

**MINUTES OF THE
MENDHAM BOROUGH BOARD OF ADJUSTMENT
April 6, 2010
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.

CHAIR'S ADEQUATE NOTICE STATEMENT

Notice of this meeting was published in the Observer Tribune on January 14, 2010 and the Daily Record on January 11, 2010 in accordance with the Open Public Meetings Act and was posted on the bulletin board of the Phoenix House.

ATTENDANCE

Mr. Palestina – Present	Mr. Smith - Present
Mr. Peck – Present	Mr. Santo - Present
Mr. Peralta – Absent	Mr. Ritger, Alt. I - Present
Mr. Schumacher – Present	Mr. McCarthy, Alt II – Absent
Mr. Seavey - Present	

Also Present:

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

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MINUTES

On motion made by Mr. Seavey, seconded by Mr. Smith and carried, the minutes of the March 2, 2010 regular meeting of the Board were approved as written.

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.

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HEARING OF CASES

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
Robert Simon, Esq. – Attorney for Mr. Isko

Exhibits: I-21: Application filed by Omnipoint to the Board in 1990: St. Johns
I-22: Resolution of 1990 Omnipoint Application: 10/03/2000
I-23: Transcript of proceedings from October 17, 1996
I-24: Transcript of Mendham Township Conifer Drive application dated August 13, 1998
I-25: Transcript from Mendham Township Conifer Drive application dated April 12, 2001

Chair announced that final arguments would be heard from Mr. Simon, Esq. and Mr. Schneider, Esq.

Mr. Simon, Esq. stated that he had reviewed the exhibits to assure that everything had been entered and marked. He further entered Exhibit I-21, a set of documents that had been filed with the Board that were part of the file, but not marked as exhibits. In discussion, Mr. Schneider, Esq. did not voice objection, but clarified that there were many other documents that are in the files, that are not marked, but part of the record. Mr. MacDonald, Esq. advised the Board that while the engineering reports being submitted can be viewed by the Board, that the factual findings were made outside of the Board, and the Board is required to make a decision on the evidence that was presented. Mr. Simon, Esq. proceeded to enter subsequent exhibits of I-22 through I-25 with clarification on their contents with Mr. MacDonald, Esq. After an objection by Mr. Schneider, Esq. to entering only three transcripts out of a very large series, Mr. Simon, Esq. clarified that they were related to his closing arguments.

In discussion on the role of the professionals in the deliberations, Mr. Simon, Esq. requested that the professionals give any summary opinions before he and Mr. Schneider, Esq. sum. In deliberations they would address specific questions.

Dr. Eisenstein provided his summary opinion for the Board. He reviewed that while there has been one attorney and one RF engineer for the application, there are two applicants. T-Mobile, or Omnipoint is a 1900 megahertz carrier with existing sites on Conifer Drive and at the bell tower. They allege there is a gap between the two sites. The propagation charts presented indicate that they have a fairly large gap in coverage along a fairly well-traveled road. The proposal is to locate a tower on a site that to a large extent fills the gap. To the best of his recollection all the information about Omnipoint has been uncontested, and there have not been any counter-professional opinions. He does not recall any comments from the public on Omnipoint. They are in full compliance with all FCC regulations and the equipment is all FCC certified equipment.

Continuing, Dr. Eisenstein explained that the complexity of the application seems to have arisen from the Verizon portion. Verizon has two different bands: 800 megahertz and 1900 megahertz. All earlier Verizon phones would have only been 800 megahertz, but those are legacy phones. All the new phones are dual banded, and Verizon has two licensed bands. When they come before the Board, they are applying almost like two separate companies. The two bands propagate differently. They have locations on Conifer Drive and at the Bell Tower.

Recapping the testimony heard, Dr. Eisenstein stated that the radiofrequency engineer for Verizon testified that there is a gap between their two existing sites at 1900 megahertz. The gap is comparable in scope and dimension to that which Omnipoint has in the same area. There may be some differences at the edges, but nothing substantial. They propose collocation at the same site as Omnipoint, and the collocation would be 10 ft. lower on the tower. To a large extent that fills the gap at 1900 mgh. If data was presented at 800 mgh, it was not discussed much, but one would suppose that the 800 mgh would propagate better and the gap would be smaller, nonexistent or spotty. Anyone with a dual banded phone would have 4 bars and would be able to make and receive calls on the 800 mgh band.

In terms of Verizon's 1900 mgh band, Dr. Eisenstein stated that it is likely there is coverage at negative 95 dbm, ten times lower the power level than the 85 dbm used for design purposes. The negative 95 dbm is not good for design purposes as there is no margin. For example in bad weather, foggy weather or snowy weather, the neg 95 can easily drop to the point where it is not usable and the calls will disappear. One would not be able to make and receive calls. When an engineer talks about reliability, they really mean that they are trying to enhance the probability that the calls will go through, and that they will be able to make and receive calls.

Dr. Eisenstein summarized that Verizon has a gap in their 1900 mgh service at neg 85 which is comparable to the size of the T-Mobile gap. He did not know the exact size of the 800 gap, but his opinion is that it is a lot smaller, and there may not be a gap at the lower frequency as it propagates better. It may very well be that the coverage from Conifer Drive and the bell tower at 800 mgh would be enough in this area. Initially they may have thought that would provide coverage to the area, but since then they have acquired other bands. They are required to cover their customer base with the other bands. There is a constant on-going build plan.

Dr. Eisenstein concluded that Verizon has a gap in coverage at 1900. The proposed site, to a very large extent, ameliorates their gap. That is the primary thrust of the application. There is probably a gap at 800, but much less so. They have testified that they are in full compliance with FCC regulations and their equipment is FCC approved. Overall, both applications, Verizon and Omnipoint (T-Mobile) have exhibited a gap in coverage. The proposed antenna site, to a large extent, ameliorates the gaps, and they are in compliance with FCC regulations.

Mr. MacDonald, Esq. clarified for the Board that from a land use perspective they have one application before them to vote on. The application deals with two carriers and one of those two carriers is dual banded. Dr. Eisenstein broke it down conceptually for the Board to understand the technical aspects. Mr. Schneider, Esq. added that the application is for two applicants to construct a 130 ft. structure with T-Mobile essentially at 130 and Verizon essentially at 120.

Mr. Simon, Esq. began his summation by thanking the Board and its professionals for providing Mr. Isko, through his professionals, a fair and full opportunity to present the opposition case. He continued that the applicants have not met their burden of proof neither procedurally nor substantively. There have been submission defects, submission omissions, evidence containing numerous errors, and an overall reluctance by the applicants to provide important information and data until finally pressed by the Board.

As they presented, in 1996 Judge Stanton encouraged a consolidated settlement of litigation involving both the Borough and the Township for the construction of one cell tower for both Verizon and AT&T to serve both communities. There were two settlement agreements. The first said that Verizon would utilize the cell tower only in the township at Daytop. The second settlement said that the Daytop Village location was acceptable provided that no other tower could be constructed in the Borough. Verizon and AT&T went back to Mr. Isko a second time as they knew that they needed his consent so that he would not object or challenge the settlement application by both carriers in 1996. At that time, Verizon represented to Mr. Isko, the Board and the public that the Daytop Village site would satisfy Verizon's needs for coverage within Mendham Borough. In accordance with the settlement, Judge Stanton issued a dismissal with prejudice.

Mr. Simon, Esq. continued that the current application by Verizon represents a breach of representations made to Mr. Isko and a breach of the settlement agreement. He read from Exhibit I-6, the 1996 settlement application. He also read from I-23 to support his point. He summarized by stating that in hearings before the Mendham Township Board of Adjustment in 2000 and 2001, Omnipoint represented that the installation of a cell tower at Conifer Drive would provide continuous, seamless coverage in 3G and an adequate hand-off along the Route 24 corridor between Conifer Drive and Daytop Village. They represented to the public that no additional cell tower would ever be needed along the Route 24 corridor in the Borough. He then used Exhibits I-8, I-24, I-9, I-25, and I-21 in support. He referenced a legal doctrine called "judicial estoppel" that acts as a bar to prevent asserting a position inconsistent with that previously and successfully asserted in a prior hearing. He stated that Verizon and Omnipoint both represented to the Borough and the Township that with conifer Drive and the bell tower and certain technology that is still in effect today, there would be no further need for a cell tower in the area. The past statements and representations of the carrier bear, in their opinion, on whether the new tower is truly needed in the community.

Moving on to the application itself, Mr. Simon, Esq. referenced the checklist contained with the ordinance and stated that out of the eleven items, eight were either not submitted or incomplete. It is their opinion that the application to this date remains incomplete. There was no needs analysis as required in the ordinance, no inventory of Verizon's or Omnipoint's active or pending sites with height, structure type and distance from the Kings Shopping Center. There was no alternative site analysis performed within an appropriate search ring area. A 500 ft. search ring from the Kings Shopping Center was used. There was no environmental assessment study showing impacts from all residential properties. According to the ordinance, the viewshed from both sides of the street, historic areas and nearby properties should have been examined. The visual analysis was completed one and a half years ago.

Addressing the RF testimony, Mr. Simon, Esq. stated that is unreliable given all the discrepancies with the data submitted. He cited the system configuration, drive test dates, calculated coverage, power levels and downtilt as issues. There is no reliable evidence chain. The Verizon coverage was not measured when the applicants did drive testing for Omnipoint only in June of 2009, and they did not perform any continuous wave drive test for the proposed site. Propagation information for the new tower at different height and at both negative 85, 90 and 95 in consideration of on air site in the area was not presented. There were no drive test measurements conducted for the proposed site or alternate site. Mr. Graiff also determined that from an RF perspective the application was incomplete.

Mr. Simon, Esq. expressed his opinion on the reaction of Dr. Eisenstein to Mr. Graiff's testimony, and expressed his disapproval.

Mr. Simon, Esq. addressed the ordinance as it relates to the proof of necessity for the requirement of wireless telecommunications facilities. The key issue is whether cell service is currently prohibited in the area in question around the Kings Shopping Center. The requirement appears to

be taken from the 1996 Telecommunications Act. If the phrase is not included in an ordinance and variances are not granted, the carrier may appeal and state the variances should have been granted. The second step is to argue the separate analysis on the prohibition of services and that is an entirely separate analysis. In this case the standard is set in the ordinance. For the applicant to demonstrate under both the ordinance and the Telecommunications Act that the new facility is necessary, one looks to the four-part Sprint spectrum case test. This includes that (1) there is a significant gap within the community, (2) the proposal is going to fill the gap in the least intrusive manner, (3) they have made good faith efforts to investigate alternate technologies and alternate sites that may be less intrusive and (4) the area is not already being served by another wireless provider. In this case the applicant fails to satisfy Subsection V of the wireless telecommunications ordinance. Mr. Simon, Esq. was of the opinion that a denial would not violate the Telecommunications Act since the federal standard is addressed in the ordinance.

Addressing the gap, Mr. Simon, Esq. stated that there are no FCC standards requiring a carrier to use a particular minimum signal strength. There is no case or regulatory standard requiring negative 85 dbm as a minimal signal strength or degree of service. Omnipoint's desired strength is 85 dbm, but that is irrelevant to determining whether there is an existing significant coverage gap. There are cases that indicate that the Telecommunications Act does not mandate municipalities to provide sites allowing optimal service, just service. It is not guaranteed uninterrupted communication regardless of weather conditions. There has not been proof offered that negative 90 or 95 is seen as not prohibiting service or substantially better than mediocre service. There has been no evidence presented as to why there needs to be a margin of 10.

Mr. Simon, Esq., continued that based on the information submitted, the Board does not know the true scope or size of the alleged gap to determine whether or not it is significant. Case law has talked about the fact that small white areas on a propagation map do not represent a gap area, and if a gap only affects a small number of people, it is not a significant gap. The Board has no idea how many people are affected. Even if there is a gap in coverage, the ordinance requires that the carriers first try to optimize the existing system. This requires analyzing the system design on the existing sites as relates to beam tilt, effective radiated power and antenna placement. Mr. Graiff had told the Board that the applicant could retune their antennas to get the required db level. Larger antennas provide more coverage. Dr. Eisenstein had said the area was covered at neg 95. Mr. Simon, Esq. questioned why the antennas could not be swapped or upgraded.

In terms of the blocked call data, Mr. Simon, Esq. stated that it was irrelevant to the issue of adequate coverage as it was not presented in a comprehensive manner. There is no demonstration of either a significant gap in coverage or a lack of reasonable reliable service for remote users. There has been no demonstration that service is being prohibited in the area.

Mr. Simon, Esq. stated that approval of the application is not mandated by any FCC licensing requirements. There has not been any evidence presented that either carrier is subject to any pending build-out deadline date where, if they failed to meet the date, that the authorization to operate wireless telecommunications service terminates. He continued that in November of 2009, Mr. Pierson testified that Verizon satisfied its government-mandated build-out for 1900 megahertz. Mr. Simon, Esq. summarized by stating that if the application is denied because there currently exists a level of service that does not prohibit wireless telecommunications services, neither Verizon nor Omnipoint are going to lose their FCC licenses because they long ago fulfilled their build-out requirements.

Addressing 800 and 850 mgh, there is nothing before the Board to show that there is any gap in coverage at those bands. Verizon clearly has seamless coverage for 850. T-Mobile is currently implementing a 700 mgh system in northern New Jersey existing sites. When that is accomplished they are also going to have seamless lower frequency coverage in the area. It is also known that the existing system is working given comments by Board members, the public and Dr. Eisenstein. The system is being proposed for competition. The economics and finances are not known. They could be looking down the road at a coverage situation or a capacity situation. They have not provided lease information as indicated on the checklist.

In terms of number two of the four-part test, Mr. Simon, Esq. opined that no evidence has been presented to demonstrate that they will fill it in the least intrusive manner. The site will have a significant impact on the Shopping Center and the Main Street Corridor. It will be the central feature of the shopping center and will be located at the front door of the Mendham Health and Racquet Club. It is not in the rear yard. It will be in direct view of the residents to the west of the shopping center. It is placed in a location where parking and circulation prevents the establishment of adequate landscaping and buffering. It exceeds the maximum height requirement and there is going to be a need for a larger equipment area. The site in the east business district with a new pole is the 5th on the priority list of the ordinance. They have not met the burden of proving that the higher priority sites are not suitable. There was no fair analysis of

the existing towers, Conifer and the Bell Tower, and power transmission towers either in Mendham or surrounding municipalities. Other less intrusive sites in the East Business District were not considered. Opportunities were not investigated to locate the facility in existing developed areas to the side or rear of the tennis club. In the case of the Conifer Drive tower, 20 alternate sites had been investigated. Here, an arbitrary 500 ft. search ring was set and one other site, the firehouse, was considered. The height used was below the minimal acceptable for the propagation model used.

Mr. Graiff was of the opinion that the fire department possibly fills any alleged gap better than the proposed site. Mr. Pierson admitted that it might work. The applicant filed the application over two years ago and there is no evidence that in the last 18 months they have requested available alternate municipal sites. It is very odd that the municipality adopted an ordinance in May 2008 encouraging the location of cell towers at municipal sites and then just months later says that the cell providers cannot locate a tower at two of the most logical municipal sites in the Borough.

Addressing alternate technologies, Mr. Simon, Esq. stated that their opinion is that the applicants have not made a good faith effort to follow up as to the Borough Council's current investigation as to less intrusive alternatives and technologies such as DAS. No follow-up has been conducted. Dr. Eisenstein conceded that DAS is certainly feasible in the area. Mr. Pierson admitted that even if a tower is placed at the shopping center there is likely going to be a need for a second tower and a second cell site in Mendham Borough, Mendham Township and/or Bernardsville at some point in the future to cover additional gaps to the southeast. There is not enough information to determine whether it is possible that one could get a site that is closer to all the target areas in the area to reduce the number of required towers. The Board has a right to demand a master plan by an applicant.

In terms of the fourth criteria of Sprint-Spectrum dealing with whether the area is already served by another wireless provider, Omnipoint and Verizon are already servicing the area. The more coverage overlap, the more potential problems one has with dropped calls, yet over 50 percent of the area that is being covered by the new towers is covering areas that already have existing coverage at negative 85. There has been no evidence to demonstrate that the area in question is not already being served by another wireless provider. Mr. Graiff said that he has a great signal from AT&T.

Moving to his summation on variances, Mr. Simon, Esq. advised the Board that according to the ordinance, cell towers and their related facilities are conditional uses in all zones. Both conditions and standards need to be complied with before the uses are permitted. He referenced the Coventry Square case in which the site remains suitable for the use notwithstanding nonconformity with the conditions and standards established by the ordinance. One focuses on deviations, their magnitude and scope. That is the positive criteria. The negative criteria relates to the impact not being damaging to the neighborhood so to be substantially detrimental to the public good. He referenced the Medici case dealing with enhanced quality of proof. Mr. Ritter told the Board that the applicants cannot overcome the noncompliance with regard to Section V because they could not demonstrate under the positive criteria that the site remains particularly suitable for the use because there is no need for the tower or there are other locations that are higher or equal on the priority list.

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Board took a 10 minute break

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Mr. Simon, Esq. continued that in addition to the first two variances, they are requesting side yard, rear yard, height and four carriers. There is also a requirement for screening and landscaping, camouflage, minimization of visual impact and buffers to the residential area. In terms of parking, they will need a variance for one parking space that they are not proposing. The shopping center should have by ordinance 1,075 spaces, but only have 418. There should be one space dedicated to the facility. The lack of parking may trigger a variance related to the shopping center itself because it is intensifying the nonconforming amount of the parking spaces.

In terms of the equipment compounds, Mr. Ritter had testified that the ones he is familiar with are usually larger than 1200 square feet and that normally four collocators would require an equipment area of approximately 3,000 square feet or 142 percent more area than is currently provided. Expansion would remove what little screening is being proposed or further reduce on site parking and traffic circulation areas and will further impact the health and racquet club. It may also affect impervious coverage.

In addition to the 13 variances identified, Mr. Simon, Esq. stated that there is also a D(6) height variance required when the height exceeds the height requirement by 10 feet or 10 percent of the maximum height. The requirement is 120 ft. and the proposal is 130 ft. That does not include whip antennas. Another variance is required as the parking spaces are preexisting non conforming as they should be 10 ft. by 20 ft. instead of 9 ft by 20 ft. There is a maximum impervious coverage of 75 percent and no information has been provided. The Mendham Village Shopping Center appears to be an existing nonconforming conditional use since conditions pertaining to parking and impervious coverage are inconsistent with the ordinance requirements. A D(2) variance is required for any changes.

Mr. Simon, Esq. referred to the ordinance provision that indicates that compliance with site priorities shall not relieve the applicant from its obligation to comply with all other applicable ordinance requirements. One needs to look at the standards in the zone. As the shopping center is located in the East Business District, those requirements and the planned neighborhood shopping center requirements apply. These would include a 30 ft. buffer requirement from any residential zone and no more than two separate uses or business enterprises in any building or on any lot.. This will be the third enterprise on the lot. That also increases the parking requirements. A site plan is required to show all loading areas, size and location of spaces, driveways and aisles and a buffering landscaping plan.

Mr. Simon, Esq. summarized by stating that for the many reason articulated by Messrs. Ritter and Graiff, they believe that the applicants have not met their burden of proof for the variance relief required by the application, whether it be 6, 8 or 18 variances. They have not addressed the positive and negative criteria for each of the variances as required for the application. It will be located at the front door of the Mendham Health and Tennis Club. They have outdoor swimming pool facilities. It will be in view of the residences to the west of the shopping center. It is too close to residential properties given the setback deviation. The shopping center has no buffer to the residential zone.

He continued that the site is not appropriate from a planning analysis. It is located in the most visited commercial property in the Borough. The tower will be seen against a one-story retail building in the shopping center. It will be the most dominant visual element in the area, raising compatibility issues. The tower is not needed to achieve any FCC mandated coverage. Neither will lose their license because they cannot meet the variance relief. The critical evidence submitted lacks credibility. The site is too congested considering the character of the historic community with multiple nonconforming prohibited uses, altering the parking and circulation area on the site.

In terms of the proofs under the positive and negative criteria, Mr. Simon, Esq. stated that they have not been demonstrated. The construction will be substantially detrimental to the public good and in violation or substantially detrimental to the master plan. The master plan indicates that the facility should be designated to serve primarily the Borough. Forty-five (45%) of the proposed coverage is going outside the Borough for T-Mobile and 20 percent is going outside for Verizon. Mr. Graiff stated that there is no need from an RF perspective for a cell tower at the site. Mr. Ritter concluded that the applicants failed to meet the burden of proof for the variances required. The application should be denied for both applicants.

Mr. Schneider, Esq. began his summation. He stated that the record speaks for itself, not how Mr. Simon, Esq. characterizes the record. He commented on the process indicating that there have been 22 or 23 public hearings. The application was very close to completion when interested parties started to participate in the proceeding. Ten to twelve of the hearings were devoted to RF testimony of the most technical nature. To suggest that the applicants have not been forthcoming in terms of the documentation is insulting.

The Board from the onset retained the services of Dr. Eisenstein. Every reasonable request for information imposed by the Board was provided to the Board or Dr. Eisenstein. To suggest after 10 to 12 hearings that a needs analysis has not been provided is ludicrous. In terms of the cooperative process, the facility as originally proposed was in an alternate location on the property. There was a suggestion to relocate it, and the applicant did. Alternate designs were suggested, and the applicant discussed a straight monopole, clustering of antennas, flagpoles, and windmills.

In terms of RF testimony, Mr. Pierson testified in June 2008 and substantiated the need for the gap based on propagation charts. He and Dr. Eisenstein were of the opinion that the charts represent the most reliable way of determining the existence of a gap. Mr. Pierson indicated from the outset that the propagation charts were confirmed by drive test data from Conifer and the bell tower. As Omnipoint had not been live from Conifer, they went out and tested it during the

pendency of the hearing. The drive test matched the propagation charts. When asked to look at dropped call data, the applicant did not think it relevant, but did provide it, and it proved the applicant's point. He concluded that to suggest that the applicants have not dutifully complied with all reasonable requests to establish its case from a radiofrequency perspective is somewhat disingenuous.

Reviewing chronology of the ordinance development, Mr. Schneider, Esq. did not agree with Mr. Ritter that the ordinance had been adopted in specific response to the application. It is his opinion that the ordinance was being worked for a significant period of time. Since the adoption of the 1996 Telecommunications Act and the Smart SMR versus Fair Lawn case, municipalities are urged to adopt wireless telecommunications ordinances to regulate the location of facilities. This provides guidance to the Board. If the governing body had been opposed to this application, they would not have zoned the largest essential property in the East Business District for the conditionally permitted use. It is the only zone for wireless telecommunications in the Borough. They would have also not adopted an ordinance that permits the facility in the Main Street Corridor.

There is another alternate explanation as to how the facility came to be at the shopping center and how it relates to the ordinance. The fact is that the site selection process predated the ordinance. The respective applicants appropriately believed that it was an appropriate site for a wireless communications facility even if an ordinance was not in place.

Referring to Mr. Pierson's testimony, Mr. Schneider, Esq. stated that Mr. Simon, Esq. has taken liberty. Mr. Pierson confirmed that at the respective license frequency bands there exists a gap in wireless communication coverage for each of the respective applicants; that approval at the site of the respective height will eliminate that gap and that no existing structures exist which could either be modified or located upon to obviate the need for a facility in this area. He also testified that the standard that was employed by both Verizon and Omnipoint respectively was a conservative, reasonable standard consistent with industry standards. The propagation charts presented fact. The drive tests the Board requested as an overlay confirmed it. The dropped call data the Board requested confirmed Mr. Pierson's position.

Addressing Mr. Graiff's testimony, Mr. Schneider, Esq. expressed his opinion that Mr. Graiff began by advising the Board on all the information they should ask for. At first he stated he needed data to form an opinion, and when it was provided he began to make every effort to find a little tweak. Mr. Schneider, Esq. read from ZB-1, Dr. Eisenstein's report and concluded that if the data were not precise, it would only call into question the margins of the gap, but not the gap itself.

Continuing with Mr. Graiff's testimony, Mr. Schneider, Esq. referred to a question Mr. MacDonald, Esq. had asked Mr. Graiff as to why the applicants would be proposing a facility based on his testimony. He responded that they put generators in that they do not need; it is the corporate culture. Mr. Schneider, Esq. questioned the reasonableness of the answer. He continued that "Objectors 101" was played. They took a standard and indicated that they did not agree with the standard. They referenced being able to make calls at neg 85 and then questioned whether 1 db made a difference and then continued with minor increments testing for significance. It is the oldest trick in the book and the Board should not fall for it. The Board's own expert, and all the cases that the Board has heard have promulgated that neg 85 dbm is a conservative standard. It is not an overreaching standard. Dr. Eisenstein says it is a reasonable standard.

Mr. Schneider, Esq. referred to the conclusions of Dr. Eisenstein as an independent expert by reading from Exhibit ZB-1. He has advised the Board that there is a gap in coverage at a reasonable power level of neg 85 in the vicinity of the proposed facility for both applicants. The proposed antenna placement will ameliorate the gap to the greatest extent possible. The antenna heights are at the minimum heights possible. The site will be in full compliance with all FCC regulations.

Mr. Schneider, Esq. continued that Mr. Isko has the right to participate in the proceedings, but his credentials should not affect the case except that he has been a man who has been a service to the community. He questioned Mr. Isko's advocating a legal position that the application is somehow barred by some proceeding back in 1996.

Continuing with his chronology of events, Mr. Schneider, Esq. stated that Mr. Isko involved himself in an AT&T application at the Black Horse Inn that was not a Verizon nor an Omnipoint application. After about two and a half public hearings there is not one document in which anyone agreed as part of any settlement not to file another application in the Borough of

Mendham. It does not exist because it was never agreed to. If it did exist, it would have found its way into a Borough resolution.

Mr. Ritter is an accomplished planner, but he used the kitchen sink approach to the application. He does not understand how Mr. Ritter's argument that the Borough adopted the ordinance in response to the application helps the objector's case. Mr. Ritter offered that there are better alternate sites. He could not identify which ones they were. The use is conditionally permitted. For a conditional use, there is no alternate site obligation. Mr. Ritter did offer two sites: JCP&L which is at the gateway and the police station. JCP&L would have required a use variance.

He discussed his view of the chronology of events versus that of the objectors. When he was first provided with the ordinance, he viewed the priority listing and before the first public meeting addressed a letter to Ms. Sandman, Borough Administrator, asking whether there were any specific municipal properties. He picked the 500 ft. ring because that was a reasonable degree of a coverage footprint relative to the Kings Shopping Center location. The Governing Body did not make the police station available. The applicants conceded that if the municipality went out to bid, the police station property would work. The Governing Body knows the site meets their needs and has not made it available.

In terms of Mr. Ritter's testimony on whether other carriers provide coverage in the area, Mr. Schneider, Esq. stated that the FCC statement is clear. It is not a basis as to whether another provider provides coverage as it relates to any prohibition claim. Addressing the testimony that part of the coverage is outside of Mendham Borough, Mr. Schneider, Esq. cited the example of Conifer providing coverage into Mendham Borough. He thought that the concept of a signal stopping at a municipal boundary preposterous.

Referring to the ordinance and the argument that the ordinance can impose a FCC prohibition standard, Mr. Schneider, Esq. stated that it is wrong. The Telecommunications Act was adopted in 1996 with the intent to promote competition to bring prices down by limiting the ability of local authorities to regulate and control the expansion of telecommunications technology. The entirety of the statutory scheme is to give exclusive authority to regulate license of wireless communications to the FCC, not to the Borough of Mendham. Local ordinances have no ability to regulate the technical aspects of radio telecommunications. There would be utter chaos if each municipality adopted their own specific standard of how to regulate the quality of service. The objector's are arguing that the FCC does not provide a specific standard of neg 85, 84 or 87, but to the opposite they rely on a standard in the ordinance which says the applicant has to provide FCC-mandated coverage. While licensing is not the basis., the addition of one site rises or falls in terms of whether the site should be approved.

Continuing with a discussion on the concept of a significant gap, Mr. Schneider, Esq. stated that there is no significant gap analysis that is required. The standard is not a significant gap. He read from case law. The analysis is not one of a significant gap. It is not one of a federal prohibition when you apply New Jersey State Municipal Land Use Law.

Returning to the ordinance, Mr. Schneider, Esq. stated that case law encourages municipalities to zone for telecommunication. A fundamental tenet of zoning principle is that with zoning there is planning via ordinance, not by use variance. That is the proper way to zone. If, as the opposition argues, the facility was outrageous and contrary to the Borough of Mendham in terms of visual impact, why would the Governing Body adopt an ordinance which made this one zone district conditionally permitted for the use.

Mr. Schneider, Esq. addressed the priorities in the ordinance. The first priorities are existing structures. Both Mr. Ritter and Mr. Graiff conceded there were none of sufficient height. The Board is the best judge of the community, and there are none. In terms of tweaking antennas, if a carrier could spend \$1,500 to \$2, 000 to change them versus millions for the site, corporate culture would not support a new tower.

Responding to Mr. Simon's iteration of the variances required, Mr. Schneider, Esq. stated about six are related to the fact that the objector's believe there is no need for the facility. In terms of the rear yard, it was intended that placement be behind certain buildings. If it were placed in the rear yard on this site, the variance would be traded for a host of others. The setback requirements would not be met. In terms of the height, it was originally 120 ft. One of the overriding provisions of the ordinance is to encourage collocation. Hours were spent discussing with the Board how it could be designed to maximize collocation. Limitation of the flagpoles and cable management were discussed as well as the windmill and the monopole. There was an attempt to balance the visual impact versus the collocation. They came to the conclusion that there was never going to be one tower that could accommodate every conceivable carrier at the location, but every carrier may not be in the Borough of Mendham.

Continuing, he explained that in discussion the applicant indicated that they could live with 120 ft., but from a construction perspective it was not feasible to construct at 120 and then try to add on in the context of a flagpole design. Clear consensus of the Board was to go to 130 ft. as a trade-off to encourage collocation. The ordinance permits 120 ft. The incremental 10 ft. is to accommodate collocation. The question is does the incremental 10 ft. make the site unsuitable when it can accommodate collocation.

In terms of the other variances, the ordinance has a specific landscaping requirement to mitigate any visual impact from public view. The Board dealt specifically with the applicant and they worked with Mr. Hansen to develop a landscaping plan. Relative to landscape buffering that ordinance section does not apply. It would be like suggesting that if McKenzies wanted to put up a new sign, a 30-ft. buffer would be required as there would be an expansion of the shopping center's non-conforming use.

Addressing parking, Mr. Schneider, Esq. stated that the parking has existed for a number of years. The Shopping Center has previously come before the Planning Board and the issue of parking has not been a concern in any meaningful fashion. The suggestion by the objectors is that there is not one parking space for a couple of hours every six weeks, and that failure to provide the parking space renders the site unsuitable. He could not believe the issue was even part of the argument.

He continued that they are not expanding the shopping center use. The ordinance specifically allows telecommunications uses on sites where there are existing other uses. Mr. Humbert has never raised the issue of creating any D(2) variance.

Concluding, Mr. Schneider, Esq. stated that they made a good faith effort to locate on the police department. Mr. Pierson indicated why the Fire Department did not meet the applicant's technical objectives, a conclusion shared by Dr. Eisenstein. No one has come forward with an appropriate response to why they would propose a site if they did not need one. After 22 hearings and after a bevy of experts to suggest that if a Verizon subscriber may have a certain degree of reliable coverage, it would work to deny an Omnipoint approval or a Verizon Wireless coverage to other subscribers for which they are licensed would be unfortunate. The Board should be mindful of what the governing body has provided has provided in terms of guidance.

Mr. Schneider, Esq. stated that the case has been contested, and litigation may be inevitable, but his goal is to get an approval, not to litigate. He will do whatever is necessary in terms of ongoing cooperative efforts to do that. He added that the applicants did agree, as required by ordinance, to make the tower available to the police/emergency municipal services. That was requested of the applicants. There was a dialogue between the applicants' radiofrequency engineer and all the emergency services. That should be considered.

Chair announced that the Board deliberations would occur at the May 4 meeting.

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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 11:15 p.m. The next regular meeting of the Board of Adjustment will be held on Tuesday, May 4, 2010 at 7:30 p.m. at the Garabrant Center, 4 Wilson Street, Mendham, NJ.

Respectfully submitted,

Diana Callahan
Recording Secretary