

**MINUTES OF THE
MENDHAM BOROUGH BOARD OF ADJUSTMENT
SPECIAL MEETING
May 31, 2011
Garabrant Center, 4 Wilson St., Mendham, NJ**

CALL TO ORDER

The special meeting of the Board of Adjustment was called to order by Chair Seavey 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 and Daily Record on May 12, 2011 and re-noticed on May 26 in accordance with the Open Public Meetings Act and was posted on the bulletin board of the Phoenix House.

ROLL CALL

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

Also Present: Mr. Hansen, Board Engineer
Mr. Germinario, Board Attorney
Mr. Humbert, Borough Planner
Dr. Eisenstein, Telecommunications Consultant

#####

PUBLIC COMMENT

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.

#####

HEARING OF CASES

#####

New Cingular Wireless PCS, LLC (AT&T) - Conditional Use Variance/Site Plan
Block 2301, Lot 13, 350 Bernardsville Road

Present: Michael Lavigne, Esq., Pitney Day, LLC – Attorney for the Applicant
Peter Tolischus, - Planner
Robert Simon, Esq., Herold Law – Representing Interested Parties

Exhibits: **0-3:** 8 Pages of Coverage Maps –

- 1 – Exhibit J: Existing AT&T 850 Mhz Coverage SS of C 5-20-11
- 2 – Exhibit K: Existing & Proposed AT&T 850 Mhz Coverage SS of C 5-20-11
- 3 – Washington Corners – Verizon @850 Mhz
- 4 – Exhibit A: Verizon Wireless Existing Coverage Bernardsville 3 4-28-10
- 5 – Exhibit B: Verizon Wireless Existing Coverage vs. Baseline Scan Drive Test 4-28-10
- 6 – Exhibit H: Verizon Wireless Proposed Coverage 110 ft. Bernardsville 3 4-28-10
- 7 – Exhibit J: Verizon Wireless Proposed Mendham Coverage Bernardsville 3 4-28-10
- 8 – Exhibit E: Existing AT&T 1900 Mhz Coverage SS of C 2-15-11

L-3 FCC Public Notice – AT&T Acquisition of T-Mobile

L-4 December 6, 2006 Mendham Borough Board of Adjustment Minutes

Mr. Lavigne, Esq. summarized the items covered in the last meeting and advised that the Board would need to hear from Dr. Eisenstein as relates to the FCC standards and Mr. Pierson as relates to the supplemental coverage plots that were prepared and submitted at the request of the Board. Mr. Tolischus would also be recalled to review the relief that is required.

Mr. Lavigne, Esq. summarized that the Board of Adjustment has retained jurisdiction of the case under the Pulio case because the existing use on the property has been permitted by D Variance. Under Section 76 of the MLUL they need to show and satisfy the Board that site plan approval can be granted without substantial detriment to the public good and without substantial impairment of the Zone Plan and Zoning Ordinance. The site is the fourth priority location under the Borough's Wireless Ordinance. They believe that they meet the conditional use standards under the Wireless Ordinance.

Mr. Lavigne, Esq. continued that they have included a variance for height in their notice, but Mr. Humbert's report indicates that he does not necessarily believe that a height variance would be required as this is strictly an internal facility. In addition, should anyone feel that a D Variance is needed, they believe that they meet those criteria as well.

Mr. Germinario, Esq. agreed with Mr. Lavigne's legal analysis. He also agreed that a D Variance is not required, but advised that it should be placed on the record.

Mr. Pierson was called for re-examination. Responding to a series of questions by Mr. Lavigne, Esq., Mr. Pierson described the parameters and the characteristics of the plots that had been requested. The plots had been requested in the same format as the Kreisberg report, but specifically at the 850 frequency band that AT&T occupies. They were developed in accordance with the design standards in the model and in three signal strengths, minus 75, minus 85 and minus 95. Exhibits J and K were labeled.

Mr. Pierson explained that AT&T currently has three main licenses. The traditional cellular license is the one active in this area right now. They have more capacity in the PCS arena than they do in the 850 megahertz arena. They do have 700 megahertz on which they are starting to launch LTE data. In terms of the propagation, the 1900 megahertz does not deal as well with the trees and hills and would normally have a smaller coverage footprint than the 850. The plots he has completed are consistent with what he would expect in doing coverage plots at the different frequency.

Addressing Mr. Lavigne, Esq. on why it is important for a carrier that is licensed in multiple bands to construct sites and have them operate in all of their frequency bands as opposed to one or two, Mr. Pierson explained that in many cases all of a carrier's usage will fit in half or less than half of what they have licensed. Thirty (30) megahertz of frequency band is needed to operate. It is to the wireless carrier's advantage to supply and design those frequencies to accommodate everything for which they are licensed. They have the ability to build out the particular license that they have. 1900 mhz would not be very useful if they could not hand off between sites if they are too far away. Dropped calls would be created, and there would be issues accessing and receiving calls and transferring data.

Mr. Lavigne, Esq. addressed a series of questions to Mr. Pierson relating to the location priorities as outlined in the Borough's Telecommunication Ordinance. In response to whether there were any other existing wireless telecommunication sites or power towers that could meet coverage needs instead of the proposed site at the Sisters of Christian Charity, Mr. Pierson stated that the only existing sites in the nearby area are the St. John's facility and the Possum Drive (Board noted reference is to Conifer Drive) site in Mendham Township. AT&T is installed on both. There are no lattice tower electrical transmission structures, only below the treeline-type of structures. They would not have either adequate location or sufficient height to serve as a collocation opportunity to obviate the need for the proposed site.

Continuing, he was not aware of any municipally owned properties with existing structures that are not already dedicated for open space or recreational uses that could work in the southern portion of the Borough. In terms of the East Business District, the

third priority, it is down in the lower area and central to the northeastern portion of the Borough. Due to the Hilltop Church hill, it is not providing any coverage to the southern section of the Borough. The prior application in that area was for a new build.

In terms of another fourth location priority, West Morris Regional High School, Mr. Pierson stated that it is located somewhat higher than a lot of the other properties, but Hilltop church is still higher and is going to block any signals trying to get south on Hilltop, Pleasant Valley and Bernardsville Road. It would not provide the required coverage.

Dr. Eisenstein provided his professional opinion that Exhibit A of A-1, the one that Mr. Pierson had originally submitted at 1900, shows that there is very little existing coverage in Mendham Borough. There is practically no coverage along Main Street. If one looks at the Kreisberg report, there is a lot more existing coverage on Main Street. Exhibit J, from the new plots, looks very much like the Kreisberg report. Main Street seems to be covered at negative 85 dBm. This indicates that Mr. Kreisberg propagated at 850 megahertz, and those are the parameters he set in his computer. His conclusion was that Mr. Kreisberg made an error in setting his parameters.

He continued that the other plot, which is K, is the existing and proposed coverage. That would correspond to Kreisberg's propagation Map B and Exhibit D of the original submission of A-1 that Mr. Pierson had sent in. They are exactly to scale and exactly proportioned.

During Board questions, Mr. McCarthy asked Mr. Pierson if there was any reason it would make sense for AT&T or any other carrier to put up an antenna that is not needed. He questioned whether there is a 4G plan that is not known. Mr. Pierson responded that there is none. 4G is not going to affect the need. The site is needed for the core network that they are operating today. In terms of whether it is needed given the new propagations, AT&T is building out given their two frequency bands for which they have licenses. They have more usage and more customers operating on the 1900 megahertz license in New Jersey than they do on the cellular license. It is an integral part of their day-to-day business of providing communications.

Continuing to respond to Mr. McCarthy on Mr. Pierson's comment that he would have done things differently than Mr. Kriesberg, Mr. Pierson reaffirmed that he did not do exactly what Mr. Kresiberg had done. He started from scratch. He took baseline data, checked the tool and the baseline data, did some tuning to make it match reality, and produced the propagation. Mr. McCarthy clarified with Mr. Pierson that he was still of the opinion that there is a need for a facility at the Sisters of Christian Charity, and Mr. Kreisberg was of the same opinion that there is a gap in coverage. Mr. Pierson added that he and Mr. Kreisberg both show gaps, but the gap he has now shown is based on AT&T's design criteria. Mr. Kreisberg's was not.

Mr. Lavigne, Esq. stated that Mr. Kreisberg no longer works with the contractor, Black & Veatch and is no longer associated with the project. In addition to providing accurate information, they are duly bound to provide someone who is available for the Board's cross-examination and who can provide live testimony in support of exhibits that they prepared. Mr. Kreisberg left Black & Veatch sometime after the initial submission.

Responding to Mr. Ritger on whether any other sites had been considered, Mr. Pierson stated that to his knowledge, the Sisters of Christian Charity was the only candidate. It was the only existing structure that was found. As the search ring was in this area, it was the only option unless one of the mansions was used. A lot of those do not clear the tree line. Going anywhere else would require building a tower or structure.

Mr. Peck questioned whether 4G capability is impacted by the design criteria. Mr. Pierson explained that the 4G design criteria would be placed between 1900 and 850 as the 700 mhz propagates more like the 850. There are data requirements, and it operates slightly different. In terms of whether in moving from 3G to 4G the coverage plots would get worse rather than better, Mr. Pierson stated that 1900 will still be the limiting

case. They should be a little bit better than 1900, but it is not quite as good as the cellular 850.

Mr. Simon, Esq. began his cross-examination. Addressing Mr. Simon, Esq. in reference to his question on the operation of all frequency bands due to traffic, Mr. Pierson explained that he used the word "traffic" to refer to users and calls on the system and the need for them to move from site to site through connection, not as in traffic or coverage or capability. It is a coverage application. In terms of his statement dealing with AT&T having more customers on 1900 than 850, Mr. Pierson responded that is the way in general New Jersey is running. They have more 1900 spectrum. He has not looked at any specific loading criteria, but it is a general rule and the way that A&T has optimized their system. It is a cleaner band and easier to control.

Continuing with a response to Mr. Simon, Esq. on the search ring, Mr. Pierson explained that he has not looked at it in a year. He recalls that it is probably about a quarter of a mile, maybe half mile tops, around the hill on which the Sisters of Christian Charity is located. He does not believe that the search ring was submitted as part of the application. He is not aware of anything that went out to property owners within the search ring area as to the potential siting of a wireless facility. He did not propagate any other sites either solo or in combination with the Sisters.

Mr. Simon, Esq. entered Exhibit 0-3. Responding to a series of questions on the Exhibits that he had previously prepared, Mr. Pierson stated that Cingular is not seeking negative 75 dBm as a minimal signal strength at 850 megahertz for the application. It is not necessarily an appropriate design criteria in the area.

Chair Seavey asked Mr. Simon, Esq. to be more direct with his questions. The Board had heard the answers to several of the questions several times before. Mr. Simon, Esq. responded that Mr. Pierson has now submitted a propagation at 850 megahertz that basically shows that the entire Borough of Mendham is currently covered. There are other applications pending such as Kings and Washington Corner, and on behalf of his clients, he wants to investigate what happens if the site goes live. He and his clients do not agree with the premise that 1900 is the worst scenario for which a build out should occur.

Responding directly to Chair Seavey on the question of the propagation standard that they would need to use, 850 or 1900, Dr. Eisenstein reported "both". One designs for the worst-case scenario because that is the weak link in the system.

Continuing, Mr. Simon questioned the model used for the 850 megahertz exhibits. Mr. Pierson did not remember the exact name, but explained that a long set of characters define the actual model name and it contains the particular losses for each clutter class and values. In terms of why he would not use the same model for 850 and 1900, he explained that 1900 acts differently than 800. For example what is lost going through a forest would be different. There are different parameters for each model that would coincide for the frequency band for which they are used. He has not provided the documentation on the parameters for Exhibits J & K. No drive test data has been submitted. Drive tests were performed at the same time as the 1900s were collected. The propagations match the drive test data.

Next, Mr. Simon, Esq. referred to Exhibits J and K and questioned whether there was any representation for less than negative 85 dBm. Mr. Pierson explained that there is a color gray that shows up to minus 95. The drive tests showed gray along Hilltop, Tempe Wick and Pleasant Valley. The submission does contain any readings from the Peapack-Gladstone facilities. In terms of the Kings site, he did not have any specifics as to whether AT&T intends to attempt to collocate. He would not estimate how much of the Borough would be covered at 85 dBm at 850 megahertz from the Kings site.

Mr. Lavigne, Esq. confirmed that AT&T attempted to reserve a spot on the Washington Corner site, but there is no reservation in place. Verizon declined to accept a check and grant them a reservation of space. Responding to Mr. Simon, Esq. on whether Mendham Borough would have coverage at 850 should AT&T collocate on the tower, Mr. Pierson

stated that at 850 megahertz, which is not design criteria, it would probably extend into Mendham Borough. He did not know to what extent. If they collocated there would still be a need for the Sisters of Christian Charity site, especially if there is a merger with T-Mobile as AT&T would then have almost three times the spectrum at 1900/2100 than they would at 800. T-Mobile customers would need to be added and there would only be 12 megahertz at 850 megahertz and much more of the higher frequency. Hypothetically, if Washington Corner Road is approved and AT&T collocated and used 850, which is not design criteria, Sisters of Christian Charity is still covering Hilltop and Pleasant Valley.

Addressing the potential overlap in sites for Mr. Simon, Esq., Mr. Pierson explained that a certain amount of overlap is needed. The sites are optimized to provide the correct amount of overlap for efficiency, provide the coverage, and fill all the gaps that they possibly can. He could not specifically define the overlap in Exhibits J & K as relate to the Sisters of Christian Charity at 850 mhz, but he thought it to be significant. The sisters of Christian Charity can almost see up to St. John's site. The Southeastern portion of coverage at St. John's down to about Thomas Road would be overlap. He believed the coverage was less than 50%.

Mr. Lupo, 17 Dean Road, questioned how many frequencies were demonstrated to the Bernardsville Board of Adjustment for Verizon. Mr. Pierson stated that it was Verizon Wireless's choice to present one at 850 based on the demographics of the area. It was a business decision based on patterns and foreseeing the future. In that area they have 10 and 20 acre lots. Dr. Eisenstein found that to be a bit strange as in the applications he has seen from Verizon recently, they have always been going on their two networks. Verizon did start at 850. Mr. Pierson added that in North Jersey, Cingular did not have a license and they roamed onto T-Mobile before the merger. Dr. Eisenstein continued that 850 is a legacy system, the original cellular system. That may have been Verizon's customer base, but he does not know the Bernardsville area and was not involved in the case.

Responding to Chair Seavey on whether it is unusual for an applicant to add their other frequency after they have gotten the approval, Dr. Eisenstein indicated that if they put up a dual-use antenna then all they would have to do is swap the radios which are down in the cabinets below. That would not be visible to anyone. He was not sure whether they would need any approvals just for the change in technology as nothing would be visible and nothing would change. If a single-use antenna were used, they would need to take it down and put up a new one. That might require Board of Adjustment approval. He thought it to be a very interesting question.

Addressing Chair Seavey's question to him, Mr. Lupo stated that the Bernardsville application, he believed, was for a dual band antenna at 800 and 1900. He also thought that they were mounting a 700 megahertz antenna on the tower. Dr. Eisenstein added that they are probably planning on putting the 1900 radios in later as given the topography, they are not going to need the coverage from 1900. It is a different region so they may want to have a confined coverage of 1900 and get more of an umbrella site at 850. He was not there, so he could not say for sure.

As Mr. Pierson had done the RF analysis for Washington Corner, Mr. Simon, Esq. questioned him on the plans for the antennas. Mr. Pierson explained that the antenna that they are putting up will be for all three bands, 700, 800 and 1900 in order to have the capability. Verizon made a decision from a design standpoint to only design at 850 for the site. When one gets closer to 287 or up toward Route 24, the design is for all three bands. This site is in the middle of the thoroughfares and the more populated areas. 850 would be one of the better frequency bands.

Mr. Pierson's testimony was concluded and Board heard from Dr. Eisenstein on the Pinnacle Report and his overall opinions on the application.

Dr. Eisenstein advised that he had reviewed the Pinnacle Report and the transcripts from the previous meeting. It is his opinion that the report was done correctly, and that it was completed in accordance with OET Bulletin 65 and the required formula. Mr. Collins does the worst case scenario and assumes that all radios are on all the time, 24 hours a

day, all operating at maximum power. He does not take into account any losses in the wires leading up to the antennas. He assumes that the whole power from the radios is going right to the antennas. On that basis where 100 percent is the limit, he comes up with a calculation of 1.3 percent of the 100 percent. It is 75 times below the applicable limit. The State of New Jersey has a limit five times higher than the allowable energy emissions. Satisfying the Federal also satisfies the State.

Dr. Eisenstein had one additional question for Mr. Collins dealing with the equipment. Mr. Collins responded that all equipment that they are using is FCC-compliant. Dr. Eisenstein concluded that if it was FCC compliant equipment, there would be no leakages and no emissions in accordance with the standards.

Beginning his overall summary of the application, Dr. Eisenstein stated that an appropriate design criteria for AT&T is negative 85 dBm. Where there is coverage less than 85 dBm it does not mean that there is no service. One can make and receive calls at lower frequencies, but that is not the way one designs a network. There needs to be leeway in the system to allow for such things as storms and extra traffic. The system still needs to work with a high degree of probability. The plots are meant to give a median level of coverage. Fifty (50) percent of the time it is going to be better and 50% of the time it is going to be worse. Drive test data only gives a snap shot of what is there at the instance one goes by that spot.

The lowest level at which the phones would work is about negative 103 to 105 dBm. There are losses in signal going across the distance, the terrain, bouncing off objects and going through the trees. Working back from there, a good design criteria is about negative 85 dBm. There have been court cases in New Jersey where the courts have said that a negative 85 is an appropriate design criteria. He uses that as a level.

Dr. Eisenstein continued that Exhibit A-1 shows the existing coverage that AT&T has in the area around Mendham Borough at 1900 megahertz. It shows a clear gap in the area both to the east of the sisters of Christian Charity site, to the west, and to the northeast of the site. The propagation ameliorates the gap to the east, somewhat to the south, and somewhat to the northeast. It does not fully cover Main Street. There is still a residual gap in Mendham Borough that extends beyond the Borough into Mendham Township going to the east. His conclusion is that there is a gap in coverage. The proposed site ameliorates the gap, but does not solve it completely. There is likelihood that one will get good voice coverage, good E-911 coverage and probably decent data all through the area as shown on Exhibit D of A-1, the area of green.

Mr. Lavigne, re-called Peter Tolischus, Planner, to review the Wireless Ordinance and why the application should be approved.

Mr. Tolischus testified that the application meets the overall goals and objectives in the Wireless Telecommunications Ordinance. Referring to the four levels of criteria, he stated that the Sisters of Christian Charity site is contained in number four of section 215-12.6B(1) which references West Morris Regional High School property and other public and private institutional sites in the 3-acre or 5-acre residential zones. The site is an institutional use and is definitely permitted within the criteria.

Continuing with the conditional use criteria, Mr. Tolischus stated that there no visual impact. They are not requesting a new cellular tower or putting antennas on a rooftop edge or even outside of the cupola. Everything is located within the facility. There is no noise or increase in traffic or population. There is no building. The cabinets will be inside the facility in the attic area rather than in a new compound. There is no pollution. There is no use of the utilities other than some electric. It is an unmanned facility. There are no negative impacts.

In terms of where they meet the spirit of the Telecommunications Ordinance, he referenced (a)3, "Preserve and protect the general visual historic and natural environment within the Borough of Mendham and prevent adverse visual impact from wireless telecommunications towers, antennas and other facilities within areas zoned or used for residential purposes along public streets, etc." By placing everything within the building

and the cupola they meet the criteria. In terms of number 5, referring to the minimization of the height of towers, by using this site they have precluded having to construct a monopole somewhere within the 112 acres or outside the 112 acres. For number 6, they are mitigating any adverse impact by using the cupola.

It was Mr. Tolischus opinion that the conditional use approval could be granted without substantial detriment to the public good or without substantially impairing the intent and purpose of the Zone Plan and the Zoning Ordinance. In terms of the site plan approval, it could also be granted without substantial detriment to the public good and without substantial impairment of the Zone Plan and Zoning Ordinance for the same reasons.

Discussing the need for a height variance, Mr. Tolischus agreed with Mr. Humbert's review memo dated January 7, 2011 in which he stated it would probably not be needed for this installation. There is nothing visible, and they are not exceeding the height of the existing cupola. They are staying below the height of the cupola and within it. He thought that a height variance would be required by something that is visible or creates some impact.

Continuing with the assumption that a D Variance might be required, but not indicating that it was, Mr. Tolischus referred to the both the positive and negative criteria required as proof. The positive criteria would benefit the public welfare in the community. In accordance with the Smart Supreme Court case in New Jersey, if the applicant has an FCC license, they have satisfied the welfare criteria as providing prompt and reliable information is essential to the public welfare. The second criteria is that the sites should be particularly suited for the use. Although it refers to cellular towers, he would apply it here even though they are totally within the cupola. The Supreme Court has said that RF testimony suffices, and if there is a gap in the area, that in itself meets the second criteria.

Summing from a planning viewpoint, Mr. Tolischus stated that the applicant was able to find a facility and place everything within the cupola totally removed from any visual impact. The cupola sits on 112 acres. It is some 400 feet from the nearest public road, and the cupola is in the center of the 112 acres. It is a wonderful site for this type of use.

In terms of the negative criteria, the Supreme Court has advised to use the Sica case criteria. It has a four-part balancing test between the positive and negative criteria. Part one is to identify the public interest. He has done research on the crime stopper aspect. Number two is to identify any detrimental effects. It is one of the very few sites that he has been involved with where there are not any detrimental effects to mitigate. Number three is what can be done to improve the site. They will match the screening at the cupola. Number four is on balance. The positive criteria by far outweighs the negative criteria which he believes to be non-existent.

Responding to Mr. Lavigne, Esq. on whether he thought the application to be a D Variance or a conditional use application, Mr. Tolischus testified that based on his reading of the Ordinance, it is a conditional use application.

Mr. Germinario, Esq. questioned whether the installation will meet the setback, lot area and other bulk requirements that are conditional use standards in the Ordinance. Mr. Tolischus explained that in accordance with section (c) 8 of the Ordinance, the setback requirement is at least 150 ft. from the street right-of-way line and not less than 250 ft. from any residential dwelling in any direction. The front yard is 783 ft. The side yard is 425.7 ft. The rear yard is 1,930.6 ft. The acreage requirement is not less than the minimum required for the zone which is five acres and they 112 acres.

Addressing Mr. Germinario's follow on question on whether the facility is necessary to avoid prohibiting or having the effect of prohibiting the provision of wireless technology services, Mr. Tolischus testified that based on the testimony of both Mr. Pierson and Dr. Eisenstein, a definite gap has been identified. The answer is yes.

Responding to Mr. Humbert on whether they looked at any other sites as cited in his report, Mr. Tolischus stated that he did not look at those specifically, but there is a

religious facility on College Avenue at Rutgers for which he did a site. The antennas were hidden in the cupola and the same affect was achieved.

Chair opened the meeting to the public for questions.

Addressing a series of questions from Mr. Simon, Esq., Mr. Tolischus stated that he had testified in favor of cell facility applications for fifteen years. He has never testified in opposition to an application for a cell facility. He has found that about 30-40% of the applicants failed to meet the applicable criteria for use, bulk, variance or Site Plan approval. Generally it is a setback. In urban cases a roof top antenna may exceed the height requirement. He has never declined a case because he felt the negative impact was too great.

In terms of the uses on the property, he believes there is the Assumption College, the Sisters of Christian Charity and living residences. He did not know how many non-conforming buildings or uses there are currently on the site. Given that there were two previous variances for the site, he assumes that the building is non-conforming in the five acre zone. He did not know how many homes and people are in the coverage gap or the number of cars a day on the road. He has not done any independent investigation as to the extent of any available collocation for other carriers. He did not attempt to identify alternate locations. He was not aware of any current AT&T plans to collocate or install an additional site in Mendham Borough, Bernardsville, Chester, Mendham Township or Mount Freedom. He did not do any independent investigation on other sites or priorities identified in the ordinance. He based his statement on the need on testimony from Mr. Pierson and Dr. Eisenstein.

Addressing his involvement with reviewing the location at Mendham High School for a previous application at the Kings Shopping Center, Mr. Tolischus explained that he took a series of photographs to determine what antennas would look like on the one particular section of the building. As far as he knows, nothing went any further. In terms of whether the site would meet the criteria under the Telecommunications Ordinance, he did not think it went much further than him taking a picture. It would meet Number 4 as a private/educational/institution. He was not sure it would meet Number 3 as a municipal owned property.

Mr. Simon, Esq. addressed another series of short questions to Mr. Tolischus dealing with knowledge of the search ring, AT&T's selection of the site and timeframe, and other locations. Mr. Tolischus responded "no" to each. Responding to Mr. Simon, Esq. on whether the Sister's site, if approved, would then become a first^t priority site as an existing WT facility site, Mr. Tolischus, explained that in accordance with Number 1 he thought it would mean existing towers.

Answering questions dealing with the Sister's site as a pre-existing non-conforming use, Mr. Tolischus did not view installing the equipment facilities and the antennas as a change of use or an expansion of use that would warrant a Use Variance. They are not doing any external expansion of any structures. Also under (b)3 of the ordinance a "WT facility is permitted on lots with other principal uses. WT facilities may be located on either lots containing no or other principal uses, or on lots containing one or more separate principal uses." They are another principal use on the lot. Mr. Simon, Esq. referred to court cases, for example, a restaurant to a discotheque, for which the nature of the use has changed, but not the facility. The Appellate Division has considered them pre-existing non-conforming uses.

There being no additional public questions, the public session was closed.

Applicant concluded their case and requested final statements from the objecting attorneys and public. Mr. Lavigne, Esq. requested the right for final summation.

Mr. Simon, Esq. announced that his clients would like to bring in two witnesses, a radio frequency expert and a planning expert in opposition to the application. Chair and Mr. Simon, Esq. exchanged opinions on the late nature of the request and the right for the public to be heard.

Mr. Riskin, Cromwell Lane, stated that Mr. Simon, Esq. is representing two of his neighbors that could not be present given the special meeting date in May. The neighbors have serious concerns. He continued that no surveys were done of the residents in the area to determine whether they had coverage. Chair explained that the issue had been explored and the propagation maps are the support. The Board is bound by what the courts have determined.

Mr. Riskin stated that AT&T has approached the board with a minimum level versus satisfying all of their inquiries and those of the people present. He believed that AT&T should rise to a higher standard. Mr. Lavigne, Esq. stated that they have voluntarily submitted additional supplemental coverage plots for a design standard that they have not even adopted to try to answer questions by the Board.

After discussion, Mr. Seavey proposed that with the time remaining they hear from everyone outside of Mr. Simon, Esq. who has questions. At the next meeting, to be fair to the neighbors, which includes Mr. Simon and his clients, the Board will provide a timeframe to wrap up any testimony of additional people. The Board would then move to closing arguments. Mr. Simon, Esq. stated that he could conclude in one evening, but would not commit to timeframes for the witnesses.

Mr. Lavigne, Esq. pointed out two things for the Board's consideration. If the application were viewed as a conditional use application, under the MLUL the board is supposed to take action within 95 days after deeming the application complete. Even if it were viewed as a Use Variance this board is supposed to take action within 120 days after it was deemed complete. In addition there are shot clock time periods within which boards are supposed to take actions with respect to applications. In accordance with that, the board should have taken action in the time already spent. The time that has been spent has been at least as much about an application at King's that was denied and an application that is ongoing in a different town for another carrier. It has no relevance with what AT&T is doing, and it has been prolonged through a largely, if not entirely, irrelevant questioning by the objector's attorney. They are now postponed another two months.

Mr. Germinario, Esq. advised that issues with Mr. Simon, Esq. not being prepared to proceed are well-founded, but he does represent clients and members of the public who have an interest and a right under the Municipal Land Use Law to have their comments and their point of view represented in the record. It is incumbent on the board to try to be expeditious, although perhaps not to the exact time limits of the MLUL. The reasons do not lie with the board, but other circumstances. He advised that the testimony should be allowed, but limited to a single evening and to require that both the applicant and the objector complete their cases at the next meeting in July. Chair agreed and announced that when the agenda was set for the July meeting, he would determine the appropriate time allotments.

Mr. Simon, Esq. agreed to comply with the schedule. Under the MLUL the objectors have the right to present a case and the right to rebut whatever evidence is presented. The questions that were asked were relevant to the issues that need to be decided by the Board. In terms of submitting exhibits ten days before the next meeting, it was not required, but he would do so. He will also advise Mr. Lavigne, Esq. the names of the witnesses.

Chair returned to the public session.

Mr. Frank Lupo, 17 Dean Road, stated that he is in support of the application, but he does not support the presentation of the coverage models or the way it has been depicted. He does support the mounting of the antennas in a hidden cupola. Mr. Lupo read a written two page statement that was supported by Exhibits L3 and L4.

His statement referenced the proposed acquisition of T-Mobile by AT&T and the need for a long term strategy. His opinion was that it would add capacity. Addressing Mr. Palenstina's question on the capacity issue versus Mr. Pierson's testimony on increased

“traffic”, Mr. Pierson stated that if they merge there will still be the same number of users, and they will still have the same total number of frequencies except that the frequencies are going to be weighted towards the higher frequencies three to one.

Continuing with his statement, Mr. Lupo indicated that Mr. Kreisberg articulated that power transmission towers are available to the east if additional service is needed near the gateway of Mendham. They are within the first priority. He also spoke of the distance to the nearest residence as about 1400 ft. versus the 255 ft. for a 130 ft. tower at the King’s Shopping Center. Referring the height for this application at 85 ft., he contrasted that with comments by Mr. Pierson that at 85 ft. the trees would be a problem. Addressing Mr. Germinario, Esq. on his rationale for discussing King’s, Mr. Lupo expressed that he is comparing and contrasting to show that the Sister’s application is a clear win for the community. Mr. Kreisberg should be complimented for thinking outside the box and using existing structures not towers.

Referencing the Telecommunications Act of 1996, Mr. Lupo expressed that we could not prohibit wireless services or favor one provider for another, but it does not state what frequency or frequencies on which those carriers need to provide service. It also does not mandate or prohibit seamless coverage. The carrier’s build out can be determined from their licenses, but where antennas will be mounted and whether they will find upgrades to existing antenna are not known. Since the plans for upgrades at Conifer and Daytop are not known, we do not know whether their coverage would be improved.

He continued that 800 megahertz is a primary spectrum due to terrain in the Mendham area. There is clear evidence in Bernardsville where Mr. Pierson only presented 800 megahertz. Phones are dual banded. He read from the BOA minutes of December of 2005 in which Dr. Eisenstein made a comment related to filling a gap with 800 mgh. It appeared that if the gap were filled, the customer could operate at either band and they would not know the difference. Given this statement, with the Sister’s propagation, models showing the area covered seamlessly with both 1900 and 800 megahertz, there should be no reason why we would need additional coverage or additional antenna or cell towers anywhere else in the community. The applicant can switch from 800 to 1900 mhz and the customers would not know the difference. He believes the gaps in the T-Mobile application will be filled through an acquisition of T-Mobile by AT&T.

Mr. Lupo summarized by stating his opinion that if everyone agrees the gaps are covered, the application would be advancing and protecting the general visual, historical and natural environments within the Borough of Mendham.

Chair questioned whether Mr. Lupo was implying that at the time of the previous application Dr. Eisenstein’s testimony was that it is not necessary to propagate at 1900 and only at 850. Mr. Lupo agreed. Dr. Eisenstein stated that he did not agree with the interpretation today. There have been a number of changes since that time, and he would need to review the case. He would suggest that the phones were not dual-banded in January 2005. There are still some single frequency legacy phones. Technology and FCC directives have changed. Today, if carriers have two licenses, they have the right to cover the gaps at whatever license they have. From the viewpoint of the board, you should treat them as two separate companies even though there is one application. The licenses are awarded and managed separately. A provider has an obligation to cover all the bands for which they are licensed.

Mr. Riskin, Cromwell Lane, made a statement on how the volunteerism of the board was appreciated, but part of the appreciation is to place the confidence of the public in the board to come up with a decision that is going to be fair, equitable and just to all of the applicants. He continued that no one wants to live next to a warehouse of antennas. That is exactly what the application is. He questioned how many of the board members lived within 318 ft. of an antenna warehouse. He again requested that his neighbors have the opportunity to be heard, and they could not be at the meeting. There was further dialog among the Board members and Mr. Riskin on the scheduling of the meeting and the presence of the neighbors. Chair Seavey concluded the discussion and stated that a plan had been discussed. It was time to move on.

Responding to Mr. Peck on what his objection was to the application, Mr. Riskin stated that the testimony that has been presented is inaccurate. There was only one drive by set of data presented to the Board. The application was filed in December of 2010 and at the end of May 2011 there has only been one drive test. Responding to Mr. Seavey on why AT&T would want to put in the antennas if there is not a gap, Mr. Riskin responded that they are warehousing and are going to sublet the space. It is a real estate venture for them.

Chair stated that if there was no need, it would need to be proven. He related the story of Brookrace in the Township and how a Training Center was fought thinking it would always remain a Boy Scout Camp. Today it is a development and the neighbors were concerned about schools, traffic, etc. He reiterated his desire to do what is right for Mendham.

Chair and Mr. Riskin exchanged dialog on potential health issues and government standards that the Board needed to accept. Chair indicated that new technology would require that antennas/towers come down. Mr. Riskin also raised the issue of the effect on real estate valuations. Board dialoged with Mr. Riskin on their need to remove the emotion and understand the facts, FCC standards, and what they have been advised on drive testing. They need to work within the parameters.

Chair announced the hearing would be carried to the Wednesday, July 6 regular meeting of the Board. There will be no further notice. Chair stated that they would anticipate voting that evening.

#####

EXECUTIVE SESSION:

Matter of Litigation - T-Mobile Northeast LLC and Verizon Wireless vs. Borough of Mendham Board of Adjustment

Mr. Seavey read the following resolution:

**BOROUGH OF MENDHAM
BOARD OF ADJUSTMENT
MORRIS COUNTY, NEW JERSEY**

BE IT RESOLVED by the Board of Adjustment of the Borough of Mendham, in the County of Morris and State of New Jersey as follows:

WHEREAS, it is necessary for the Board to discuss matters relating to T-Mobile Northeast LLC, et al., vs. Borough of Mendham Zoning Board of Adjustment, docket no. MRS-L-2719-10PW (hereinafter referred to as the "Litigation"), which matters are permitted to be discussed in closed session in the absence of the public pursuant to section 7.b. of the Open Public Meetings Act (chapter 231 of the Public Laws of the State of New Jersey for 1975); and

WHEREAS, the Board has determined that it is necessary in the public interest that the matter(s) in fact be discussed in closed session, and has determined that the results of the discussion can be disclosed to the public when all issues involved in the Litigation have been resolved.

NOW, THEREFORE IT IS RESOLVED that the public be excluded from the ensuing portion of this meeting, during which only the aforesaid matter will be discussed.

Mr. Peck made a motion to enter Executive Session. Mr. Ritger seconded. All members being in favor, the Board moved to Executive Session at 10:30 p.m.

#####

Board returned to public session and there was no additional business.

ADJOURNMENT

There being no additional business to come before the Board, on motion duly made, seconded and carried, Chair Seavey adjourned the meeting at 11:20 p.m. The next regular meeting of the Board of Adjustment will be held on Wednesday, June 8, 2011 at 7:30 p.m.

Respectfully submitted,

Diana Callahan
Recording Secretary