MINUTES OF THE
MENDHAM BOROUGH BOARD OF ADJUSTMENT
November 4, 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 7:45 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 – Absent
Mr. Peck – Present
Mr. Peralta – Absent
Mr. Schumacher – Absent
Mr. Seavey - Present
Mr. Smith - Present
Mr. Santo – Present

Also Present:
Mr. MacDonald, Attorney
Mr. Humbert, Planner
Mr. Hansen, Engineer
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, seconded by Mr. Peck and carried, the minutes of the regular meeting of October 6, 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:
Lupo-26: Report by Dr. Eisenstein for Hopewell Township
A-23: "T-Mobile call statistics in the Mendham Area"
A-24: "Normally operating sites in Morris County"
ZB-1: Report on Proposed Antennas dated Oct. 19. 2009 – Dr. Eisenstein
ZB-2: Report on Dropped Calls Analysis dated Oct. 28, 2009 – Dr. Eisenstein
I-11: Aerial Photo

Before moving to the planning testimony by Mr. Ritter, Chair Santo requested that Dr. Eisenstein comment on dropped calls.

Dr. Eisenstein explained that a wireless provider can have gaps from a coverage or a capacity perspective. A coverage gap exists when there is not sufficient power in the area to maintain two-way communication. Hand-held devices have little ability to transmit power and it cannot be increased causing a problem in power getting back to the tower. A capacity gap occurs when there is enough power in the area, but there are too many users and the carriers can only handle a limited number. This results in blocked calls as circuits may not be available, or dropped calls as channels in a new zone may not be available. In either a capacity or coverage gap users cannot

access the Public Switched Telephone Network that is a requirement of the Telecommunications Act.

Dr. Eisenstein continued that when a capacity gap exists, a provider will make a request to add a cell by splitting an existing cell into several parts. There are not capacity gaps in this area. For a capacity gap, he would request that the applicant provide plots of dropped or blocked calls, not propagation plots. The standard for a capacity gap is grade of service which is the sum of the percentage of blocked and dropped calls. Cellular providers under the Telecommunications Act and the Code of Federal Regulations that govern should maintain a grade of service of 2 percent or less. No more than 1 out of 5 calls should be blocked or dropped. Grade of service is measured as an average over several days, or weeks and the providers are entitled to use a peak period of coverage. If the average exceeded the 2 percent level, the provider would say they have a capacity gap. How much it exceeds would determine how big the gap is. Four to 5 percent would be exceedingly high and 6 percent would start getting to the range of almost intolerable from the viewpoint of a network provider.

In terms of the use of the data for a coverage gap, Dr. Eisenstein explained that if one is in an area where there is inadequate coverage, one does not know whether a call is being blocked as the switch does not know that there is a user there. The only time you can get the data is if there is adequate coverage. In an area like this where an applicant is asking for a coverage site, they are alleging that they do not have enough power and the dropped call analysis is not pertinent.

Referring to Mr. Pierson's report on blocked calls, Dr. Eisenstein had requested that the sectors from the surrounding sites aimed towards the area of the gap be included. The data understates the amount of the grade of service as it cannot account for the blocked calls that are just not there as there is no switch data. In terms of the data, the combination of blocked and dropped calls should be under 2 percent.

Dr. Eisentein clarified how the data would be recorded using an example for the Board. He continued that for Verizon questioning dropped and blocked calls is more complicated as Verizon is dual banded. All of the phones will switch from band to band depending on what is available. Better coverage is achieved on 850 mgh, but the applicant is applying for coverage at 1900 mgh based on their license. In his opinion, if the analysis were to be done correctly, Verizon should be treated as two separate companies: Verizon 850 and Verizon 1900, the two separate licenses. Any call at Verizon 1900 should be treated as a blocked or dropped call and that would be nearly 100 percent of the calls in the area because it is easy for the phone to switch over to the 850 and complete.

Chair opened the meeting to questions by the public. Mr. Frank Lupo, 17 Dean Road, questioned Dr. Eisenstein's report on coverage in Mendham. Dr. Eisenstein responded that there is coverage, and that he has previously stated that there is power coming from the towers, but it deteriorates rapidly as it moves away from the tower. The question is not whether or not one can make or receive calls, but where does the provider design the network. They have to design a network to cover all ranges and conditions including weather and random effects. One might be able to make and receive a call at negative 105, but the applicants give themselves about a 20 db factor which takes is down to 85 dbm.

Mr. Lupo referred to a report that Dr. Eisenstein had completed for Hopewell, New Jersey where he used the bars of a phone to determine whether there was adequate service. Mr. Lupo reported that he completed a similar analysis and obtained three or four bars in 90 percent in the Mendham area. After discussion on whether Dr. Eisenstein's report should be admitted as evidence and Mr. Lupo's credentials as to whether he could provide expert testimony, Mr. MacDonald, Esq. clarified that Mr. Lupo was entitled to ask questions of Dr. Eisenstein, but there is difficulty when he testifies about an analysis and field tests that he has done. If Mr. Lupo were going to present testimony, then at the appropriate time, he would need to be qualified as a witness.

Continuing, Exhibits ZB 1 & 2, Dr. Eisenstein's reports on Proposed Antennas and Dropped Call Analysis were marked. After another reference to Dr. Eisenstein's Hopewell Report, Dr. Eisenstein explained that the report was not prepared in conjunction with any application and it is not intended to be a gap analysis. Hopewell Township had requested him to determine if there were areas in the township that would be good candidate sites for a cell phone antenna if they, the township, chose to designate a particular site within the township. The purpose was to find areas in which there was weak reception. They used all different phones and there was no mention of a gap as they were not doing the analysis for any provider. It was a weak technical analysis completed to advise the Township where they had areas of very weak coverage for potential designation of cell site coverage. It was a Master Plan completed five and half years ago.

Referring to work he had done for Hopewell Township on particular applications, Dr. Eisenstein stated that he used the same criteria that he is using here. Negative 85 dbm has been his criterion for years for adequate power levels for designing a cellular system.

Responding to Mr. Lupo on whether neg 85 is adequate or optimal service, Dr. Eisenstein stated "adequate". It gives the provider what would be considered a level of service substantially better than mediocre. Following on as to whether he has done a "bar" test similar to what he did in Hopewell, Dr. Eisenstein explained that when he is a consultant to a Board, he does not do that test. The expert, in this case, Mr. Pierson is sworn to tell the truth and has been accepted by the Board as a witness. He is using standard tools that are industry-wide standards. As an expert evaluating his testimony, he has the right to rely on the opinions of experts, just as the Board has the right to rely on the opinions of experts. No one skilled in the art believes that when one sees a plot that shows a power of negative 85 dbm in a particular area, that if you went out and measured it, that is what you would measure. Levels fluctuate. The system is being designed to be substantially better than mediocre.

When Mr. Lupo again referred to Dr. Eisenstein's report, Chair and Dr. Eisenstein indicated that they were at a disadvantage not having seen the information. Mr. Lupo requested to enter the document. Responding to the Board on what point he was trying to make, Mr. Lupo stated that Dr. Eisenstein used the bars of a cell phone to determine that there was adequate, weak or strong coverage. Anyone can do the same thing.

Board requested that Mr. Lupo phrase a question to Dr. Eisenstein. After further discussion with the Board, Mr. Lupo again requested that the document be entered. Mr. Peck questioned Dr. Eisenstein on whether the methodology in the report is valid in the application in front of the Board. Dr. Eisenstein replied that it is not. Responding to Mr. Seavey on whether the next step after the report would have been a propagation analysis, Dr. Eisenstein explained that he would have presented the report to Hopewell and at some later time, an applicant would have come in and shown a propagation analysis. The town did not do a propagation analysis themselves as he nor the town can afford the software. They could have hired someone to do a drive test on all the providers in town, but it would have cost a lot more. For large towns with many sites, this type of report is considered a master plan.

Mr. Lupo continued that based on the bars, Mendham does not have any no service areas. Dr. Eisenstein cautioned that he did not say that if a red area was found, a cell tower would be warranted. He was reporting the area to the town as areas where they might expect an application sometime in the future. There was not an application.

Mr. Lupo again requested to enter the report. Mr. MacDonald, Esq. clarified that he wanted to offer the report to support his contention that for making whatever analysis Dr. Eisestein has described on the record, he arrived at those conclusions in Hopewell Township in 2004, and that he wanted to offer it subject to Dr. Eisenstein's explanation of the purpose of the report and subject to his explanation as to what its relevance may or may not be to the Board. Mr. Lupo agreed. Mr. Schneider, Esq. once again noted his objection. The report was marked Exhibit Lupo 26.

Mr. Schneider, Esq. objected again when Mr. Lupo wanted to enter his own analysis. Mr. MacDonald, Esq. recommended to the Board that they allow Mr. Lupo to enter Lupo 26, but there is no adequate foundation to enter Mr. Lupo's analysis. When Mr. Lupo acknowledged that the drive test he performed showing adequate, continuous seamless coverage utilizing the bars of a cell phone would not be put into the record, Mr. Schneider, Esq. again objected to Mr. Lupo's characterization of coverage.

Mr. Simon, Esq. questioned Dr. Eisenstein whether in his capacity as an expert on behalf of a Board he had occasion to request propagations at different power levels and different heights other than negative 85. Dr. Eisenstein replied that he did as he has a concern about the impression to the public that where there is green there is coverage and where there is white there is no coverage. The power fades off gradually. He likes to see neg 85 and neg 95 on the same plot as one can see the boundary and the margins.

Responding to Mr. Simon, Esq. on the reason for the different heights, Dr. Eisenstein explained that topography can require a little more height in a tower. Also, if a tower is too low, it can limit co-location possibilities.

Mr. Simon, Esq. questioned Dr. Eisenstein on why he could not do the same type of analysis for the Mendham Borough Board as he had done for Hopewell Township. One of the requirements of the wireless telecommunications ordinance is the identification of alternate sites. Identification of a master plan would be beneficial if another carrier come forward in the near future. Dr.

Eisenstein responded that when he does a master plan he works for the municipality, not the zoning or planning board. The master plan is paid for by taxpayer funds while the zoning board payment is made from escrow of the applicant. The applicant might object to the study of coverage of other carriers being paid from their funds. He also does not have the equipment or capability of doing as thorough an analysis as the carrier, and he would not substitute an analysis such as was put in the Hopewell report for what the carrier has presented as evidence.

Board took a five minute recess.

Before commencing with the planning testimony, Chair Santo asked Dr. Eisenstein to comment on DAS, Distributed Antennae Systems.

Dr. Eisenstein explained that Distributed Antennae Systems differs from a macrocell that is usually a monopole with antennas on the top in a centered location. With DAS the antennaes are at a much lower height and they are spread out around the community. There may be 10 antennaes on the much lower structures such as utility poles, buildings or power lines as opposed to the one central site. Downtown Philadelphia and Manhattan have DAS. The system is also used where there is a linear stretch of road to cover such as the Lincoln Tunnel. Gated communities such as a suburban university campus or a new town development in an isolated area in New Mexico would also be applications.

The information from the antennaes needs to get back to the Public Switched Network. The backhaul is handled through fiberoptic cable that is usually buried in the ground and run back to a "mobile motel". Any carriers wanting to hook up to the system put all their cabinets and their equipment in the motel.

In terms of installation, Dr. Eisenstein continued that the companies that put in DAS will only do so if they have the providers sign up in advance and agree to pay for the system. As it is too expensive, they will not put it in on speculation. The providers first put up the money for construction and then they pay rent. With the exception of a small township outside of Philadelphia where there was not site to place a tower, he has not had a carrier come forward to pay the bill. That took three years. There are also sites in Gross Point, Michigan, on the island of Nantucket, the island of Hilton Head and one in Ranchos Grande, south of New Mexico, and a couple on college campuses.

Dr. Eisenstein continued that it is a great idea as it works technologically and allows the community to avoid having monopoles. The down side is that generally the antennaes need to be placed on 70 ft. poles and it is rare in this area to find that height. His estimate is that most poles in the area are 30 to 35 ft. Some poles would need to be replaced with the greater height. The proposed monopole is 120 ft. There would also be the need for equipment cabinets the size of compact refrigerators mounted about 8 ft. off the ground on the pole and fiberoptic backhaul needs to take the signal back to the mobile motel. One also needs providers that agree to pay the cost.

Dr. Eisenstein expressed his opinion that he did not think that in an area like Mendham the conditions are met to enable a DAS system to be put in. The applicants have not come forward and to the best of his knowledge no DAS provider has approached Mendham asking for right of way permission. While it has been installed in isolated areas of the country, he has never been able to find out how the systems work. None of the providers will release any information.

Responding to Mr. Peck on how technology has changed the size of equipment, Dr. Eisenstein stated that three years ago the box would have been a lot larger and would have been located on the ground. It would have looked more like a real refrigerator. In terms of the future Dr. Eisenstein sees femto cells in addition to macro sites. Femto cells would mount on the side of a residential home and the backhaul would be provided through the Wifi system in the home. It would handle three to four houses in the community and in an area like Mendham there might be a thousand such sites, not the 9 or 10 that DAS would have. The boxes would be relatively unobtrusive and sit on the side of the house to re-radiate the cell phone signal. With the backhaul through the WiFi system one would not need to get above the tree line.

Explaining the potential DAS coverage, Dr. Eisenstein referenced the plots provided for the application and indicated that it would need to be divided like a checkerboard perhaps with hypothetically nine or ten sites. He explained that if there is a macro cell site that covers a one-mile radius and it is reduced to a site that covers a thousand-foot radius due to lower height and less power, the radius is cut by a factor of five, but the coverage area is cut by a factor of 25. With overlap maybe 15 or 18 sites are needed for the same coverage. In an area like Mendham where one is trying to cover an area around the site, not just a linear portion, geometry starts becoming a curse.

Chair expressed concern over a potential proliferation of poles and equipment boxes. He opened the meeting to questions by the public.

Mr. Frank Lupo, 17 Dean Road, questioned Dr. Eisenstein on whether he had a continuous wave test to assure that 70 ft. is the right height as he has reviewed literature that says DAS systems could be placed on standard 42 ft. poles. Dr. Eisenstein stated that one needs to look at the trees. While he has not done a scientific study, he sees a lot of trees that look 60 or 70 feet tall. The antennaes need to be above the tree line in order to get coverage. They are going to proliferate more. Also, hypotetically, in this case, the proposal is for the shopping center which is an open area as opposed to a residential area which is where DAS antennaes would need to go.

Responding to Mr. Lupo's question on whether a determination could be made without an appropriate study for the actual heights, Dr. Eisenstein stated that there is no possibility of a DAS system in Mendham today. It is theoretical. Addressing Mr. Lupo's question on how he could say that without the DAS providers present, Dr. Eisenstein stated that the manufacturers will only install a system if they have providers that will pay for it up front. They do not install any systems themselves. Their business model is very simple. The providers come forward, agree that NextG or XtraNet or any of the other companies will put it into the system and that they will rent the space and rent the fiberoptic lines from them. Neither of the two providers for this application have come forward. It would be three to five years off.

Addressing Mr. Simon's question on whether he is aware that that Mendham Borough has put aside money and requested the submission of a proposal and cost estimate to advance the evaluation of the viability of a DAS system, Dr. Eisenstein replied "no".

Mr. Schneider, Esq. presented a plan for continuing the testimony first with the dropped call data and then concluding issues with RF. After discussion, it was agreed that Dr. Eisenstein would be present for the planning testimony. Mr. Simon, Esq. objected to discussion on the dropped call data as it was received the day of the meeting and not 10 days prior. Chair stated that there would be some time allotted on November 17 for any comments after Mr. Simon, Esq. has reviewed the data with Mr. Graiff.

Mr. Schneider, Esq. questioned Mr. Pierson relative to the dropped call data. Exhibits were marked A-23 and A-24, T-Mobile call statistics in the Mendham Area" and "Normally operating sites in Morris County" respectively and copies were provided to the Board. In terms of the relevance of the dropped call data as a means of identifying the existence of a gap in the area in question, Mr. Pierson stated that he tended to agree with Dr. Eisenstein. It introduces a lot of variables that one cannot quantify. It is not directly related to a gap and the statistics from a cell site will not always give a definitive answer related to a coverage gap.

Continuing with an explanation of A-23, T-Mobile (Omnipoint), Mr. Pierson stated that the data represents a two-month period starting a week or two after the drive test data on Conifer live was done. Mr. Pierson provided an explanation of each of the columns containing the data for the towers and the various sectors. Averages were calculated to show "Average daily call setup attempts" , "Average daily call setup failures" and "Average daily successful call attempts". In the time period there were, on average, 543 call attempts. On average in a day there were 2.5 percent average failures, and out of the remaining about 2.9 percent are dropped. The total call failure is 5.4% in the area. The switch does not know where they are located.

Responding to Mr. Seavey on whether the data is relevant as there is a coverage issue, not a dropped call issue, Dr. Eisenstein explained that he had previously stated that 2% was the accepted grade of service. The data shows 3.6 percent. It is worse than the standard. It also does not show blocked calls as it does not know there was a setup attempt. Further addressing Mr. Peck on his question on how a 2% standard can be determined, Dr. Eisenstein explained that it is calculated in an area where there is already adequate power. Everyone is registered on the site; but there is not an available channel. Further explaining why only voice, not data, is considered, he continued that voice is the most stringent requirement on a cell phone system because it is done in real time. There cannot be a delay. In data a short delay does not make a difference. Data is less stringent. When channels or bandwidth are not available the data is just held in the phone or system and sent out when one gets to an area of strength.

Clarifying the data for the Mr. Seavey, Dr. Eisenstein stated that the data is collected from the switch. The actual situation is not better than the data, but one does not know how much worse. At face value, 5.4 against the standard of two is more than two and a half times off. That is an intolerable number. Dr. Eisenstein explained that one pole hands off to another. There is a point at which one signal is declining in power level and the other one is increasing in power level. At

some point there is an intersection and a hand-off to the next cell. In this case, the cells are so far apart that there is not a hand-off.

Responding to Mr. Peck on whether a new call is registered when an existing call is handed off, Mr. Pierson explained that it is not. It is already tagged as an originating call where it was initiated. Calls balance themselves out as people are traveling in both directions. Call drops are recorded at various towers. A single call could be successful at one tower and recorded as a drop at another. Dr. Eisenstein went on to explain how the cell phones are tagged by a site regardless of whether you are using it. There is constant communication. In an area of poor coverage, the communication is interrupted and the central computer does not know where the user is. The attempt to call you is not registered. The statistics only make sense when there is an already adequate coverage and the user is registered on the site. Then if a call comes in and it can't be sent to you as there is no available channel, it is a dropped call from that site. The same is true if one tries to make a call. An example is near the Lincoln Tunnel where there is a lot of coverage, but so many users people are being blocked and dropped all the time.

Moving to A-24 Mr. Pierson explained that the exhibit provides a comparison to a properly running site with adequate coverage. He chose a three sector site in Mt. Arlington that is in the hilly area. It is running total call failure of approximately 2 percent. Also the Roxbury Town Center is running a little better, averaging around 1.5 with very low dropped calls. Mr. Schneider, Esq. confirmed with Mr. Pierson that based on the 2% criteria identified by Dr. Eisenstein the grade of service is acceptable.

Mr. Simon, Esq. questioned whether the Board was going to consider Exhibits A-23 and A-24. In discussion on whether the information was useful, Dr. Eisenstein advised that the data is undoubtedly worse than what is presented in terms of the grade of service. The data is the best case scenario. If it were a capacity case, which it is not, the applicant would be allowed to take the busy hour data which would be a lot higher. It is already inadequate. The Board can evaluate the usefulness or not, but it corroborates the fact that there is a coverage gap.

Clarifying the validity of the data for Mr. Peck, Dr. Eisenstein stated that the dropped call data is valid. The blocked call data is not valid as the person would not necessarily be registered on the site. The blocked call data would be worse. Inadequate power is causing the drops. Mr. Seavey commented that to use the data he would require that dropped calls be provided from every sector for every tower for comparison.

Mr. Simon, Esq. stated that he still did not hear consensus on the use of the data from the Board. Mr. Schneider, Esq. advised that Mr. Graiff raised the question. Dr. Eisenstein gave his opinion and Board members have given there opinion. It will either go to weight or not go to weight. Board stated that they would not take a poll.

Mr. MacDonald, Esq. requested that Mr. Simon, Esq. clarify the question. Mr. Simon, Esq. summarized that in response to a discussion on dropped calls, the Board asked for certain information from the applicant. Mr. Graiff specifically cautioned the Board to clarify what they were asking for. Responding to Mr. MacDonald, Esq., Mr. Simon, Esq. stated that he needed to cross examine Mr. Pierson about A-23 and A-24. Chair stated that Mr. Simon, Esq. should discuss the information with Mr. Graiff. Mr. MacDonald, Esq. advised that the Board is extending the courtesy to Mr. Simon, Esq. to discuss the information with Mr. Graiff, but would not delay the hearing further if Mr. Graiff is not available.

Mr. Lupo, 17 Dean Road questioned whether the numbers were inclusive of the gap on Hilltop that Mr. Graiff pointed out. Mr. Pierson referred to A-2 and that the gap would be handled by the two sectors at the one site and the one sector pointing west on Confier Drive. He would need to verify the information for T-Mobile. Further discussion took place by Mr. Lupo and Mr. Pierson on the positioning of the antennaes and the tuning. Mr. Pierson stated that no changes had been made over the last several weeks.

Planning testimony began with Mr. George Ritter presenting his credentials and being accepted as an expert witness. He outlined all the information that he had reviewed in the case.

Responding to Mr. Simon's line of questioning, Mr. Ritter agreed that if it was determined the wireless telecommunications ordinance was not applicable, the application would be a D-1 use variance case under NJS 40:55D-70. For the purposes of his testimony, he would assume the ordinance to be valid.

Mr. Ritter testified that the Borough's telecommunications ordinance goes considerably further than just trying to decide if there is a substantial gap in service. It lays out a methodology by which the Borough would like to review and prioritize sites. The ordinance is a little different

than what is normally reviewed by both planning boards and boards of adjustment in the sense that they are not fixed sites. The ordinance is a planning exercise in that it has a series of priorities and the applicant goes through each step as to whether they can locate the facility on a particular site and whether that site can solve the service problems. It's a check-down list. It does not presume that the applicant has picked a site and that their goal is to justify it by offering the proposal. It also asks if there are any other service providers that might be providing service in the area that could basically provide the service that would relieve the need for a physical structure. The ordinance is clearly written with the idea to minimize the types of facilities that would be located in the town and to assure that they are carefully placed to address a real need; not for the convenience of the applicant.

Mr. Ritter continued that much of the weight of the ordinance does not revolve around RF testimony. Evaluation needs to be done to show that the location is the best place to put the facility. In this case the applicant has requested to put the new monopole essentially dead center in one of the most predominantly visual spots that it could be located. It has become more visible in the sense that the shopping center has gone through a major renovation. All the larger trees from the front have been removed. New younger trees have been planted. It is also located in a large open parking area.

Mr. Ritter's aerial exhibit of the Mendham Village Shopping Center and surrounding area was marked I-11. He overlaid the zoning districts and the Main Street Corridor. Continuing, Mr. Ritter stated that the shopping center is not only located in a large field, but is only one-story. The pole will come well above the Kings supermarket. The tower is proposed to be located directly in front of the Mendham Health and Racquet Club. It will remove parking to be relocated in a different part of the facility. It is also a location that will dominate, not only the shopping center, but helps to set the tone of the community. One of the goals of the master plan items discussed is the importance of the Main Street Corridor and maintaining the historic character of the neighborhood and the Borough itself.

In terms of the ordinance, Mr. Ritter stated that it was adopted at an interim time. From his understanding of the dates, it occurred while the application was in progress. There was an applicant looking at the shopping center site. The ordinance established a conditional use and every standard in the ordinance is a condition of the conditional use. Any relief from any of those standards is essentially a D-3 variance. There are no "C" variances in the ordinance. Also, from his interpretation, all design standards and all the bulk standards in the underlying district are also conditions of the conditional use. Any relief would also be considered D-3 variances.

Mr. Ritter continued that if the Board does not feel that there is a significant gap in service, then the tower or telecommunications facility would be viewed from the point of view that it is for the convenience of the applicant. His opinion was that it would go from a conditional use consideration, a D-3 to a D-1.

Addressing the standard of having to prove a gap, Mr. Ritter thought the language was directly from the Telecommunications Act which allows towns the latitude to plan and zone for tower, but still giving the telecommunications facilities leverage. The first test is whether there is a sufficient gap in service to warrant the facility. The next test after that would be whether or not the applicant has gone through the procedures to properly locate the facility and put it in a place where it will have the least impact, which is the design standards, the priority ratings of the sites and how they have to site it. The applicant must demonstrate that the site remains suitable for the use even after all the variances are considered.

Referring to the negative criteria aspect, Mr. Ritter stated that the granting of the variances would need to be done in such a way that they do not have adverse impact on the neighborhood, the community at large, or the public good in the neighborhood. It is an important balancing act. Adverse impacts should not affect the shopping center, the town's Main Street Corridor, the goals and objectives of the master plan. They need to meet the purposes of the Telecommunications Act itself. There are three proofs. First, they must demonstrate that there is a significant gap in service. Also, the Board needs to evaluate whether or not the applicants' filling of that gap is done in a way that is the least intrusive and whether the applicant has made a good faith effort to look at other sites. Lastly, there needs to be a determination if there is other service in the area.

In terms of the gap, Mr. Ritter stated that based on Mr. Graiff's testimony about the types of data that were submitted and how it could be interpreted, the applicant has not demonstrated that there is a significant gap in service. This included that the coverage maps were submitted in different scales and it was difficult to overlay them, the models seemed to have overlapping coverage areas, and the edges of the service areas could not be identified clearly.

Responding to Mr. MacDonald, Esq. as to why the applicant wouldn't ask to waive one of the conditions of the conditional use section of the ordinance and remain as a D-3 proposal, Mr. Ritter stated that in his opinion, the threshold is set in the ordinance. The key to the conditional use and all the standards is that there has to be proven a need for service. His opinion was that the purpose is to show a need and if there is not a need, it should be a D-1. The need is the triggering fact that makes it permitted and the rest of the standards are how it should occur.

Continuing, Mr. Rittter referenced Mr. Graiff's testimony on the difficulty in determining where the edge was located and differing levels of pilot power. From the Borough Master Plan, Mr. Ritter noted that the criteria was to primarily have service in the Borough rather than the larger community. Doing an eyeball calculation it looks like 45% of the T-Mobile area is outside the Borough and 20% of the Verizon area is outside the Borough. It also does not solve all the gap problems. Choosing the location that is the most efficient, broader service area is important to avoid going through the exercise again some time in the future.

Finishing with his summary of Mr. Graiff's testimony, Mr. Ritter stated that from the RF testimony, it was his opinion that there is a considerable gray area as to whether the applicant has demonstrated a gap. There is somewhat of an anecdotal evidence that clearly there is service throughout the area and that cell phone do work in that location.

Addressing the conditions of the ordinance as relate to the purposes of the ordinance, Mr. Ritter pointed out eight points of goals as enumerated in the ordinance. The eight goals tie together with many of the conditional use standards and the exercise in the ordinance. He hopes to demonstrate that the proposed location of the facility does not promote the public good but, will be a detriment to the neighborhood.

Responding to Mr. Humbert as to whether he would be identifying the required variances a D-3, D-1 and D-6, Mr. Ritter stated that he would. He would also be proving the reasons. He is also not planning on providing written documentation of his studies or analysis.

Application was carried to the Board's Tuesday, November 17, 2009 special meeting without further notification. The applicant granted an extension.

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ADJOURNMENT

There being no additional business to come before the Board, on motion duly made, seconded and carried, Chair Santo 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. There will be a special meeting of the Board for the continuation of the Omnipoint hearing held on Tuesday, November 17, 2009 at 7:30 p.m. at the Garabrant Center, 4 Wilson St., Mendham.

Respectfully submitted,

Diana Callahan
Recording Secretary