismissal

The hearing continued with the introduction of the witnesses that would be presented by Mr. Simon, Esq., attorney for interested party, Mr. Irving Isko. Witnesses would include:

Irving Isko, Resident - 44 Prentice Lane
 David Schechner, Esq. - former Attorney for Mr. Isko
 Ron Graiff – RF Engineer
 George Ritter – Planner

Mr. Simon, Esq. addressed notice in several areas based on his review. His arguments were:

- In terms of the notice for the application, the Cell Tower Ordinance was enacted subsequent to the time that the application was filed with the Board. Public notice did not contemplate a conditional use or proposed violations of bulk violations in the Eastern Business District. The notice does include a catch all, but it is insufficient to adequately and appropriately notify the public. During the course of the hearing, the siting and the height of the tower changed which directly affects more people, and amended notice should have been provided.
- Regarding notice to residents with 200ft by certified mail and publication in the newspaper, it appears that the notification was made, but the circumstances of the D variance and the excessive height affect many more people. People are reading the newspapers less and less and utilizing the internet and websites. Even though notice was provided in accordance with the Municipal Land Use Law, the notice does not adequately and appropriately notify the public.
- For notice of the ordinance itself, under MLUL section 40:55D-63 personal notice should have been given to all property owners in the zone as the Eastern Business District's classification was changed from prohibiting cell towers to now conditionally permitting them. Based on his verification with the Borough Offices, notification was not sent. The ordinance is invalid and was lacking jurisdiction when it was adopted. There is a provision for the property owners in or within 200 ft. of the zone to file a protest which would then require a vote by a supermajority.

During the course of Mr. Simon's arguments, Mr. MacDonald, Esq. confirmed that the State statute for notification is the Municipal Land Use Law. He also advised that it is not the jurisdiction of the Board to determine whether the ordinance has jurisdiction. Based on

discussion of the DiPietro case with Mr. Simon, Esq. Mr. MacDonald, Esq. agreed that the Board might be able to consider the application both ways in consideration of whether there is a valid ordinance or not, but he stated that the applicant would probably have input. He continued that the DePietro case dealt mostly with protest issues. In the case of the Borough, if the wireless communications ordinance came about as a result of a Master Plan update that might eliminate the necessity for personal notice.

Mr. Simon, Esq. stated that he did not believe that the Borough had a re-examination report, and that even if the Master Plan was a re-examination report, it did not specifically recommend the enactment of this wireless telecommunications ordinance.

Mr. MacDonald, Esq. expressed a difference of opinion. The Master Plan was studied over a period of time and updated in 2006 with a provision that recommends the adoption of an ordinance. Mr. Lupo placed it in evidence as part of the goals and objectives. Mr. Simon, Esq. stated that it does not specifically recommend the enactment of the ordinance in the Eastern Business District as a conditional use.

Mr. Schneider, Esq. expressed his position on Mr. Simon's comments relating to notice. The Board has a statutory obligation to accept the ordinance as is. Any concerns should be taken to the Governing Body. It is his opinion that the adoption of the ordinance does not invoke personal notice as it is not a change in classification of use. The Board of Adjustment also does not have any authority to require greater notice than what's required in the Municipal Land Use Law. He cited an Appellate Division case in which Edison Township required a 500 ft. notice in their municipality. It was determined that notice was limited to that required under the Municipal Land Use Law.

Mr. Schneider, Esq. continued that it was very obvious to anyone with an interest in the application that the facility was being proposed at the Kings Shopping Center. It is not feasible that one would not show up if it was a use variance in accordance with Section 70D as opposed to 70D-3. He doubted that Mr. Isko is present objecting due to the 10 ft. increase in height, but would have been present if it were 120 ft. Everyone had appropriate notice. He disagreed with Mr. Simon, Esq. and requested that the Board continue with the application in accordance with the ordinance as adopted by the governing body.

Mr. Simon, Esq. clarified that it was his opinion based on file correspondence that the notice was delivered to the Borough subsequent to the adoption of the telecommunications ordinance.

The hearing continued with Mr. Simon, Esq. calling Mr. Irving Isko, 44 Prentice Lane as a fact witness.

Mr. Irving Isko presented past professional history and qualifications leading up to his involvement with an AT&T application for a cell tower application in the Borough of Mendham in 1996. The application was for a cell phone tower on top of the Black Horse Inn. He testified that given the close proximity of the parochial school and his concern with health issues, he opposed the application. He was not sure whether AT&T was the only applicant or whether Bell Atlantic and Nynex were also involved.

Mr. MacDonald, Esq. clarified that in terms of the application for the Black Horse Inn, AT&T was the only applicant.

Mr. Isko continued that after the Board of Adjustment denied the application, the applicant appealed. At the same time there was an application denied by the Board of Adjustment in Mendham Township that was appealed. It was not A&T, but might have been Nynex. Judge Stanton put the cases together and wanted a tower to be built. As a result, Mr. Isko agreed not to object to what was done in Mendham Township, but he would not agree to anything in Mendham Borough.

Mr. Isko stated that he participated in the appeal, but could not clarify the legal position of his role. Mr. MacDonald, Esq. clarified that Mr. Isko petitioned to intervene through Mr. Schechner, Esq. and permission was granted to intervene.

Continuing, Mr. Isko explained that after the initial discussion, the Sisters at Daytop wanted to obtain the revenue from a tower. As Daytop was on the border line of Mendham Borough and Mendham Township, he agreed that a tower could be constructed as long as it was a building, not a pole; and that carriers using Daytop would never build in the Borough. Responding to questioning by his attorney, Mr. Isko agreed that he signed off on the deal, and that it was agreed to by the multiple carriers using Daytop.

Mr. Simon, Esq. clarified with Mr. Isko that his position is that Verizon, as successor to Bell Atlantic, is prevented by the settlement agreement from proceeding with the application at the Kings Shopping Center. Omnipoint would also be prohibited as it is on the Daytop site. Mr. Simon, Esq. summarized that Mr. Isko's position is that the application constitutes a breach of the settlement agreement and a breach of the representations that were made by Mr. Isko.

Mr. Isko explained that while he attempted to locate the settlement agreement, there were various appeals and the files were sent to Trenton. The microfilm in Trenton would need to be reviewed. He remembered that there was a cell tower application in Bernardsville that was denied, and when they wanted to build in Mendham, he said no. It was never pursued. He recalled another time when he said no to a tower at the Exxon Station owned by Dennis Moro. The applicant backed out.

Addressing other issues of concern, Mr. Isko referenced the Isko versus Township of Livingston case in which St. Barnabas wanted to continue construction beyond their setback line. The Livingston Civic Association, composed of residents, went to the Board of Adjustment, but a decision had already been made in favor of the hospital. They had no notice and no opportunity to take action. After the case was taken to the Supreme Court, it resulted in that court writing due process into the law of zoning which includes such things as the constitutional right of the public to have notice and opportunity to appear, and to be represented by Counsel.

Relating the issue to the case at hand, Mr. Isko addressed safety, or lack of safety, due to radio frequency waves. He stated that something might be overlooked by people in good health. What may be or may not be danger to ordinary people may be to a person who has certain ailments. He drew a parallel to a situation when PSE&G wanted to install broadcast signals on gas meters. He has an ailment that is sensitive to environmental conditions, and his doctors advised that it could trigger a malfunction. When PSE&G would not listen, he went to the Board of Public Utilities and the case decision was that it is a danger. At the location of the proposed cell tower there are 500 people working eight hours a day, five days a week with hundreds of thousands of shoppers. They should have notice to make up their mind to the extent to which they feel there is danger to themselves.

Responding to Board questions, Mr. Isko explained that they were working on finding the written settlement agreement, but had not yet. In terms of how he heard about the application, he read an article in the newspaper. He had retired from the Board of Adjustment in 1995 and was not with the Board when the case was appealed and the deal was made. In terms of whether the deal was with him as an private citizen or the Borough of Mendham, Mr. Isko stated that he did not make the deal, Judge Stanton did. It was worked up with Mr. Schechner, Esq. and he signed it.

Mr. MacDonald, Esq. clarified that there was an application before the Board of Adjustment in 1996. The Board denied the application that was submitted by one applicant, AT&T. AT&T appealed to Judge Stanton. Prior to that, there was an appeal proceeding from an application that had been denied in Mendham Township. That was Bell Atlantic and perhaps another party. The decision had been appealed, and the case had been briefed and argued. Judge Stanton had a decision pending. Mendham Borough was not involved. Time wise, the Borough case was well behind.

Continuing, Mr. MacDonald, Esq. explained that the Mendham Borough Board of Adjustment denied two whip antennas on top of the Black Horse. These were similar in configuration to what is being discussed for police and emergency antennas on the current proposed tower. Mr. Isko and Mr. Schechner participated during the entire hearing before the Board, and objected as did various other people. Answers were filed against the appeal, but a brief was never filed as the case was diverted early in the process. There was contact to the Borough and the Township, but he, as Board Attorney, was not involved in discussions with the carriers. He does not believe that Judge Stanton was involved in those discussions. The Daytop site presented itself. The parties then decided that the facility would be useful for all of the applicants and would resolve the two lawsuits. Consequently, a hearing was held before the Mendham Borough Board of Adjustment at a special meeting and the result was the Bell Tower. He has no recollections of any written settlement agreement of any sort whatsoever coming to him as a guideline for use by the Board in resolving the matter.

Chair Santo also agreed that there was nothing in writing. Mr. MacDonald, Esq. advised that there is a transcript of the proceedings that resulted in the Bell Tower. Copies have been provided to Messrs. Simon and Schneider.

Mr. Isko referenced a copy of an Appellate Division document (Exhibit I-1) that reflected history and stated that the Plaintiff and Board settled their prerogative writ claim. Further to questioning

by Mr. Simon, Esq. he agreed that the matter was dismissed pursuant to a settlement agreement between the parties.

Following, there was lengthy questioning and discussion between Mr. MacDonald, Esq. and Mr. Isko on whether there was a settlement agreement and whether the Mendham Borough and Mendham Township cases had been joined together by the courts. Mr. MacDonald, Esq. reinforced that AT&T utilized the bell tower, and that is how the matter was settled and resolved. Mr. Isko countered that the timing for the settlement pre-dated Daytop when Judge Stanton allowed something to go forward in the Township and not in the Borough. Mr. MacDonald, Esq. stated that it would be necessary to hear from Messrs. Simon and Schechner for testimony to support the timeframe.

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Board took a 10 minute recess.

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After a brief exchange on whether Bell Atlantic was a party to the matter, and statement by Mr. Schneider, Esq. that the case did not involve the applicant currently before the Board, the order of witnesses and cross-examination was determined. Chair directed the continuation of the hearing with testimony from Mr. Schechner, Esq.

Mr. Schechner, Esq. presented his credentials to the Board. He testified that he represented Mr. Isko in opposition to a cell application located at the Black Horse Inn. When the applicant appealed to the Superior Court after the Board of Adjustment denied the application, he filed a petition to intervene on behalf of Mr. Isko. It was granted. Mr. Isko filed a counterclaim, cross-claim and third-party complaint to not only oppose the appeal of AT&T, but also to attack the DEP regulations concerning cell phones.

Responding to Mr. Simon, Esq. on the Mendham Township case, Mr. Schechner stated that he did not know if the a cell tower application had been denied, but that there was a suit pending before Judge Stanton involving cell towers in the Township. He was involved in the settlement, but cannot find the file with the records. When Judge Stanton heard about the Borough case, he asked the Township to reach out to the Borough, but there was no meeting before the Court and no settlement conferences. Once a deal was reached, they needed to still settle the matter with Irving Isko who had filed claims against AT&T and the Borough. Mr. Isko agreed to dismiss his appeals as long as there was agreement to build towers outside of Mendham Borough. There is either a letter or agreement, but he could not find it in his files.

In the subsequent part of the meeting, Mr. Simon, Esq. introduced Exhibits I-2, I-3 and I-4 pertaining to documentation from Mendham Township's attorney to Judge Stanton, Mendham Township's attorney to Mr. MacDonald, Esq., and the final order of dismissal by the Superior Court of Morris County. He questioned Mr. Schechner and had him read portions of the documentation relating to (1) the Mendham Township attorney's report to the Court on its suggestion to consolidate cellular communications for Mendham Township and Mendham Borough in one location, (2) the carrier's objections to be involved with Mr. Isko's litigation with the DEP, (3) the request to Mendham Borough for Board of Adjustment hearing dates, and (4) the dismissal of the case with AT&T due to settlement of that and the counterclaims, cross-claims and third party claims.

In discussion on whether a settlement agreement had been formally reached, Mr. MacDonald, Esq. advised that a settlement agreement would not have been signed with the Mendham Borough Board of Adjustment as party to the suit without his signature. Mr. Schechner responded that it was a document between the company and Mr. Isko indicating that they were not going to build in the Borough of Mendham. Mr. Schechner clarified that there was never a formal settlement like one would obtain in a court case, but one more like an accident case where a release would be signed. His recollection was that Mr. Isko signed something with AT&T.

Mr. Simon, Esq. and Mr. MacDonald, Esq. exchanged differences of opinion on procedural issues.

Mr. Schneider, Esq. stated that there needed to be some relevance to the matter proceeding. Given the testimony and exhibits there was not anything that related to the applicant, Bell Atlantic Mobile, now Verizon Wireless. There is no Court Order. There is no stipulation of settlement that involves the applicant in this case. The Appellate Division case does not involve the applicant. The matter was never consolidated.

Responding to Mr. MacDonald, Esq. on why there would be a cell tower application in Mendham Borough subsequent to the agreement if that agreement prohibited towers in Mendham Borough, Mr. Isko stated that the Sisters wanted it, and he agreed based on the condition that the carriers committed not to build any other cell phone tower in Mendham Borough.

Chair Santo stated that the Board needs the factual evidence in the form of the written stipulation agreement or settlement in court signed by Mr. Isko. Discussion continued among Mr. Isko and the Board to try to understand why only Mr. Isko would have signed the document and not a carrier as well.

Mr. Simon, Esq. summarized that they presented a circumstantial case. They do not have a direct signed document by all parties, but they have proven that there was a document signed by Mr. Isko based on the representations from him and Mr. Schechner, and that Mr. Schneider's clients would not build any other cell tower in Mendham Borough other than the cell tower that is at Daytop.

Mr. MacDonald, Esq. expressed his opinion that the attorney for the Township cell tower applicants had already won his case, but the decision was not released. He would not have had to agree to a deal not to build in the Borough. If an alternate site had not been found, he could have built in Mendham Township. Mr. Isko reiterated that it was not what the carriers did, but the Court through Judge Stanton. The Judge wanted the case settled.

Mr. Schneioder, Esq. stated that he made inquiry to Mr. Czura, the attorney who had represented the carriers, and that he never agreed to it, it was never in writing and never discussed. He presented his facts. Mr. Isko appealed from a denial at the Black Horse relative to AT&T. That matter was never consolidated with the Bell Atlantic Verizon matter. They were two separate proceedings and they both came before of Judge Stanton. Mr. Czura argued the case. The way they resolved it was to build a tower at St. Johns. Bell Atlantic was never a party to anything involving Mr. Isko. There are no stipulation of settlement and order of consolidation documents. There is no mention of Verizon Wireless or Omnipoint in the captions of the other documents that were presented. The Bell Tower resolution contains no reference.

Mr. Simon, Esq. stated his opinion that Verizon would have wanted to assure that Mr. Isko, who was granted intervention status in one of the litigations, would not return to oppose a new application. The resolution does have comments relative to the fact that the application resolves and settles two litigations involving Mendham Township and Mendham Borough. Their position is that with the approval of Daytop, Verizon agreed that they would not submit an additional application before the Mendham Borough Board or before any Board in Mendham Borough for a cell tower, especially while Daytop was up.

Chair opened the meeting to public questions. Mr. Elias Meko, 91 West Main St. questioned why Mr. Isko thought why the cell tower radiation is dangerous. After discussion, Chair stated that the question was not related to the fact testimony presented by Mr. Isko.

Ms. Susan Kaplan stated that she expected her cross examination to take one hour. She wanted to raise issues associated with notice as opposed to questioning the witness. Board advised Ms. Kaplan that the witnesses could be questioned at this time. A case could be made at a later time. When Ms. Kaplan referenced Mr. Isko's testimony related to notice of those with health problems, discussion ensued with the attorneys and the Board on the difference between factual and expert witnesses.

Mr. Joel Robbins wanted to question Mr. Simon, Esq. who was not a witness. Again, he was advised it was time to question the witnesses.

In discussion on the next steps, Dr. Eisenstein requested a report on the nature of the RF testimony to be presented by Mr. Graiff. Mr. Simon, Esq. stated that it was not necessary for an objector to provide a report. The RF testimony would relate to the testimony and evidence that was presented by the applicant. Dr. Eisenstein requested at a minimum any scientific paper references. Mr. Simon agreed.

Mr. Schneider announced that the application would be carried with no further notice to the Tuesday, April 7, 2009 regular meeting of the Board.

ADJOURNMENT

There being no additional business to come before the Board, on motion duly made, seconded and carried, Chair Santo adjourned the meeting at 11:10 p.m. The next regular meeting of the Board of Adjustment will be held on Tuesday, April 7, 2009 at 7:30 p.m. at the Garabrant Center, 4 Wilson Street, Mendham, NJ.

Respectfully submitted,

Diana Callahan
Recording Secretary