

**MINUTES OF THE  
MENDHAM BOROUGH BOARD OF ADJUSTMENT  
SPECIAL MEETING  
July 16, 2013  
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 7:35 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 the Daily Record on June 27, 2013 in accordance with the Open Public Meetings Act and was posted on the bulletin board of the Phoenix House.

**ROLL CALL**

Mr. Palestina – Absent	Mr. Smith – Absent
Mr. Peck – Present	Mr. Ritger - Present
Mr. Peralta – Present (Pilshaw Only)	Mr. McCarthy, Alt I - Present
Mr. Schumacher – Absent	Mr. Germinario, Alt II – Present
Mr. Seavey – Present	

Also Present:

Mr. Germinario, Esq., Attorney  
Mr. Hansen, Engineer  
Mr. McGroarty, Planner

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**APPROVAL OF MINUTES**

Mr. Ritger made a motion to approve the minutes of the May 7, 2013 regular meeting of the Board as written. Mr. Germinario seconded. All members being in favor, the minutes were approved.

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**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.

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**HEARINGS**

**Pilshaw, John & Susan** – Hardship Variance  
Block 1902, Lot 13, 7 Prospect Street (Historic District)

Present: Susan Pilshaw, Applicant  
John Pilshaw, Applicant

**Completeness:** Mr. Hansen reviewed the Ferriero letter dated June 13, 2013 and recommended appropriate waivers as outlined.

Responding to Mr. Ritger on why the setback line was recommended to be waived, Mr. Hansen advised that the dimensions of the property have been provided, and it is obvious that the unit would be located in the sideyard setback. The Zoning Officer has made that determination.

Mr. Seavey made a motion to deem the application complete. Mr. Peralta seconded.

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

In Favor: Peralta, Ritger, Peck, McCarthy, Germinario, Seavey  
 Opposed: None  
 Abstentions: None

The motion carried. The application was deemed complete.

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**Hearing:** Mr. Germinario, Esq. advised that the public notices were in order and that the Board had jurisdiction to proceed.

Mrs. Pilshaw testified that they were seeking a hardship variance to place an air conditioning unit on the eastern side of their home where the gas, electric meters and telephone lines are currently located. The unit will be placed next to the home behind a 6 ft. stockade fence not visible to neighbors or the street. It will be located 60 ft. from their neighbor's home. The neighbor has provided a verbal approval. They have received approval from the Historic Preservation Commission.

Continuing, Mrs. Pilshaw stated that the noise level of the unit is 67 decibels which is equivalent to a raised voice from a distance of 6 ft. . The unit cannot be placed in the front of the home due to a one story front portch. In the rear a porch also limits the placement. It would also be visible to the neighbor to the west. If placed in the rear, it would partially block the basement and cause a problem in backing out of the driveway. Their lot is very narrow with a 100 year old home. The lot is only 50 ft. wide and the home is only 29 ft. wide. The driveway on the west side is 11 ft. wide and the land on the east side is 9.9 ft.

Concluding, Mrs. Pilshaw stated that they believe the variance could be granted without substantial detriment to the public good, and it will not substantially impair the purpose of the zone plan and zoning ordinance.

Mr. Seavey summarized that there is a pre-existing condition and that their property is narrower than most. There is a limited amount of space on the side, one side being the driveway. There is a fence that protects most of the visible impact. He would like to see the fence maintained. Mr. Seavey also complimented the applicant on the thoroughness of the application.

Mr. Peralta commented that there was a concise explanation of the hardship. Mr. Peck confirmed that the unit was not replacing an existing unit. Messrs. Ritger, McCarthy and Germinario agreed that it met the criteria.

Mr. Seavey noted that it is unfortunate that the applicant had to come for such a small item; however it is important as another applicant may come to the Board and want to place it very near the window of a neighbor. In this case there is separation.

Mr. Germinario, Esq. identified two conditions: (1) the fence should be maintained and not removed, and (2) the minimum distance from the property line should be identified. Mr. Seavey suggested that the distance be stated to indicate that it should be placed as close to the home as the manufacturer permits. Mr. Ritger recommended also setting a distance from the front so in the future it would not drift. Applicant agreed to provide a distance from the corner of the home back.

Mr. Germinario made a motion to approve the application with the conditions identified. Mr. McCarthy seconded.

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

In Favor: Peralta, Ritger, Peck, McCarthy, Germinario, Seavey  
 Opposed: None  
 Abstentions: None

The motion carried. The application was approved. Mr. Germinario, Esq. will prepare a resolution for the August 6, 2013 regular meeting of the Board.

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Mr. Peralta recused from the Board for the New Cingular Wireless application and the discussion dealing with T-Mobile/Verizon.

**COMPLETENESS****New Cingular Wireless PCS, LLC (AT&T)** – Site Plan and Use Variance  
Block 1801, Lot 5 & 5.01, 82 West Main St.

Present: Christopher Quinn, Esq., PinilisHalpern LLP, Attorney for the Applicant

Mr. Quinn, Esq. provided a summary of the application stating that it is an application for an expansion of antennae on an existing cell tower at St. John the Baptist. AT&T has had facilities on the tower since 1996. They are in the process of upgrading facilities to accommodate 4G that will provide additional high speed transmission. They are proposing to add an additional 6 antennae to the existing 6. The antennae will not be visible, and there is no ground disturbance. Additional equipment will be added within the shelter. The coverage pattern will not be changed. In terms of relief, the Zoning Officer has determined that they require a D variance as they are expanding non-conforming conditions. They are requesting various waivers against the Application Checklist as there is no ground disturbance. They are also requesting waivers for certain submissions against the Wireless Telecommunications Checklist as they have coverage, but are upgrading service.

Mr. Hansen reviewed the Ferriero letter dated July 8, 2013 outlining the recommended waivers against the Application Checklist. They did not have any objections to those waivers as nothing was changing from a site plan perspective, and there was no land disturbance. In terms of the Wireless Telecommunications Checklist, he advised that the applicant was looking for waivers associated with such items as Needs Analysis, Tests for Signal Coverage, Radio Frequency Studies, Identification of Other Providers, and Visual, Environmental Assessment and Exterior Colors of Facilities. The Board would need to determine if they wanted to waive this information for completeness only as they are just adding antennae.

Responding to Mr. Seavey, Mr. Quinn, Esq. stated that they are adding six new antennae at a new frequency. Six currently exist for 2G and 3G. Mr. Seavey questioned whether there would be less room for other carriers at the site. Mr. Quinn, Esq. advised that the applicant leases for vertical height. He believes there are currently more than three carriers at the site. The frequencies would not interfere with any other carriers. They are separate licenses operating at specific frequencies. Mr. Seavey stated that while the waiver requests seemed reasonable, he would not want to give up the option of obtaining the information later if needed.

Mr. Seavey also noted that upon visiting the site he saw staining on the upper portion down the face of the stucco that should be fixed. There is also a portion of the driveway that is completed in pavers and a portion that has been washed out. He recommended that the pavers be extended to the gate. Landscaping is also overgrown. He requested that Mr. Hansen review.

Mr. Ritger expressed his concern on granting the waivers for the Telecommunications Checklist items. The Board would need to have the information to determine the need that is fundamentally part of the Telecommunications Ordinance. Mr. Quinn, Esq. responded that if they provide an Exhibit now, it shows white where there is no coverage and green where there is. The Board has seen it. They could do it in terms of the different frequency band widths. The law says to look at it from a holistic perspective. The service is being enhanced. Mr. Ritger responded that the Board needs to know if there is a need. He continued that the need for 4G should be justified along with the benefit of 4G. They should show 4G sites and prove the need.

After a short discussion, it was determined that the applicant would provide maps dealing with the 4G need and coverage to the Board as part of the Completeness requirement. The maps would need to be provided a minimum of 10 days prior to the August 6 meeting.

Mr. Seavey made a motion to deem the application complete with the provision that the applicant provide the maps required a minimum of 10 days prior to the August 6 meeting. Mr. Peck seconded.

ROLL CALL: The result of the roll call was 5 to 0 as follows:

In Favor: Ritger, Peck, McCarthy, Germinario, Seavey  
Opposed: None  
Abstentions: None

The motion carried. Pending receipt of the required information, the application will be scheduled for a hearing at the Tuesday, August 6 regular meeting of the Board.

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**OTHER BUSINESS****T-Mobile/Verizon** – Discussion of Alternative Cell Tower Locations

Present: Richard Schneider, Esq.- Vogel, Chait, Collins & Schneider  
Attorney for the Applicant  
Robert Foley, Engineer for the Applicant

Exhibits: A-1: Set of 6 drawings: Site Plan 2/10/12 Revision #10  
A-2: 1 inch = 200 ft. aerial photograph provided by DEP  
A-3: 2001 Mendham Borough Resolution of Approval for 9 Parking Spaces  
A-4: Site Plan  
A-5: OPRA request to the NJDEP for DEP permits

Mr. Germinario, Esq. provided a context for the discussion with the Board. He explained that in the litigation that took place with the Supreme Court, the supplemental order of August 10, 2011 provided the applicant with two options: (1) They could request that the Board open the previous record to consider one of two alternate locations either at the rear and westerly yards of the Racquet Club or (2) They could determine that there is not a suitable site at the Kings location and advise the Board at a public hearing. He believes that the applicant will provide information dealing with the second option. As the applicant was required to notice for the Board discussion, Mr. Germinario, Esq. had reviewed the public notices and advised that the proceeding could continue.

Mr. Schneider, Esq. continued with a summary of the procedural history. He stated that this is an application in conjunction with the original request to site a wireless telecommunications facility at Block 801, Lot 20 at the Kings Shopping Center. The original matter was heard at 22 previous hearings on the application.

In 2007 the applicant sought approval to site a wireless tower behind Building C in the shopping center. During the course of the hearing, some members of the Board made a request to relocate the tower in front of the Tennis Club. There was no change to the design. During the public hearing the applicant indicated that there were environmental constraints. At the conclusion of the hearing the application was denied on the basis that the applicant should have investigated placing the tower in the rear yard based on a provision in the ordinance. The denial was appealed. After the court review, an order remanded the application back to the Board for consideration of a location in the rear yard or the westerly side yard of the Racquet Club.

Since the order, the applicant has conducted their due diligence and worked several issues. The property is set up such that there are separate lease rights to the Racquet Club. There was a need to investigate whether they would have the right to lease in the area. Additionally, they considered whether a site plan could be designed at that location. Most critically they needed to investigate whether, should the property be available for lease and should the site be suitable and acceptable to the Board, could the governmental permits required, primarily those from the NJDEP, be obtained. They also were willing to consider any other feasible locations in good faith. They looked at whether the police station would be available, but have obtained a “no” from the Borough.

Overall, the applicant would be willing to locate near the Racquet Club, but the applicant’s experts do not believe that they can obtain the wetlands permits for the location. They had obtained extensions to the court order in order to be able to work through the issues. The purpose of the meeting is provide one witness to testify as to why they believe the wetlands permits cannot be obtained.

Mr. Robert Foley had been qualified as a witness during the previous hearings. He explained his change in employment over the last several years. Mr. Seavey clarified that the 2007 wetlands letter was prepared when Mr. Foley was with CMX. Mr. Foley stated that he had testified when he was employed with CMX in 2008.

Mr. Foley entered Exhibit A-1, site plan dated 2/10/12. He identified the area in the northwestern part of the property as a potential location for the tower. The general intent, given no potential regulatory issues, was to use the existing paved area in the side yard of the Racquet Club. He was aware that the site was a “go” from the leasing perspective. They knew that the location was adjacent to wetlands and that permits would be required.

Entering Exhibit A-2, the DEP aerial photograph, he identified the stream channels and ditch channels that exist in the area that are tributary to the riparian buffers and wetlands. The 2007

letter noted this. The wetlands scientist also conducted an on-line search done at the time of the letter. It shows areas of indigenous habitat that almost always trigger an exceptional resource category designation on wetlands in proximity. Mr. Schneider, Esq. clarified that a letter dated December 4, 2007 wetlands feasibility review letter had been re-submitted to the Board for this meeting.

Responding to Mr. Seavey as to whether there is a line, Mr. Foley stated that they do not have an official line from DEP. At this point it has been by inspection and reasonable certainty. Mr. Seavey questioned as to how they would proceed without the official documentation prepared by a certified engineer that flagged it and surveyed it. Mr. Schneider, Esq. advised that he could make that determination by inspection. Mr. Foley stated that the transition line is likely inside the building. Mr. Seavey understood for the location on the side, but expressed that a line would aid in the discussion of the feasibility of other locations.

Mr. Foley stated that, in his professional opinion, there would be no question that wetlands permits would need to be obtained to develop the site. There are regulations that determine whether a permit can be granted. Assuming that the improvements such as the parking lot have been lawfully constructed, redevelopment permits could be obtained from the DEP. The area would be subject to "Permit by Rule" as it is within a riparian zone or buffer. This would require a 14 day notification prior to construction to advise that a previously disturbed paved area will be used.

Mr. Foley continued that there is an "however". Using the aerial photo, Exhibit A-2, and referring to a previous map from 1995, it was noted that the area was not previously paved. It was an undisturbed grass area providing maintenance and fire access. There was an OPRA request submitted to the DEP for any wetlands permits pertaining to the property. There were none found. Based on an OPRA request for the Borough's development records, it was determined that the 2001 Site Plan or Resolution Approval to add nine parking spaces and add a side entrance for Kessler, made no mention of the fact that wetlands permits were to be obtained. It was probably an oversight in a much simpler time.

Mr. Schneider, Esq. entered Exhibit A-3, the Borough 2001 Resolution of Approval; A-4: The 2001 Site Plan; and A-5: The OPRA request to the NJDEP for the DEP permits.

Mr. Seavey summarized his understanding that there are wetlands and a transition area. Both are part of the parking area, and hence the potential location of the cell tower. We have an area for which there were no permits. Responding to Mr. Schneider, Esq. that given the facts that the area was not disturbed in 1989 when the wetlands regulation came in, but the area of the potential location was constructed in 2001, and there were no permits, Mr. Foley testified that he did not believe they could obtain a wetlands redevelopment permit as the areas in question were not lawfully disturbed. To qualify it would have to have existed prior to the wetlands regulations of 1989. It is highly speculative, but given the resource category, there may have been some permits that could have been obtained at that time. Today in the regulatory climate, he would unequivocally say that it would not be possible to obtain the general permit. It would need to be an individual permit which would require an extensive review, and given the magnitude of the shopping center paving, they would not qualify.

Mr. Ritger clarified that the building had been constructed around 1979 and vegetation removed in the rear before the regulations, but the regulations requiring permits came into effect in 1989. Responding to Mr. Seavey on the riparian buffer regulation dates, Mr. Foley stated that they were at the end of 2008. Mr. Hansen clarified that mostly everything in Mendham Borough classified as wetlands will have a 150 ft. riparian buffer. The riparian buffers regulations from 2008 are not as much an issue as the wetlands regulations that came into effect in 1989.

Responding to Mr. Hansen on the location of the riparian buffer, Mr. Foley stated that the limit of the area is about the vegetation line on the west side. Addressing Mr. Seavey on whether there were other areas in front of the Tennis Club that were paved after 1995, Mr. Foley stated that they were not aware of any. Paved areas directly south of the tennis club and in proximity of Buildings A, B and C previously existed.

Addressing Mr. Schneider, Esq. on the other area he believed permissible by the DEP, Mr. Foley stated that it is located north of Building A and west of Building B, Kings.

Responding to Mr. McCarthy, on whether any of the wetlands testimony had been presented to the Board prior to its making a decision, Mr. Foley stated that the only testimony related to the discussion of the December 2007 letter that was the review of the wetlands scientist site walk was review of the bottom line data. Mr. Schneider, Esq. added that when the previous Chairman

inquired about the location in the general area under discussion, there was some discussion that the property was subject to environmental constraints.

Chair opened the meeting to the public for questions on the wetlands testimony.

Mr. Robert Simon, Esq., Harold Law, representing Mr. Irving Isko, questioned whether the order was limited to existing paved area. He confirmed that no LOI was prepared or applied for. In terms of any investigation, Mr. Foley stated that there is the letter of December 2007 prepared by CMX. There has been on-going review of the wetlands that have been brought in by the applicant. Since 2011, no additional permits have been applied for.

Responding to Mr. Germinario, Esq. on whether the footprint of the tower might reduce impervious coverage, Mr. Foley stated that it is an interpretive item by DEP. Typically for towers, they are picking up pavement and putting in stone, but the DEP does not look at it as they would grass. Technically it is a reduction of a few hundred square feet. Addressing Mr. Germinario, Esq. on whether the longevity of the time the pavement has been in place would impact the decision, Mr. Foley stated that from the lay person perspective it makes sense that there is no great impact, but from a DEP perspective, it would probably not be favorably received.

Chair opened the meeting to for brief comments by the public. Mr. Germinario, Esq. advised that there is no proposed action before the Board. The context is informational. Any information that the public has that supplements the feasibility of the sites at the locations discussed would be relevant, but the need for the tower or any other aspects is not within the scope. The public would be heard when/if the hearing would continue.

Mr. Frank Lupo, 17 Dean Road stated that T-Mobile is a new corporation, and not the company we knew several years ago. It is a new corporation and a new technology. It is 4 billion dollars wealthier in investing in 4G. The application is for 2G. When one looks at the Daytop facility there are no 4 G or 3 G antennae there. Additionally, T-Mobile acquired Metro PCS, the largest user of DAS. Now T-Mobile has the most significant nodes. They will leverage DAS in areas difficult to zone. All information is backed with facts. They also have new antennae that provide 20% more coverage. While this application came down to moving the tower to a different location, T-Mobile has transitioned to new technology. AT&T has come before the Board to upgrade their antennae. T-Mobile is also looking to purchase 600 mghz.

Mr. Schneider, Esq. objected to the comments as they were beyond the scope of the discussion. He has limited the discussion to wetlands. Mr. Lupo stated that the 22 hearings have no relevance to the new company.

Mr. Germinario, Esq. stated that they are to discuss the two locations at this meeting. Should a new application be filed, then there will be time to present this type of information.

Mr. Robert Simon, Esq., Herold Law, stated that the prior 22 hearings speak for themselves. Any effect or determination as to the availability of the police station is irrelevant. It is not part of the order or the remand procedures. Mr. Germinario, Esq. advised that the reference was made as a good faith effort. Mr. Simon, Esq. again stated that it is irrelevant. It is clear there are no locations that are feasible. The only thing the applicant has been ordered to do is to advise the Board at a public meeting whether there are sites to the west and rear at the Racquet Club. Now the applicant could take an appeal or file another application. The proceeding is not to look at any other sites.

There being no other comments, the public session was closed.

Mr. Germinario, Esq. advised the purpose was for the applicant to inform the Board that they have done an investigation, and the two possible sites from the remand and possible reopening of the original application are not feasible for location and construction of a cell tower. The judge's supplemental order should become final, and the applicant will have a choice to proceed with an appeal or to file a new application. The Board is not in any position to take action.

Responding to Mr. McCarthy, Mr. Germinario, Esq. advised that the time to appeal will begin when the final order is issued. There will be an appeal period of 45 days.

Mr. Schneider, Esq. stated that the final implications are up to Judge Weisenbach. He does not concede that the judge will automatically issue an order.

Mr. Ritger stated that he feels the Board has one side of the story, and he would like both sides. He would like to see a Letter of Interpretation. Mr. Germinario, Esq. answered that Judge

Weisenbach's decision indicates a unilateral decision by the applicant, and advisement to the Board. The Board cannot second guess the decision.

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**ADJOURNMENT**

There being no additional business to come before the Board, on motion duly made, seconded and carried, Chair Seavey adjourned the meeting at 9:25 p.m. The next regular meeting of the Board of Adjustment will be held on Tuesday, August 6, 2013, at 7:30 p.m. at the Garabrant Center, 4 Wilson St.

Respectfully submitted,

Diana Callahan  
Recording Secretary