

**MINUTES OF THE
MENDHAM BOROUGH BOARD OF ADJUSTMENT
SPECIAL MEETING
November 17, 2009
Garabrant Center, 4 Wilson Street, Mendham, NJ**

CALL TO ORDER

The special meeting of the Board of Adjustment was called to order by Vice Chair Seavey 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 and the Daily Record on October 22, 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 – Absent
Mr. Schumacher – Present

Mr. Seavey - Present
Mr. Smith - Present
Mr. Santo – Absent

Also Present:

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

PUBLIC COMMENT

Vice Chair Seavey 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 made, seconded and carried, the minutes of the regular meeting of November 4, 2009 were approved as written.

HEARINGS

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

Block 801, Lot 20, Kings Shopping Center

Present: Richard Schneider, Esq., Attorney for the Applicant
Glenn Pierson, RF Engineer for Applicant
Robert Simon, Esq., Attorney for Mr. Isko
George Ritter, Planner for Mr. Isko

Exhibits: I-11A: Aerial Photo (Revised I-11) to include date of April 21, 2007
I-12: 10/16/09 Letter from CompCom to Mendham Borough Administrator

Mr. Schneider, Esq. summarized the plan for the hearing to include completion of the cross examination of Mr. Pierson, planning testimony of Mr. Ritter, questions by Ms. Kaplan and time permitting, his cross-examination of Mr. Ritter. There was a short discussion on whether Mr. Humbert and Dr. Eisenstein would ask questions of Mr. Ritter.

Mr. Simon, Esq. cross-examined Mr. Pierson. Responding to a line of questioning, Mr. Pierson testified that there are many types of blocked calls. Referring to Exhibits A-23 and A-24, he stated that identified the calls where an attempt was made and the cell site identified the attempt, heard it, assigned the cell phone a voice channel, but the call never showed up on the voice channel to which it was assigned. This is a call set up failure.

Continuing, Mr. Pierson stated that he did not identify other types of blocked calls for A-23 and A-24, but depending on the types of technology one uses there could be three or four other types.

On GSM there are blocked calls on text messages that will be registered after the attempt exceeds a certain number of times. He did not have a list of all the other types of blocked voice calls, but explained that most of them are basically related to the fact that an attempt is heard and it failed to set up, or an attempt was heard and there was no place to put it. He clarified that for A-23 he included a call that was in progress, assigned a resource and it disappeared. Depending on the equipment one may have an idea of why it dropped, i.e. quality, bin errors, signal strength. The data that he provided does not include any type of hand-off failure. In the data he provided the calls did not fail due to a lack of capacity; it is a lack of coverage.

Moving to Dr. Eisenstein's testimony on grade of service at 2%, Mr. Pierson stated that he agreed. The industry standard target for grade of service is 2 percent. The standard comes from the wireline, not the FCC. The wireline set up a standard that was reasonable and it was determined over decades of usage. Addressing why he did not use Verizon dropped data for A-23 and A-24, Mr. Pierson explained that as discussed by Dr. Eisenstein, when there is CDMA technology and multiple frequency bands it is difficult to pin down exactly what one is looking for. T-Mobile is the lead carrier and demonstrated a gap in propagation and has now also demonstrated a gap with data. He considers T-Mobile the lead carrier as they are the one that started the project and they have been driving the height. Verizon is the co-applicant.

Answering further questions, Mr. Pierson continued that Verizon has satisfied its government mandated build-out for coverage for 1900 megahertz. T-Mobile does not have a 700 megahertz license. To his knowledge the 700 megahertz license auctions are completed. T-Mobile either did not bid or did not get a license. In terms of the number of voice channels in each sector in A-23, he did not pull the data and he does not know the number of calls that can be handled. He does know the number of successful set ups. The dropped calls are not due to someone hanging up or a phone having a dead battery. The phones themselves beep when they have a low battery and will send a signal to the system before they turn themselves off.

Continuing on whether he could determine if the dropped calls in A-23 are from the gap area, Mr. Pierson stated that the GSM technology does not have the ability to provide that data. Many times this data is not used in a coverage case as one does not know exactly where the drops occur. If signal level is used, one can deduce more easily where they are.

In terms of the coverage in the area in A-24, Mr. Pierson explained that it is pretty good. The location is around the Roxbury Mall and the Ledgewood Circle. There is sufficient service in the area. The other area is up in Mount Arlington around Lake Hopatcong. He did not know the height of the towers. All the towers run with full power, usually of 20 watts.

Responding to Mr. Palestina on who determined what statistics would be presented, Mr. Pierson stated that he reviewed it with the client's team. Based on the fact that there are so many variables with CDMA and 800 and 1900 from Verizon, it was determined to use T-Mobile statistics.

Vice Chair Seavey opened the meeting to questions of Mr. Pierson by the public. There being none, the public session was closed.

Dr. Eisenstein clarified that if Verizon data had been used, it would have been near 100 percent failure rate. He also suggested that they not present it. If a phone came in at 1900 and there was not a 1900 signal available, it would automatically switch to 800. It would show a failure at 1900. It would be a dropped call from the viewpoint of Verizon. As he stated at the last hearing, Verizon should be thought of as almost two separate applicants: Verizon 850 and Verizon 1900. As they have a license in both of those frequencies, they are entitled to coverage in both frequencies. With the CDMA system there is also cell shrinkage. In a weak signal area there may be dropped calls for no other reason than some else came into the same area.

In terms of Mr. Simon's question on whether a blocked call would occur in a no-coverage area, the answer is "no" as no one but the user would know that their call is blocked. The system does not know that you exist. The only way to register a blocked call on a network is if one is in a range where at least the data channel or the channel that the carrier uses for billing, the administrative channel, picks the call up and knows its there, but it can't get it to a voice channel. The reason is usually that the uplink from the mobile back to the tower cannot complete the communication. In an area of no coverage, no one knows how many blocked calls there are.

Mr. Palestina clarified with Dr. Eisenstein that he believes that all phones are dual banded. He assumes that everyone in the room could make a call regardless of whether it is 1900 or 850.

Mr. Ritter, Planner for Mr. Isko, continued with his testimony regarding the Borough's telecommunications ordinance. He summarized his testimony from the last meeting stating that

the first hurdle that was important from a planning and zoning point of view was the that the applicant would have to prove to the satisfaction of the Board that the facility was necessary to avoid having, or the effect of prohibiting the provision of wireless telecommunications service. The applicant would have to prove there was a need and if they did not, it would move from a conditional use to a use variance, a D1.

Mr. Ritter continued that the language in the ordinance is closely related to the Telecommunications Act of 1996, which allows towns to regulate their zoning as long as they avoid prohibiting or having the effect of prohibiting wireless service. He referenced four criteria used in a Sprint Spectrum case in Upper Saddle River to test whether or not the applicant has actually identified an area where a facility should be considered for construction. The criteria include that there is a significant gap, the proposal is the least intrusive way of meeting the need, that there is a good faith effort to investigate alternative technologies for less intrusive ways to provide the service, and that the area is not readily being served by someone else.

In terms of demonstrating the need, Mr. Ritter explained that usually with an application before a Board, the applicant comes in, makes a presentation to the Board and provides the criteria for whatever relief they need. The Board would make a decision and then there would be a comparison to the Telecommunications Act criteria. In the case of this application and the ordinance, he believes that the Council envisioned the task as part of the Board's review. If the applicant cannot demonstrate that there is a need for the facility, then the rest of the conditional use standards in many ways would be moot. His opinion was that if there were no need, it would move to the level of a D1 variance. It would be the same as an applicant coming in and simply requesting the telecommunications tower be located in a residential district or another commercial district in that they thought it was the appropriate place for the facility and would not necessarily have to provide proof of need.

Mr. Ritter continued that Mr. Graiff testified that he believed that the information that was submitted to the Board was insufficient to draw a conclusion that there was a gap in service. Mr. MacDonald, Esq. advised that he did not believe the standard is that the Board has to draw a conclusion beyond a reasonable doubt. There is not a quasi-criminal standard. Mr. Ritter clarified that the Board should use their judgment as to whether the applicant has met the test. It is his opinion that the applicant has left many gaps in the information provided to the Board and there should be doubt as to whether there is truly a lack of service in this portion of town. In the course of the hearing people made comments about how phones work in that area and there is an issue that the area is served and at what level.

Returning to the four criteria, he stated that the proposal will not fill the gap in the least intrusive way. There are site specific and neighborhood specific issues. In terms of the site, the shopping center is located in the Main Street Corridor and is one of the major semi-public facilities in the community. It is one of the elements within the community that is recognizable and recognized as setting some of the tone and character of the town. It is his opinion from a planning perspective that the location chosen for the facility, squarely behind the Kings supermarket, almost centrally located in the parking field for the shopping center, is one of the most obvious and most divisive spots one could have picked. It is the central element.

Further elaborating on the shopping center, Mr. Ritter explained that since the hearing began, it has been renovated and new sidewalks and new curbing have also been added. All the large trees that were located in front of the parking area have been removed and all new landscaping installed. From reviewing the Planning Board resolutions, there was considerable care taken to maintain the visual quality of the shopping center. There was even considerable discussion about the fencing that was placed around the tops of the buildings. There was care on the part of the Planning Board and the town to help maintain the character and scale of the center and the identity of the center as a major and important visual element in the community. The proposed tower is a 120 to 130 ft. high located in a one-story shopping center with low buildings. It is out of scale and inappropriate to the location.

Moving to the telecommunications ordinance, Mr. Ritter stated that the ordinance itself sets up criteria to minimize the effect. One criteria is to locate the tower in the rear yard of existing structures or past midpoint if the property is vacant. The applicant indicates that they cannot do that due to wetlands or other issues. It was not investigated to the full extent that it could have been. There are existing developed portions of the rear portion of the site such as parking areas that might be less intrusive. That would be permitted if the paved areas fall within buffers of wetlands because they would be exempt as it would be being built on an existing developed site. There are sites that could be tucked more back between the building and trees that would be less visible and less obvious.

Further discussing the specific location, Mr. Ritter stated that the parking would need to be re-located. There was minimal landscaping provided for such an open area, and that while the location is to the rear of the Kings Shopping Center, it is clearly in the front door of the Mendham Health and Racquet Club. They will be looking at not just a pole, but the equipment cabinet. There is also a question as to whether four users can fit on the proposed facility which would mean there could be a loss of more parking in the future. The allocation of that area should go into the design. If there might be impacts on circulation, parking and other requirements, they should be evaluated now and not at a later date.

Discussing the buffering requirement of the ordinance, he explained that the location picked makes it extremely difficult to provide a screen of evergreen trees in addition to fencing. The applicant is indicating that they cannot provide the trees. In order to plant the trees they would have to relocate additional parking in the shopping center that is grossly under-parked. The location that was picked is dictating the relief that is being sought.

Addressing the height, Mr. Ritter acknowledged that part of it was driven to the Board's desire for co-location. The ordinance is clear that co-location is desired, but the co-locators are supposed to fit at 120 ft. and lower. Ten additional feet triggers the need for a D6 variance as the height is exceeded 10 feet or 10 percent of the height of the ordinance and a D3 from the Borough Code. The 10 ft. in height makes a difference in the shopping center location.

Mr. Ritter continued with reference to the priorities as stated in the ordinance. A limited attempt was made to use the ordinance to set the priority of the site. First the applicant should look at existing facilities. Mr. Graiff had questioned whether there was consideration of re-orientating Daytop or Conifer Drive. In addition, there may be other sites in the East Business District that might be less intrusive that could still meet the carrier's perceived need for service. There are the police station and the substation. His opinion was that there were other opportunities that could serve the town far better and the applicants could still find a location to provide service in the area. There are portions in the East Business District which permit telecommunications such as Mendham Plywood and Mendham Auto body that are not part of the Main Street Corridor. Areas such as behind the restaurant and behind the Ford dealership are much more isolated and were not looked at. For the Conifer tower, over 20 sites were reviewed. The site that has been picked is probably one of the most visible obvious spots in the community.

The alternate technology of DAS is being investigated by the Borough Council. He questions whether alternate technologies have been given adequate consideration. The Master Plan provides strong emphasis on maintaining the Main Street Corridor and the historic character of Main Street.

Responding to Mr. Simon, Esq. on alternate site analysis for the application, Mr. Ritter stated that the actual search area or the area that was investigated by the applicant was very limited, partially by his own choice. They indicated to the Borough that they were interested only in sites that were within 500 feet of the existing facility. (Exhibit A-4). He continued that he thought that to limit the actual search area to 500 ft. of their proposed facility is a bit disingenuous. They could find adequate sites that are in the general area, but clearly further than 500 ft. from the site. There was even testimony by the applicant's own RF expert that, as an example, the police station may very well serve as an adequate location and that is beyond the 500 ft. range. He has seen sites in the 1000 to 1500 ft. range for investigating areas.

He continued that more importantly the ordinance itself sets a series of priorities that he does not believe the applicant has gone through in reviewing the sites. It appears that the shopping center site was picked and the justification has really been nothing more than justifying the initial choice rather than looking at the alternatives. He reviewed the priorities as outlined in the ordinance. The new facility located in the east business district is about the fifth priority in the town. After further discussion and clarification by Mr. Simon, Esq. and Mr. MacDonald, Esq., Mr. Ritter agreed that the priority is the sixth priority. Having the tower located in the areas referenced in previous priorities would have a lessening effect of the potential impact than actually constructing a new facility.

Mr. Ritter interpreted the ordinance to mean that the location for the carrier does not absolutely have to be his ideal location, just that it provides adequate service. If an area can be found that has less impact, is better concealed, and more sensitive to the neighborhood, it does not have to be the absolute ideal first choice of the applicant. It has to provide a reasonable level of service. The way the ordinance is constructed, the applicant is to undertake the evaluation for the Board. He did not see that process happening with this application. The applicant is has not established that the proposed location is the least intrusive.

Responding to Mr. Simon, Esq. on whether another location might cover the other alleged gaps that were identified in testimony, Mr. Ritter stated that from the beginning of testimony there were indications that there were gaps in the southern part of the town and that the tower will not meet the needs of those areas. He thought that the applicant indicated that they might need to come back in the future for another location. His opinion was that as part of the evaluation, it is important to look at the overall plan and try to find a site that could accommodate essentially the best location for not only the current users, but also might be an ideal location for additional services in the area that might be able to cover some of these other gaps. He did not know if they exist, but the exercise was not done with this plan.

Mr. Simon, Esq. entered Exhibit I-12, a letter from CompCom, signed by Christine Malone, dated October 16, 2009 addressed to the Borough Administrator and the Borough Attorney in reference to a "Follow on proposal for DAS evaluation". Mr. Ritter explained that he believes that the letter is a proposal from a potential provider of DAS services to investigate the feasibility of providing a DAS system within the Borough. It goes to the previous question that he raised on alternate technologies. Given the sensitivity of the Borough and the Main Street Corridor from maintaining the visual quality and the historic character, the investigation of the alternative technologies are well worth looking at to help mitigate substantially any impact of telecommunications facilities. Addressing Mr. Simon's question on whether the way the letter was written indicated that funding had previously been allocated for the review, Mr. Ritter stated that it might, but he is not sure how the Borough is handling the funding.

Mr. Ritter raised another area of concern as to whether the area is being served by another wireless provider. He does not recall any discussion by the applicant of other providers that are in the area and possible service levels. There is another gap that has not been adequately addressed, and that is the level of service by other providers in the area, and whether there is truly a need to construct a new tower.

Summarizing, Mr. Ritter stated that the applicant has failed to adequately address the four points. They have failed to go through the process and actively try to look at the phasing or the priorities of the sites. They have not attempted to find the least intrusive facility even within the area that is permitted. There has been inadequate discussion of using existing facilities to possibly reorient them and fill the gap without the need for a new facility. There has also been a lack of discussion on the real level of service in the area. He believes that the applicant has not provided sufficient information to meet their burden of proof with regard to the four-part test.

Mr. Ritter moved on to provide his testimony on other variances required should the Board determine that the applicant has addressed the four part test. First he believed that a D3 variance was required on siting priorities. The applicant did not adequately address alternative sites. There are better suited sites in the East Business District and in the surrounding area that could very well meet the need and be less intrusive. There was no discussion, leaving the Board at a disadvantage.

Returning to discussing the variances under the general zoning and the property, Mr. Ritter explained that it is necessary to look at the zoning on the site today. In the East Business District there are two types of uses, the standard retail/business/office use and the planned shopping center as a conditional use. Each district has its own design standards and area and bulk requirements. The applicant indicates the shopping center standards on his chart, but also mixes standards for "B" districts such as side yard requirements. He lists a 15 ft. side yard requirement rather than a 30 ft. for the shopping center. The applicant has stated that he does not require any variances as he complies with a 145 ft. setback. However, if the shopping center setback is used at 30 ft., the applicant would need a 160 ft. setback and would require an ordinance.

Describing his opinion as to the conditional use standards for the shopping center and the general standards for the permitted uses in the East Business District, Mr. Ritter stated that he believes they are cumulative to the degree of which one is more restrictive. He offered the example that for the East Business District there is a 30 ft. buffer requirement from residential areas, but the conditional use standards for the planned shopping center do not mention buffers. It is his opinion that the portion of the ordinance dealing with the general district standards would apply and the conditional use standards are in addition. The one that is most restrictive would control.

Mr. Ritter continued that there is a standard that says that there cannot be more than two business enterprises or business uses on a property. He believes that means that one can have a shopping center and another business use, but there cannot be a third business use on the lot. A variance would be required. The ordinance talks about both the use as well as the business enterprise. A shopping center might be one enterprise and as an example, the Mendham Health club might be the other. The cell tower coming in could possibly be a third business enterprise being located on the property. That would bring up the issue of a variance.

Responding to Mr. Simon, Esq. on whether all the existing conditions of the shopping center are currently met, Mr. Ritter stated that it has been clear that since the beginning that the shopping center is under-parked as it relates to the ordinance. A shopping center requires eight per thousand. Based on the numbers he has seen, the shopping center and the existing health club contain about 134,000 sq. ft. Using those type of ratios, parking of over a thousand would be needed. The site currently contains about 418 spaces. That is a non-conforming condition. In terms of the impervious coverage, there has not been any indication on the drawings. It appears that the site is heavily paved, but he does not know if it exceeds the requirement.

Continuing with response to Mr. Simon, Esq. on the East Business District requirements, Mr. Ritter explained that the shopping center is substandard as to buffers. There is not a 30 ft. buffer next to the residential portion of the property. It is more like 12 or 13 ft. of open space. It is deficient as to the East Business District Standard and would require a bulk variance. In terms of the Wireless Telecommunications Ordinance there is a cross-reference. The ordinance at the end states "Compliance with these site priorities shall not relieve the applicant with its obligation to comply with all other applicable ordinance requirements." There is a question raised as to whether those types of standards that are not directly related to the ordinance are now brought under the scope of the ordinance as conditional use standards. Any deviation from the standards could trigger not only a "C" variance, but also possible a D-3 variance.

In response to further questioning by Mr. Simon, Esq., Mr. Ritter stated that the compound did not have a separate entrance and exit with doors, but there is one access that Verizon has. There would be a variance required for parking.

Mr. Simon, Esq. summarized the variances indicating that the need triggers a D1 or a D3, the siting priority issue triggers a D3, a deficiency in parking triggers a D3 or C and impervious coverage is unknown. The issue of separate uses or the business enterprise was raised, but he believes that the shopping center might subsume that requirement. Mr. Ritter agreed with all.

Returning to his responses to Mr. Simon, Esq. on the telecommunications ordinance, Mr. Ritter stated that the applicant requires a side yard variance. He believes that 160 feet is required: 130 feet for the antenna and 30 feet for the side yard. Only 146.1 is provided. The facility is also not located in the rear yard, and the applicant has acknowledged that. The tower height is also a variance as the ordinance limits the height of the tower to 120 ft. The applicant is asking for 130 ft. The 10 ft. difference would also trigger the need for a D6 variance as it would exceed the height by more than 10 feet. The height in the East Business District Zone is 35 ft which is the first priority. If that failed it could go to a maximum of 120 ft. Screening and landscaping could also be a D3 or C variance depending on how one reads the ordinance. He also believes that the applicant failed to provide sitings and viewsheds from the surrounding roads during the balloon test and did not provide other areas that could be looked at to evaluate the areas to the side and rear of the facility. The evaluation was inadequate and requires a variance. Relief should also be required as the facility does not have the least visual impact on a residential area. It is very visible from the residential area that abuts the shopping center. Relief from parking is required as the ordinance requires at least one parking space. They relocated existing parking, but did not provide the extra space. The existing shopping center is under-parked.

Board took a five minute break.

Mr. Ritter resumed stating that the telecommunications ordinance requires that at least one parking space be provided. The applicant has to change parking spaces to locate the facility. They have indicated that they will relocate the existing spaces, but the additional space would require a variance. Since the parking needs to be added into the existing system, he would make the argument that it is a violation of one of the conditional use standards for the shopping center itself. The buffers abutting the residential area are also clearly substandard and are important as the facility is located in such a wide-open field of parking that is clearly visible from the backs of the homes in the senior citizen project.

Recapping the variances required, Mr. Ritter stated that he believes the side yard is a D3 as it is one of the conditional use standards: 160 ft. required; 146 provided. As these types of sites are to be located in the rear yard, the rear yard variance is also a D3. Tower height is a D3 as it relates to the telecommunications portion of the ordinance which limits the height to 120 ft. There is also the requirement for a D6 as the proposed height is 10 ft. or greater. A variance from landscaping and screening is also needed and that would be a D3 as the complete perimeter should be basically enclosed with evergreen trees. It possibly could be a C2. The visual impact should be interpreted as a D3 or at least a C2 as there is no reason that the viewsheds could not have been defined and looked at from all the points around the exterior of the site. Parking variances could be a D3 or C2. It also expands the nonconforming use, the shopping center that

by ordinance is under-parked. That might be a D2 variance. Lack of buffering of the shopping center could be a D3 or a C1. All of these are in addition to the D1 variance relating to proving the need for the facility and the D3 required for what he believes is not adequately addressing the priority siting criteria in the ordinance.

Mr. Ritter continued that in the discussions, the equipment compound was overlooked. The plan proposes an 18 x 67 square foot equipment compound at the base of the tower. The area is about 1,206 sq. ft. If the goal is to encourage more users, the adequacy of the compound should be addressed. The area is too small and if there are additional users, it will need to be expanded in a very tight space making the parking situation worse. Impervious coverage is also a question as the facility may need to be located in the buffer area in an existing raised island area that is being considered as a buffer. More variances could be triggered.

Addressing the visual analysis test, Mr. Ritter stated that the applicant provided various studies showing balloon tests and various views from around the community. He thought the analysis was a little light particularly on some of the viewpoints. They failed to look at some of the residential areas particularly to the rear of the site in particular the senior citizen housing. There was no site analysis provided in reference to the new property on Main St. included in the Master Plan Amendment for the expansion of the Historic District, In reference to the Historic Preservation Commission letter dated July 30, 2008 regarding the cell tower design, Mr. Ritter stated that the letter does give a sense of the Commission's concern about constructing a facility in the area and quoted the section dealing with the fact that the Commission could not fully endorse a structure of that magnitude in the Main Street Corridor. The site is a focal point in the community and there are serious concerns about the impact on the visual quality of not only the shopping center, but the Main Street Corridor and the general character that is trying to be preserved. To maintain a small town atmosphere as identified in the Main Street Corridor ordinance, a cell tower should be placed in a less intrusive place. There are areas outside the shopping center that would be more desirable and meet the needs of the applicant.

Enumerating the criteria to be met for the variances and whether the applicant has or has not met its burden of proof with regard to the variances or other relief, Mr. Ritter explained that most of the variances are D3 and some Cs. The test for the D3s is whether the site is particularly suitable for the use notwithstanding the nonconformity. There must also be a way to reconcile the relief with why the Borough Council listed the items as conditions. His testimony has indicated that there are better sites that have less intrusive impact. The site picked is detrimental. Granting the variances is contrary to the public good.

Continuing with why the site is unsuitable, Mr. Ritter stated that one needs to look at the reasons collectively as there is lack of buffers and encroachment into the yards. The tower is not located in the rear yard and it is visible and not adequately buffered from residential development. The variances in combination add up to a burden that makes the site not particularly suited for the use. The applicant has not really made a concerted effort to discuss or evaluate the alternative sites.

Responding to Mr. Peck on what sites he believes are more suitable, Mr. Ritter identified the Mendham Plywood area and the Mendham Auto Body area as they are not in the Main Street Corridor. The second area he identified was the area behind the Ford dealership and the restaurant in the east business district. It is a back land area and could be out of the primary lines of site. The higher priority out of the East Business District is possibly the combined use in the substation area. There may be a way to share facilities with the police station. He also referred to Mr. Graiff's testimony about the fire department and his opinion that the area could provide service over a much larger area. Mr. Ritter expressed his opinion that a redirection of an existing tower would be a better approach than creating a new tower.

Responding to Mr. MacDonald, Esq. on whether Mr. Ritter's opinion would change from a planning perspective if he knew there was a nursery school located near the fire department, Mr. Ritter responded not necessarily.

Exhibit I-11 was revised to Exhibit I-11A to reflect the date on which the picture was taken: April 21, 2007. Utilizing the Exhibit, Mr. Ritter pointed out the zones and locations that he had addressed. Responding to Mr. Humbert, on the wetlands and transition buffers behind the Ford Dealership, Mr. Ritter stated that there is the possibility of locating the tower on developed areas. He did not know the extent of any wetlands. In terms of the size of the site at Mendham Plywood, Mr. Ritter explained that a larger site is not needed, but one that is less intrusive is. It is the applicant's responsibility to address the various sites. In terms of Mr. Humbert's follow-on that a D variance would be needed for the police station or substation as that is the Limited Business District, Mr. Ritter responded that the ordinance sets out those areas as priorities as a power transmission station and a municipal property. There is sufficient space on the site and it could possibly be shared between the two locations.

Responding to Mr. Peck on whether as a professional planner he believes that locating the tower at the police station or substation is less intrusive than the Kings Shopping Center, Mr. Ritter stated that it was as it is clearly less visible because it is not in as much of a public space. Locating it in the rear would place it out of the main visual corridor.

Continuing with the positive criteria, Mr. Ritter stated that the first thing the Board has to decide is whether or not the applicant has met the burden of proof as to whether there is a need for the facility. If there is no immediate need, then there is a question as to whether or not the positive criteria are met. The site itself generates negative criteria. As the ordinance is designed to locate towers as to have minimal visual impact and to maintain the character, the central location with lack of buffers and lack of ability to accommodate future development makes it run afoul of the negative criteria. It would be a detriment to the overall public good. It is inconsistent with the Borough Master Plan as well as the Main Street Corridor Ordinance.

Responding to Mr. Schumacher on the safety, Mr. Ritter stated that it is being located in a very public space. There will be people parking around it and trucks traveling around it. People may be walking around it to and from cars and activities. Location in a more remote area would help safety issues. While he was not familiar with falling ice issues, location out of the public space would help minimize any potential impact..

Responding to Mr. Simon, Esq. on C variances should the Board determine the applicant does not need D3 variances, Mr. Ritter stated that the C variance is a hardship variance. The site would need to be of such configuration or the topography of such configuration that relief is needed in order to accomplish any type of useful construction. There are no hardships for the site. In terms of the landscaping and setbacks, he did not see how granting of the variances would improve the public welfare when one considers the location. In terms of the side yard, the facility could be moved. In terms of the rear yard, while there may be wetlands, there are paved areas.

Addressing the D2 variance, the expansion of a pre-existing non-conforming use, Mr. Ritter stated that the cell tower would be considered a principal use being added. The Shopping Center already does not meet the Borough regulations as to parking and it may need relief in terms of impervious coverage. Adding a new principal use has impact on how it affects the configuration of the site in terms of circulation and available parking to the existing uses. The facilities yard is not large enough for co-locators so the future is not known.

In summary, Mr. Ritter stated that the applicant has not met its burden of proof. They have not shown that it is an appropriate location. They are not asking for variances that make the situation better and make it more compatible with the neighborhood. The variances detract. If granted they would be a detriment to the location.

Board reviewed how to procedurally continue for the remainder of the evening and into the December 1 meeting.

Mr. Humbert questioned Mr. Ritter on whether there were any other locations in addition to the ones he previously identified as worthy of evaluation. Mr. Ritter explained that he personally did not look beyond the general area of discussion. He did not see any structures of 120 or 130 ft. in the area that he is aware of. There are some poles in the substation area, but he was not aware of the height. He clarified that visual intrusiveness has to do with the impact of having the tower in close proximity to people entering and exiting buildings and people seeing it at a distance. He believes the location would be more appropriate as it is not a public location. It would be out of the line-of-sight with the Main Street Corridor. It would be in an area where towers and facilities are almost expected as it is a substation. You will see the tower, but a 130 ft. tower can almost be seen anywhere. The question is where it is least intrusive.

Mr. Humbert clarified that the substation is a priority for location of antennae, not necessarily a new tower. The tower priorities are municipally owned properties and facilities not reserved for open space or public recreation. The second is the East Business District. Mr. Ritter did not disagree for new facilities provided the applicant had worked their way down the list to that point. Mr. Humbert advised that the Board would need to decide if the applicant needed to do that if a new tower is proposed.

Mr. Humbert continued that the area of the substation across from the Main Street Corridor is the Limited Business District, and a D1 variance would be required. Mr. Ritter added that it would be if it were a freestanding pole. The applicant would need to prove whether the facility prohibits or has the intent of prohibiting service. If they did, the site could be evaluated as a D3. Responding to Mr. Humbert on whether he considered the site on the west side of the Mendham Health and Racquet less intrusive, Mr. Ritter explained that it is already paved as a parking lot. It

is adjacent to a larger-scale building and has heavy tree cover along one of the property lines. There is a fairly substantial separation between it and the residential units. In terms of his reference to the telecommunications ordinance as a planning tool, Mr. Ritter stated that it is positive that the ordinance is a planning Tool that asks the applicant to test various sites and to work their way through a planning exercise to come up with the best available site. It is not simply a set of design standards.

Hearing was continued to the Tuesday, December 1, 2009 regular meeting of the Board without further notice.

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ADJOURNMENT

There being no additional business to come before the Board, on motion duly made, seconded and carried, Vice Chair Seavey adjourned the meeting at 10:50 p.m. The next regular meeting of the Board of Adjustment is Tuesday, December 1, 2009 at 7:30 p.m. at the Garabrant Center, 4 Wilson Street, Mendham, NJ.

Respectfully submitted,

Diana Callahan
Recording Secretary