MINUTES OF THE
MENDHAM BOROUGH BOARD OF ADJUSTMENT
July 6, 2011
Garabrant Center, 4 Wilson St., Mendham, NJ

CALL TO ORDER

The regular 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 January 13, 2011 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. Peck – Absent
Mr. Peralta- Present
Mr. Ritger – Present
Mr. Schumacher - Present
Mr. Seavey – Present
Mr. Smith - Present
Mr. McCarthy, Alt. I – Present
Mr. Germinario, Alt. II – Present (until 9:00 p.m.)

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

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OATH OF OFFICE

Mr. Germinario, Esq. administered the Oath of Office to Anthony Germinario, Alternate II.

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APPOINTMENT OF PLANNER

Mr. Seavey introduced the following resolution that had been provided to the Board with their pre-meeting packages:

RESOLUTION
BOROUGH OF MENDHAM
BOARD OF ADJUSTMENT

WHEREAS, the Board of Adjustment of the Borough of Mendham has a need to acquire professional Planning Consultant services without competitive bidding pursuant to the provisions of N.J.S.A. 19:44A- 20.5; and,

WHEREAS, the business administrator has determined and certified in writing that the value of the services will exceed $17,500 (including escrows); and

WHEREAS, Banisch Associates, Inc has submitted a proposal indicating that they will provide planning services for the period of July 2011 through December 2011 in an amount projected to exceed $17,500 (including escrows); and

WHEREAS, the anticipated term of this contract is 6 months*;* and

WHEREAS, Banisch Associates, Inc. has completed and submitted a Business Entity Disclosure Certification which certifies that they have not made any reportable contributions to a political or candidate committee of the Borough Council in the Borough of Mendham in the previous one year, and that the contract will prohibit them from making any reportable contributions through the term of the contract; and

WHEREAS, this resolution is subject to the Chief Financial Officer certifying to the availability of funds; and

WHEREAS, the Board of Adjustment of the Borough of Mendham wishes to retain Banish Associates, Inc.; and

WHEREAS, the Local Public Contracts Law (N.J.S.A. 40A:11-1 et seq.) requires that the Resolution authorizing the award of contracts for "professional services" without competitive bids and the contract itself must be available for public inspection.

NOW THEREFORE, BE IT RESOLVED by the Board of Adjustment of the Borough of Mendham as follows:

1. That the Board of Adjustment of the Borough of Mendham retain Charles T. McGroarty, PP/AICP of the firm Banisch Associates, Inc. to serve as Planning Consultant for the period of July 2011 through December 2011, at a total cost not to exceed required escrows for 2011; and
2. This contract is awarded without competitive bidding as a "professional service" in accordance with N.J.S.A. 40A:11-5(1)(a) of the Local Public Contracts Law because said services are exempt from the provisions of the bidding statutes in that they are services rendered or performed by a person authorized by law to practice a recognized profession and are services which require knowledge of an advanced type in a field of learning acquired by a prolonged course of specialized instruction as distinguished from general academic instruction or apprenticeship and training.
3. The Business Disclosure Entity Certification and the Determination of Value shall be placed on file with this resolution.
4. That a notice of this action shall be published once in the official newspapers of the Board of Adjustment of the Borough of Mendham, as required by N.J.S.A. 40A:11-5(1)(a).
5. This Resolution shall take effect as provided herein.

Mr. Schumacher made a motion to approve the resolution. Mr. Palestina seconded.

ROLL CALL: The result of the roll call was 7 to 0 as follows:

In Favor: Palestina, Peralta, Ritger, Schumacher, Smith, McCarthy, Seavey
Opposed: None
Abstentions: None

The motion carried. Mr. McGroarty was appointed planner. The Board Secretary will make the appropriate public notifications.

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APPROVAL OF MINUTES

Mr. Schumacher made a motion to approve the minutes of the regular meeting of June 6, 2011 as written. Mr. Ritger seconded. All members being in favor, the minutes were approved.

Mr. Ritger questioned the reference to Possum Drive in the May 31, 2011 special meeting minutes. Board Secretary advised that was the location stated. Board requested that a note be made indicating the reference should be to Conifer Drive. A minor editorial comment was noted. Mr. Palestina made a motion to approve the minutes as amended. Mr. Smith seconded. All members being in favor, the minutes were approved as amended.

Mr. Ritger made a motion to approve the minutes of the executive session of May 31, 2011. Mr. Palestina seconded. All members being in favor, the minutes were approved as written.

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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HEARING OF CASES

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Mr. Peralta recused from the AT&T application.

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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: 0-4: Curriculum vitae for Mr. Menkes

Mr. Simon, Esq. began the objectors' case. He called Hank Menkes, RF Expert. Mr. Menkes presented his credentials and was accepted as a witness by the Board. Mr. Simon, Esq. entered 0-4, Curriculum Vitae for Mr. Menkes.

Mr. Menkes stated that he had reviewed the transcripts from the previous meetings, exhibits and predicted computer plots at 850 and 1900 megahertz, and the Borough's wireless telecommunications ordinance. He reviewed both the Kreisberg and Pierson reports and visited the site.

Mr. Menkes clarified that the application is for coverage, not capacity. He took exception to a statement in the application indicating that AT&T did not have service in the area around the site as it is was his opinion, that based on information submitted, AT&T has reliable coverage at 850. He did not see why the site was required. Taking exception to Dr. Eisenstein's previous statement that the 850 and 1900 megahertz systems should be considered as if they were separate companies, he explained that the systems operate as a complete network. They are integrated at 850 and 1900 and are capable of doing inter-frequency handoffs. Mobiles deployed to customers are multi-band capable of operating at 850 as well as 1900, and many operate at international frequencies as well. The customers do not need to do anything to find the appropriate frequency. As far as they are concerned AT&T has reliable coverage in the area.

Responding to Mr. Simon, Esq. on whether he was able to make a determination as to the frequency used in the Kreisberg report, Mr. Menkes stated that it was clearly done at 850 megahertz as it is within reasonable limits of the PierCom plots at the same frequency. There was no indication in the initial application submitted that it was for 1900. It was his opinion that there would not be any difficulty whatsoever obtaining connectivity to the national switch telephone network with the 850 megahertz coverage that currently exists around the cell site. Which frequency is being used by the customer is invisible. AT&T has already achieved FCC-mandated coverage in the 1900 megahertz frequency band without the need for this application according to their Form 601 filing.

Mr. Menkes explained that a search ring was not included either for 850 or 1900 megahertz with the application. There was also no data whatsoever presented with regard to examining any of the other Borough recommended locations based on their priority. Responding to Mr. Simon, Esq., Mr. Menkes agreed that with the priority list, the carrier would normally determine the search ring and then determine in which areas the facility is permitted. Mr. Simon, Esq. reviewed the priorities with Mr. Menkes.

Referring to the first priority for existing sites and whether collocation was possible, Mr. Menkes explained that it did not appear that any data was presented with regard to whether any improvement could be made to existing cell sites to improve coverage in the area of the gap. He stated that the St. John's site employs older power wave antennas that only provide 14.1 dB of gain. These are 45-degree horizontal beam width with a six degree vertical base. They have been discontinued by the manufacturer. There are newer antennas that provide as much as 16.9 dB of gain with the same vertical and horizontal beam width. They could provide an additional 2.8 dB of effective radiated power and comparable increase in signal level on the street. That is assuming that topography is not a limiting factor.

Responding to Mr. Simon, Esq. , Mr. Menkes testified that he did not remember seeing any communication dealing with municipal sites. In terms of the third priority, the East Business District, no factual technical data was presented. He stated that as T-Mobile is one of the co-applicants at the Kings Shopping Center site, it would be possible for AT&T to consider that site as well.

In terms of the potential AT&T/T-Mobile merger, Mr. Menkes explained that it would be inappropriate speculation to offer an opinion as to what is motivating AT&T to purchase T-Mobile. Instead, he provided the answer that John Donovan, AT&T's Chief Technical Officer, provided at a cellular telephone industry association conference in March. The answer was "spectrum". T-Mobile owns the largest amount of AWS spectrum at 1700 and 2100 megahertz of

all the carriers in the country. In order for AT&T to deploy their next generation technology, which is called Long-Term Evolution, LTE, AT&T is very interested in acquiring the AWS spectrum that T-Mobile owns. He did not say they were interested in their capacity at 850 or 1900.

Addressing the impact if AT&T collocates at Kings on its own or by virtue of merger, Mr. Menkes explained that T-Mobile has very good 1900 megahertz coverage in most of Mendham Borough. If AT&T and T-Mobile combine, it would seem the need for the Sister cell site is totally superfluous as there would be duplication in coverage. If AT&T were to collocate at the Kings site, in order to do due diligence, the Board should ask to see what the impact is of the coverage provided from that cell site for just AT&T at both 850 and 1900 megahertz. AT&T's coverge around that site at 850 megahertz is more than adequate without the Sisters of Christian Charity and without any addition from T-Mobile.

Returning to the ordinance, Mr. Menkes also was of the opinion that as a fourth priority, Mendham High School should also have been explored. He also responded to Mr. Simon, Esq. that he did not see any data from the applicant that demonstrated for each of the higher priority sites that placing a wireless telecommunications facility on a building or structure on a higher priority site would result in prohibiting service in accordance with the Federal Communications Act. A user of AT&T's wireless telecommunications services within the gap area in question is able to connect with the National telephone network and maintain a connection capable of supporting a reasonable uninterrupted communication at 850 megahertz. Wireless telecommunications services are not being prohibited.

Mr. Menkes referred to the cell tower application on Washington Corner Road in Bernardsville that could affect the coverage in Mendham Borough. His opinion was that the site at the Sisters of Christian Charity is one of convenience rather than looking at all of the composite cell sites in the surrounding area and what could be done with the existing cell sites to improve coverage. There was no search ring presented to identify the area that needed to be covered. Addressing his testimony for the Washington Corner Site in Bernardsville and his review of Exhibit 0-3 propagation maps, Mr. Menkes stated that AT&T has submitted a Letter of Interest with regard to the application. That application is 850 megahertz and at neg 85 dBm the propagation reaches into Mendham Borough. That is why all of the sites need to be considered together as opposed to separately. That would include St. John's, Conifer Drive, Kings, Sisters of Christian Charity and Washington Corner. He did not see any data to that effect in the application.

In terms of -85 dBm as a signal strength, Mr. Menkes stated that he participated in the global standards for wireless communications for many years. There is no technical standard whether it be with the American National Standards Institute, the International Telecommunications Union, or the European Telecommunications Standards Institute that require minus 85 dbm for the appropriate signal on the street for in-vehicle coverage. In fact, Metro PCS uses minus 88 dBM for their analysis. The point is that minus 85 is not cast in concrete; it is an industry practice. It makes life easy for the carriers. AT&T has used minus 102 dBm with the FCC to justify that they have met their build out requirements. Minus 85 is a conservative view of fading.

Addressing Mr. Simon, Esq. on the difference in signal strength of neg 102 dBm and neg 85 dBm, Mr. Menkes explained that the 20 dB buffer is almost 100 times more signal strength than the minimum that AT&T says they require with the FCC. Continuing to respond to a series of questions, he agreed that under the right circumstances in Mendham Borough calls can be made, received and maintained while in a car with a street level signal of even up to 98 dBm. They can access the national network at less than minus 85 dBm.

Explaining overlap, Mr. Menkes agreed that at there would be overlap at 850 and 1900 and that it is possible that there could be problems with interference. AT&T did not present information with regard to their carrier interference level or their frequency planning. It would be speculation for him to be definitive.

Referring to Femtocell technology, Mr. Menkes stated that no carrier can financially afford to provide 100 percent coverage to every person that would like to have it. In the areas that do not get appropriate RF signals to maintain reliable communication, AT&T has used the Femtocell technology. This consists of small self-contained base stations about the size of a showbox that are very sophisticated. It uses self-optimizing network technology such that one can drop it into the middle of a macro cellular network. It figures out what frequency to use to minimize interference and integrates itself to the network. It has an advantage in that it uses the owner's or consumer's broadband backhaul network rather than the network provider's backhaul network. At one time AT&T gave out Femotocells to anyone who complained that they had inadequate coverage. It has been in existence for a decade. It could be used by people in the Mendham area that feel that they do not have the coverage that they would like to have.

Answering the question as to why a carrier would spend the money for a facility if they do not need it, Mr. Menkes explained that the cellular industry, PCS or wireless communications industry is a business like any other business. Their main objective is to earn revenue for the stockholders. AT&T is not the premier service provider with regard to the best performing networks. As Verizon is doing significantly better, AT&T is playing a game of catch up. That is a reason they want T-Mobile to be able to compete with Verizon on LTE. It was his opinion that they are looking for this cell site to prepare themselves for future competition using the AWS for their next generation technology deployment.

Mr. Menkes concluded by summarizing that based on the exhibits that they have been provided by PierCon and by Kreisberg and the facts that this is a coverage issue not a capacity issue, , and AT&T has reliable cellular service surrounding the proposed cell site, the site is superfluous. He is not aware of any law or mandate that any carrier needs higher frequency, i.e. 1900, once they meet the build-out requirements. It is his opinion that based on the data that he has reviewed, the applicant has not proven beyond a reasonable doubt, nor have they done due diligence in justifying the need for the cell site.

Chair Seavey requested that Mr. Menkes have a conversation with Dr. Eisenstein on the coverage discrepancy opinion on 850 and 1900 megahertz. Dr. Eisenstein stated that there is no discrepancy as 850 does cover more, and he agrees with Mr. Menkes in that regard. Responding to Dr. Eisenstein on whether he would be able to receive calls on a legacy AT&T phone that worked only at 1900, Mr. Menkes agreed that he would not. He added that if he had a Verizon analog phone it would not work either. The legacy single-mode similar frequency phones are few and far between, and most of the GSM phones are now quad-band phones that cover both the US frequencies as well as the European frequencies. The Smart phones probably cover even more frequencies as they have synthesizers so redesign for deployment of new technology is not needed.

Dr. Eisenstein explained that according to the law, the carriers are obligated to provide service to everyone that has an FCC approved phone. There has been a buy-back program for analog phone, but there are still some 1900 phones being used. Mr. Menkes made his point by adding that there are also some phonographs and vinyl records existing. Anyone going to AT&T could exchange a single frequency phone for a multi-band one.

Addressing the GSM standard, Dr. Eisenstein clarified that it is either minus 103 or minus 105 depending on the source. The number around it, 102 is within range. There is no margin for fading and propagation into a vehicle. Mr. Menkes agreed that a network would not be designed to minus 102, but he would not necessarily design to minus 85 or minus 88. Dr. Eisenstein continued that he agreed with Mr. Menkes that minus 85 was not carved in stone and is not set out as a standard, but it is not an irrational number. It has become industry practice to take fading into consideration. He explained the logic based on loss associated with the vehicle and phone. Building a network at minus 88 or minus 84 is not going to make a difference and will not change the distance between the cell sites to any large extent.

In terms of the reliability, Mr. Menkes agreed with Dr. Eisenstein that reliability is compromised once the design starts to go below minus 90. He added that he had a concern about how minus 85 is calculated as the vehicle penetration loss is also a random variable. Just adding up random variables is not the right way to do the arithmetic. He believed it was the square root of the sum of the squares. The method they used to calculate provided them with a conservative number. There is still a range between minus 84 and minus 90 where there are still very viable communications. The graphs cannot be taken as black and white as regards to yellow and green.

Dr. Eisenstein stated that their only difference of opinion is design philosophy. He encourages conservative design as one cannot predict the weather or the conditions should an emergency call occur. He cited an example of a disabled car in a snow storm.

Responding to Chair Seavey's inquiry on the frequencies being requested in the application, Dr. Eisenstein clarified some propagations. Utilizing Exhibit A-1-A, existing coverage, he stated that the area around the Sisters of Christian Charity is covered at 1900 from the St. John's site. At 850 it would go much further. Utilizing Exhibit A-1-B, proposed coverage, he stated that there are areas in the Borough that were not covered in the existing that are covered in the proposed. It does not cover the entire Borough as it does not reach Main Street. He concluded that they are getting coverage in areas outside of the area in which they are placing the facility. Whether they are allowed to need coverage at 1900 in addition to 850 is a legal matter. He believed the carriers would say that they needed it as they are going to need all the spectrum that they are allocated because they do not have enough. They are going to be re-using the 850 and the 1900 to deploy a

new generation system. As they add users they are going to be bumped from one frequency to another and if 1900 is not available, they will get cut off.

Dr. Eisenstein continued that from his point of view there are two different applications. He did not know what specifically is happening in Bernardsville, but in some areas the providers are making a business decision not to deploy 1900 in this area. They are only deploying 850. This is happening a lot going east toward the New Jersey coastline. The reason has to do with topography as they will not get additional coverage. This is the basis for his statement.

Addressing Mr. Palestina's question dealing with the upgrading of sites such as St. John's, Dr. Eisenstein explained that if they are the old style antennas, then a newer antennae that would be larger might allow an extra 2 or 3 dB that would help. He does not specifically know if the larger antenna would work at St. John's. He continued that the Sister's site is proposed to fill in a lot to the east. Improving St. John's by 2 or 3 dB is not going to reach that area. It would provide more duplicative coverage in the area of the Sisters of Christian Charity. He added that while they are talking about the improvement in antennas, the limiting factor is the hand-held device, not the antennas on the tower. The question is whether the hand-held device can get its signal back. Phones are getting smaller with less power as people want a longer battery life.

Responding to Mr. Ritger on whether there is a quantitative threshold for determining inadequate coverage, Dr. Eisenstein stated that based on Exhibit A-1-A, the applicant would argue that anything not in green is a gap. In one of the famous cases in the New Jersey Supreme Court they said that they did not have to cover every cul-de-sac, but a gap was very small. An eighth of a mile on a major highway is a major gap, but a gap in a cul-de-sac does not have to be filled. It is judgmental. Mr. Ritger added that in a eighth of a mile, a call could be dropped.

Dr. Eisenstein explained that taking the submission at face value, in the area that the applicant would allege to be the gap, the gap is big enough that you could argue it should be filled. It was his opinion that the argument was fair. He has seen applications with gaps much larger than this one and a lot smaller where a major highway such as 287 or the Turnpike with fast moving traffic would run through the area. In this case there are roads and people are moving through them at 30 or 35 miles an hour. If, in accordance with Mr. Menkes argument, the power was neg 88 or 89 the covered areas would expand a little, but in his opinion, it would not erase the gap at 1900. He agreed with Mr. Menkes that at 850 there is no gap, or at least a minimal gap.

Concluding, Dr. Eisenstein stated that he preferred to view the area as a "fuzzy boundary" rather than a threshold. Moving a couple of pixels out of the green area is not going to make a difference. Even in a five bar area, a call could be dropped. Wireless communication unlike wired communication experiences random phenomenon.

Mr. Menkes agreed that it is a "fuzzy boundary". He added that even the performance of a handset can differ from the same manufacturer. The minus 85 number and the performance of reliable communications is not a hard threshold that one crosses. The FCC is even very careful about how they make reference to reliable communications. He added that AT&T does have service in the area at 850 megahertz and there is no gap. He believed that there is coverage in the area.

Responding to Mr. McCarthy on the lack of AT&T coverage at Mr. Gorman's home across Rt. 525, Mr. Menkes that there are still some spots without coverage. The laws of physics preclude a carrier from providing 100 percent coverage to every customer that has a phone. He acknowledged Mr. McCarthy's statement that in Mr. Gorman's case, 850 was not sufficient.

Mr. McCarthy initiated discussion on the high school as explored in the Omnipoint application. Mr. Menkes was not aware of the application. Mr. Ritger noted that Mr. Pierson's testimony indicated that the hill at Hilltop Church blocks signals that would have the high school or Kings. There would have been a gap given the topography.

Mr. Lavigne, Esq. began his cross examination of Mr. Menkes and his statements on the lack of information with respect to other sites. Having reviewed the transcripts, he did not recall any testimony from Mr. Pierson with regard to his RF analysis of the other priorities on the list in the ordinance and his opinion as to whether or not they would be suitable from an RF standpoint. He was interested in data, meaning propagation maps. In terms of the possibility of improvements to the St. John's Tower and the impact of topography, the topography could have an effect, but the predictions would need to be made for determination. He did not recall Mr. Pierson's testimony on the topography of the area.

In terms of the King's site, Mr. Menkes did not believe that site alone would obviate the need for the Sisters site. He understood that the Kings application was denied and under appeal. The

AT&T/T-Mobile merger is pending and not approved. He believes that T-Mobile has good 1900 coverage in the area based on plots from the Kings application. He only reviewed the application; he was not involved in the case.

In reference to the phrase in the ordinance pertaining to prohibiting the provision of service, he was not familiar with the one provider rule. He would not comment on the difference of the standards of the Telecommunications Act and the MLUL as he was not an attorney.

Addressing Mr. Lavigne's question pertaining to Washington Corner Road, Mr. Menkes agreed that the propagation charts he reviewed were prepared with respect to a different carrier. He also agreed that clutter could be caused by trees and foliage from trees as well as topographic rises. In terms of his opinion on Verizon service and AT&T catch up, Mr. Menkes agreed with Mr. Lavigne, Esq. that the Federal Telecommunications Act is intended to encourage competition among carriers. He advised Mr. Lavigne, Esq. that he also believes in the need of three and to address a question on the effect of price to the consumer is a very complicated. It could drive down the price, but it is not the reason that AT&T is going to buy T-Mobile. He reiterated that AT&T has exceptional coverage at 850 megahertz in the area.

Clarifying his testimony on signal strength and reliability, Mr. Menkes stated that as the signal level goes down, the reliability goes down. Below minus 90 one starts to see increasing levels of lack of reliability.

Chair opened the meeting to members of the public for cross examination. There being none, the public session was closed.

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Board took a seven minute break.

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Mr. Peter Steck, Planner, presented his credentials to the Board and was accepted as a witness. He stated that he had reviewed the transcript of the May 31 hearing, application materials, zoning ordinance, Master Plan, case law and toured the site.

Mr. Steck began his testimony by describing the property as over 100 acres with religious/education/institutional and residential uses. There are several large houses, large buildings and a retreat house on the property. One of the tallest buildings has a cupola. The property was granted a "D" variance previously for parking. The application introduces another use, a cellular facility.

He continued that the area is largely built up, predominantly single-family with less than 250 homes. There are some properties in the area that are farmland assessed, but generally it is rural. It is a low density area with narrow roads that handle mostly local traffic. The Borough Master Plan has the goal of preserving the rural characteristics and the small town character. The plan also indicates that the Borough is nearly built out indicating that there will not be an anticipated or significant change in the number of residents in the area.

Referencing the zoning, Mr. Steck explained that the property is located in the middle of the R-5 Zone. It permits single-family detached homes with one per lot, parks, agriculture, and home occupations. Listed as conditional uses in the zone are clubs, nursery schools and libraries. The building height limit is 45 feet. In terms of the Wireless Telecommunications Ordinance, it contains reference to minimizing the number and height of facilities. The Borough desires the least number of facilities that meet the standards of the federal law. They should be as low in height as possible. The ordinance introduces conditional use standards for certain locations. If someone met all of those conditions, the Planning Board would have jurisdiction; otherwise a "D3" variance requiring 5 votes is required. He continued by summarizing the four priorities as outlined in the ordinance. The ordinance also references the Federal standard dealing with the effect of prohibiting the provision of wireless telecommunications service. The applicant must prove that if the Board does not grant approval, service is prohibited. It is also his opinion that a height variance is required.

Mr. Steck summarized his conclusions by stating that the zone does not permit the existing uses on the property. He cited the "Rasberry" case that referenced a D variance where a variance was required when the size of the land was decreased even though a conforming structure was to be built. It was considered increasing the non-conformity. In his opinion, the applicant has not satisfied the conditional use criteria and variances are needed associated with adding another use that is not permitted. He continued that the fact that the applicant has selected a site that is not

seriously aesthetically damaged or does not seriously aesthetically effect the surrounding properties is only a very small part of the application. There are other standards that deal with need, height and number of facilities. He reiterated that he believes a height variance is required.

Addressing the priority list, Mr. Steck stated that in order to move through the priorities, it is necessary to look at other facilities in the area that the applicant has or potentially has. There is a separate check list in the Ordinance for cellular facilities, and one of the things that the applicant has to demonstrate is signal strength plotting for all the applicant's other WT facilities that are approved, but not operational or that are filed but not approved, or that are planned but not filed.

Based on the prior witness, it was his conclusion as a planner that the applicant has not demonstrated that the service is necessary. There was no search ring and alternate site analysis. There is no data for signal strength for facilities approved but not operational, filed but not approved, planned but not filed. The Board is to be provided with the big picture. The height variance has not been addressed. No one has addressed the "Rasberry" issue. If the Board approves the application, it jumps to a number one priority site. That appears contradictory to the overall goal of the ordinance. It is necessary to apply the Sica test and if service is already adequate, and this is the lowest density part of the municipality, and if there are no major roads, and if the Master Plan says the area is not growing, and if the prior testimony said there was adequate service at 850 and it is the decision of the applicant to provide two levels of service, that is not the standard in the ordinance. The ordinance standard parallels the Telecommunications Act which is basically says service must be prohibited. The applicant has not met the burden of proof. The Board should turn down the application. A D6 Variance is required as the application has not met the conditional use standard, has not addressed the height variance, and has not addressed the impact on the existing use which is not permitted.

Responding to Mr. Ritger with his opinion on why towns attempt to limit the number of cell installations, Mr. Steck stated that they are ugly and commercial operations. In some cases whether rational or irrational there is a fear of health concerns. It is also alleged that they can adversely affect property values. Addressing Mr. Ritger's follow on for his preference of a few visible installations versus more that are virtually impossible to detect, Mr. Steck responded that each town gets to set its own standards and follow the rules of the Governing Body. The public policy is the minimum height and the minimum number. There may also be revenue issues when the review of municipal sites are a priority.

In terms of his rational dealing with the height variance, Mr. Steck explained that the Ordinance references the location of the equipment and limits it to a low height. In addition, the panels that will be blocking the cupola will require building permits. That is further blockage of the building envelope in an area outside of the building envelope.

Mr. Palestina questioned Mr. Steck on his reference to consequences and what they would be. Mr. Steck explained that another carrier could go to the site as a Priority 1. All of a sudden the Board would be establishing a new site and countering the overall purpose of the Ordinance which is to minimize the number of facilities that should be located in the municipality.

Responding to Mr. Palestina on his question dealing with the ordinance and whether the locations are opportunities for placement or a pecking order, Mr. Germinario, Esq. advised that it is a progression for which the applicant must show that the selection at the higher priority categories would have the effect of prohibiting service. Then they are entitled to look at the next lowest category and so on.

Following up on Mr. Smith's concern that approving a site with marginal propagations could open the door for building a tower if the cupola is not of sufficient size, Mr. Germinario, Esq. explained that based on what he has heard from the experts, the "fuzzy line" propagation is something inherent in any application. In terms of the use of the site, it is necessary for each applicant to run through the list of priorities before they get to deal with locating a new tower. All the considerations of visual impact in this application would go away if a new tower were to be considered at the location. It would become a priority one site, but at most given testimony would accommodate two additional antennas. The Board would not be establishing a priority one site which is going to attract 2 or 3 more co-locators. The approved site would be the cupola.

Mr. McCarthy clarified with Mr. Steck that the ordinance requires limiting the number of towers. This application is not for a tower. Mr. Steck explained that if one of the proofs is to show that the site is necessary,that means the opposite side of the coin is then duplicative sites are not necessary. Whether it is a tower or an in-building facility, the conclusion goes along with the standard that one has to show it is necessary. McCarthy clarified that Mr. Steck's conclusion was based on testimony by Mr. Menkes. He also noted that if the facility is needed, based on the applicant's testimony, it is one less tower in the town.

Addressing his comment on the requirement for a height variance, Mr. Steck agreed with Mr. McCarthy that nothing would be higher than the cupola itself, but explained that the Zoning Ordinance refers to a three-dimensional box, a building envelope. Once anything is done outside of the building envelope that blocks light, air and open space and requires a building permit, ot triggers some type of variance. In this case it is more than 10 feet and 10%, and it is a D6 variance.

Mr. Germinario, Esq. reviewed the ordinance with Mr. Steck as pertains to the height of the equipment. He explained that the ordinance reads that the height of roof mounted WT facilities shall be measured from the top of the roof surface. He did not believe it practical for the Board to measure the height and allow 12 feet up from the roof for the equipment compound and say that an equipment compound below the cupola level has to be measured from the ground level. Mr. Steck countered that there are architectural panels that are being added to the cupola that he believes require building permits due to wind load and safety issues. They will become part of the building above the 45 foot height limit. Mr. Germinario, Esq. advised that they are being installed with the antenna, not the equipment cabinet. Mr. Steck stated that the enclosure is being constructed in an existing building that exceeds the maximum height limit for the buildings. Board discussed that there are screens there today, but they are being replaced.

Mr. Germinario, Esq. referred to the "Rasberry Case" and Mr. Steck's interpretation that a D2 variance is required as it is an intensification of a non-conforming use. He questioned Mr. Steck on his opinion should the Board finds that the conditional use does meet the conditions, and referenced the Puleio Decision. He was of the opinion that the logic did not apply when there is a previously granted use variance for the site. Mr. Steck was of the opinion that this is not a bifurcated application and that the whole application is for a use that is foreign to the property. There is a substantial fundamental distinction in the two cases.

Mr. McGroarty, referenced B2 in the Telecommunications Ordinance that indicated that WT facilities were permitted on lots with other principal uses, and WT facilities may be located on either lots containing no other principal use or on lots containing one or more separate principal uses. Mr. Steck noted that the section would apply for adding a cellular facility to a conforming use, but it was his opinion it did not apply to non-conforming uses. It is an intensification of the site.

Mr. Lavigne, Esq. began his cross examination by asking Mr. Steck if he had ever seen an application as an objector or applicant witness that was less visible than the site proposed in this application. Mr. Steck did not recall any being less visible. He has seen some less less impactful from a planning perspective such as those in the industrial zones where the impact on the surrounding properties would not be as great, or those that meet the conditional use criteria as they meet the local standards. As the intent of the plan is to minimize the number of facilities, this facility goes in the opposite direction and it changes the priority of the site. Other facilities may not fit neatly in the cupola. In terms of whether towers or facilities should be minimized, Mr. Steck stated that the beginning of the ordinance refers to towers, but combined with the fact that the applicant needs to prove the site is needed, it is logical that it refers to facilities. The ordinance does have a preference for using existing structures whenever possible, but the burden of the applicant is to show that the site is necessary. In his opinion, if it is a duplicative site, there is one too many.

Responding to Mr. Lavigne, Esq. on whether he was familiar with all the locations in the list of priorities, Mr. Steck answered "no" and explained that there are a lot of locations in the three priorities. He is not aware of every property that the municipality owns. He could not comment on whether there were any existing structures of 30 or 40 ft. that would protrude above the tree line. Addressing further questions, Mr. Steck responded that he relied on the RF testimony of Mr. Menkes, and that Mr. Humbert's report did not contain his rationale as to why a height variance was not needed. He did not know the facts of the Ringwood case that determined revenue generation is not an appropriate basis for crafting a Zoning Ordinance with respect to wireless facilities.

Mr. Lavigne, Esq. discussed with Mr. Steck his opinion on whether the existing Sisters of Christian Chairty site and use is a non-conforming use or one that is a use that is permitted by prior "D" variance. Mr. Steck was of the opinion that had not yet been established.

Responding to Mr. Lavigne, Esq. on whether service would be effectively prohibited for a carrier if the analysis has been supported by its RF experts and the Board's independent consultant, Mr. Steck stated that the definition needs to spring from the language in the ordinance. The ordinance does not speak to 850 or 1900 megahertz, just service. He was of the opinion that Mr. Menkes opinion is closer to the intent of the Ordinance. In terms of a carrier's right to provide service

that is substantially better than mediocre, Mr. Steck stated he was not familiar with the phraseology. He referred back to the ordinance and stated that it parallels the Telecommunications Act. Referring to the one provider rule, Mr. Steck explained that he thought it was case law, not an FCC ruling that indicated that just because one provider provides service, it does not allow the exclusion of other providers.

Addressing Mr. Simon's redirect question on whether there would be room for additional carriers in the cupola, Mr. Steck responded that there is no evidence in the record. He agreed with Mr. Simon, Esq. that if approved, there is a site with a facility and if an additional carrier needed height above the cupola, the door would be opened to either a tower or an extension on the building. It was his opinion that carriers could locate a wireless facility in places other than inside the cupola. In terms of the ordinance, it is his understanding that it is valid, and that the Board is bound to assume it is valid.

Chair opened the meeting to any questions of the witness by the public. There being none, the public session was closed. Chair opened the meeting to the public for any statements they would like to make in reference to the application. There being none, the public session for qualitative comments was closed.

Mr. Simon, Esq. began his summary with a review of the 850 and 1900 frequencies indicating that the user does not know the difference. The 850 frequency is traditionally the one that most people will utilize when speaking on a cell phone as it is the first channel selected on a dual banded phone. The testimony of Mr. Menkes stated that the frequency moves to the 1900 channel only when there is a capacity issue, and this application is not a capacity application. It is lack of coverage for AT&T.

Mr. Simon, Esq. stated that the application states that there is no wireless communication service in the area around the site. At 850 megahertz this is blatantly incorrect. Mr. Kreisberg's propagations show good reliable coverage at neg 85 and neg 75. That propagation turned out to be rather reliable as it was practically identical to Mr. Pierson's propagation at 850. It has not been explained how an 850 application has become a 1900 application, yet about 1.8 miles away down the road in Bernardsville at Washington Corner Road there is another application where Verizon has proposed 850, not 1900 megahertz. His opinion was that the proofs at 1900 are easier for the applicant as it does not propagate as well.

Continuing, Mr. Simon, Esq. explained that as a matter of law it is incorrect and inaccurate to state that each frequency must be treated like a separate company or two different companies. There is no basis for it. The issue is whether coverage is being provided to customers. According to Mr. Menkes and Mr. Steck's testimony there is a priority list and the priorities are not skipped unless the applicant demonstrates that they are prohibiting service. The applicant has not done that. The proof is not just testimony based on knowledge of topography; the applicant needs to demonstrate it based on data and proofs. He referenced the discussions of the experts dealing with variations due to changes in antenna and frequencies and the need to look at all of the sites: St. Johns, Kings, Washington Corner, Conifer and the Sisters. The site is not needed at 850.

Referring to the Ordinance, Mr. Simon, Esq. explained that it requires a regional plan. There is no definition of "avoiding prohibiting service" in the ordinance. The dictionary says it is preventing service and in this case, some service is being provided. It should be looked at in the same context as the federal Telecommunications Act requirement. Some towns do not permit towers and require a D variance. In Mendham Borough it is different, but the ordinance says that if the applicant does not meet the Federal standard then it is not permitted no matter what the location, inside or out, on a building or free standing. He referenced the Ho-Ho-Kus Third Circuit case where it was determined that the user of the service needed to be able to connect with the land-based national telephone network or maintain a connection capable of supporting a reasonable uninterrupted communication. That is the phrase to be used in determining whether the applicant is avoiding prohibiting service.

In terms of whether the carrier has the right to have separate applications as a separate company for each license, no Federal or State court has ever ruled that is required. Otherwise carriers would be coming back year after year for multiple applications with multiple frequencies. The law is that 1900 megahertz coverage is not needed to avoid prohibiting service if service is not prohibited for 850 megahertz, especially in a coverage case. The case law is not about neg 85 or neg 86, but whether calls can be made, received and maintained while traveling through in a car at a particular street level signal. That is the standard. There has been no drive test data to even substantiate neg 85.

Mr. Simon, Esq. noted that there is not a visual impact to the application, but according to Mr. Steck's testimony, it is not the job of the Board, just to judge the visual impact. The Board must

look at the ordinance. Mr. Steck reviewed all of the variances and the positive and negative criteria that is required. In their opinion the applicant has not demonstrated that they avoided prohibiting service either at the existing site or any of the higher priority sites. There is a height variance required. There is no evidence on the on-air approved, proposed or contemplated sites in the area, for the applicant and potential co-locators. There is solid neg 85 coverage at 850. The application should be denied as the site is not needed.

Mr. Simon, Esq. continued that if the Board should approve the application, they would request consideration of conditions to minimize the adverse impact of granting any variances. First, he requested that the applicant be required, in a specified timeframe,to return to the Board and demonstrate status as the site may not be necessary for various reasons such as additional licenses, a merger, new evidence or information on radio frequency emission, or new technology. He also requested that the site not become a first priority site, but remain a fourth priority site requiring all the proofs in the ordinance. In addition, the colors of the panel should be of an inconspicuous nature. As long as there is not visible impact, the site should be available for Emergency 911 service for Morris and Somerset County.

While the conditions would mitigate impacts, it is their position that they have demonstrated that the site is not necessary under Federal law, under State law, under Municipal Land Use Law and under the Borough's Wireless Telecommunications Ordinance. They request the application be denied.

Mr. Lavigne, Esq. began his summation stating that they believe under the Wireless Telecommunications Ordinance the facility is a conditional use and worthy of conditional use approval. The goals and objectives of the ordinance are to preserve the visual, historic and natural environment; to prevent adverse visual impacts; to eliminate safety hazards and attractive nuisances; and to minimize the total number and height of wireless telecommunications towers in the Borough. With respect to the visual impact of the proposed facility on a property of in excess of 100 acres with an existing cupola roughly in the center of the property and with setbacks of several hundred feet, Mr. Steck even stated that based on his experience he did not recall any site with any less visual impact. This is exactly the type of facility, the Governing Body had in mind when they adopted the ordinance.

It is a fourth priority location under the ordinance and the ordinance does prefer existing structures over new land builds. Mr. Pierson, the RF specialist, reviewed the priorities in the Ordinance. He reviewed his familiarity with the Borough both in connection with his application and his many appearances in connection with the Kings application that was denied. He reviewed the location of the existing wireless sites both in the Borough and the environs, and identified those sites where the applicant already has existing sites, propagated them and showed the coverage on the exhibits. They also spoke about the West Morris Regional High School and the fact, that due to its location and the topography that intervenes between the location of the high school and the area they are seeking to cover by the Sisters site, there are no existing structures of sufficient height that would provide the coverage that is needed. It is a line of sight technology.

Mr. Lavigne, Esq. stated that they did not provide photographs of municipally owned properties where there are no existing structures. The ordinance shows a preference. In Mendham Borough these structures do not exist. The St. John's site had to be built to accommodate the height required. The Board is within its right to take judicial notice of the fact. In reference to the Kings site, there is no monopole at that location; the application was denied by the Board, and Mr. Simon, Esq. represented objectors.

In terms of the need, they initially submitted A-1 through A-4, propagation maps prepared at 1900 megahertz. They do not file applications based on establishing a frequency for the site. Dr. Eisenstein had asked them to provide the maps at 1900 and at two signal strengths, neg 85 and neg 95. They also provided testimony with respect to drive test data. Mr. Steck only read the transcript of the May 31 meeting when he offered testimony about the need. That was not the hearing at which the testimony was offered.

Referencing the objector argument that there is no need for the site at 850 megahertz, Mr. Lavigne, Esq. stated that AT&T is licensed at 850 and 1900. Both licenses have an affirmative obligation to provide coverage. At the request of the Board and Dr. Eisenstein, Mr. Pierson presented additional exhibits at 850 that show gaps at 850 approximately a half mile in width. He identified the roads where the gaps continue to exist, specifically Hilltop and Pleasant Valley. To say there is no gap is not consistent with the propagation maps and the evidence that the applicant offered.

Continuing, Mr. Lavigne, Esq. stated that they do believe it is a conditionally permitted use. They meet the conditions that have been set forth in the ordinance. They do need site plan

approval as part of the application, but due to the nature of the application there are very few aspects that are typically associated with Site Plan approval. The Puleio case states that when you have a subject property that has a use and that use has received "D" Variance relief, it falls under a separate category and becomes a use permitted by variance. If the applicant comes back and further modifies the site or has subsequent applications with respect to the site, the use is permitted by variance. It is not a non-conforming use. Site Plan approval is required for subsequent modifications. Under the MLUL it must be shown 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. That has been done. This is essentially an invisible site.

They have provided testimony confirming that emissions from the facility comply with all the applicable FCC and State of New Jersey emission standards. The case law indicates that once this is established that the Board would be preempted from denying the application on the basis of perception that there might be adverse health effects.

One of the main purposes of the Wireless Ordinance is to make sure that attractive nuisances are not created when the facilities are built. It is far from the boundaries of the properties and an essentially invisible site, 90 feet up inside an existing 120 ft. cupola. They have also addressed all the issues in the Ferriero Engineering report.

Mr. Lavigne, Esq. referred to their notice and stated that they included a D1 Variance should it be required, and they have covered it as well in their presentation. There has been a lot of reference to the Telecommunications Act of 1996, the federal cases interpreting it and the prohibition of service. The Board is familiar with the positive and negative criteria for granting a use variance. The Smart case establishes that if the applicant has an FCC license, by virtue of that license and providing service, it is advancing the general welfare and the public good. Above that the applicant must establish the need, which they have done.

The negative criteria is the Sica Balancing Test that includes identifying the public interest at stake which is the provision of wireless service and the ability to make emergency 911 calls. Any potential detriments from the application need to be identified, and here they are virtually non-existent. After balancing those factors, the Board needs to determine whether on balance the site is substantial detriment to the public good. They feel it is not.

There has also been discussion on whether they meet the conditional use standards and whether a D3 variance is required. Coventry Square provides the case law that states that the applicant needs to establish that the site still remains appropriate for the proposed use notwithstanding any deviation from the conditional use standards that might arise if the application were approved. They do not believe that there could be another existing facility on any other higher priority location that could possibly serve the area of need that has been established that would be less impactful and less intrusive and be more appropriate for this type of use than the one that they are proposing.

In terms of a height variance, while they did cover it in their notice, Mr. Humbert, Borough Planner did not believe it necessary, while Mr. Steck did. They are not exceeding the height of the existing structure and are well below it. With the exception of the screening panels, the structures are internal to the existing building. He referred to the Grasso case that established the reasons why ordinances have height restrictions. They are in order to limit visual impact, to minimize the effects of massing of new structures on adjoining property owners, and to make sure that there is not a sense that the property is being over utilized. There is essentially no change. The Sisters have placed mesh wiring in the cupola to keep the birds out. That would be replaced with panels that would provide the same function and screen any equipment. The cupola is not visible from any surrounding public areas. Even if a D6 variance were required, they meet the standard.

In order to conclude that the application should be denied and that the applicant has not met its burden of proof, the Board would need to conclude, that in addition to all the time and effort in obtaining the evidence, the fact that they are not a tower company, and that they need to pay rent to the landlord, they are doing it for fun. One would also need to believe that there are a lot of tall existing structures in all the higher priority sites and that the applicant did not do his homework in trying to scout them out and bring them to the Board's attention. The Board's own independent RF engineer would need to be discounted.

Before the Board entered deliberations, Mr. Germinario, Esq. provided his legal opinion to the Board on some of the variance issues. He did not believe that there is a compelling argument for a height variance. The changes to the existing structure do not rise to the level of creating the need. With respect to the Rasberry decision and a D2 variance, the intensification of a non-conforming use, he agreed with Mr. Lavigne, Esq. that this is not a non-conforming use. It is a

permitted use, a use permitted pursuant to variance, and under the Puleio Decision it is very clear that the additional use added to that does not trigger a D Variance as it would in the case of a non-conforming use. The ordinance itself contemplates that there will be the location of WT facilities on properties that already have principal building and other principal uses on them. In his opinion, an additional variance is not required.

He advised that the board should review the application in a two step process. Initially it needs to determine whether the application meets the conditional use standards of the Ordinance. They include the priority hierarchy, the proof of necessity and the lot area and setback requirements. If the Board determines that one or more of the conditional use standards are not met, then it must move to the second step which is a D3 variance under the Coventry Square Decision. That would involve determining the positive criteria which would be determining whether the use remains suitable for the site despite that fact that it does not meet one or more of the conditional use standards, and the negative criteria which would determine whether it is detrimental to the public good and significantly impairs the intent and purpose of the Zone Plan and Zoning. If it meets the conditional use requirements then, under the Puleio Decision, the Board is required to deal with the negative crieteria and a simple majority vote would be sufficient for the conditional use and the site plan. If it does require a D3 variance a supermajority vote is required.

Mr. Germinario, Esq. recommended to the Board that they might consider a finding that the wireless telecommunications site as that term is used in the Ordinance in regard to the hierarchy in the priorities would simply be the cupola of the building and not the entire property. He did not agree with Mr. Simon's suggestion that a five-year comeback should be imposed. There is not anything in the ordinance to support it. The Board must make its decision on the facts at the time of the decision. The panel color should be addressed by the Board. In terms of the emergency antenna installation, he did not believe that the local police and fire have asked for that on this application as they did with the Kings application. He recommended a condition to have it required if requested.

Board deliberations began with Mr. Palestina who believed there is a gap at 1900 and less at 850 based on testimony by the experts. The additional 850 could potentially help in vehicle and in home coverage. The safety issues have been explored. He had no issue with the priority hierarchy or the setbacks. There is no visual impact.

Mr. Smith had some of the same comments as Mr. Palestina stating that he agreed with the gap at 1900 with some, but maybe not so much at 850. He relied on the testimony of the Board's RF expert. There would not be any visual impact. The facility could possibly prevent a tower from being placed on another property within a certain radius of this site. He considered it good planning to approve the application.

Mr. Schumacher agreed with his colleagues on the gap at 1900 based on the opinion of Dr. Eisenstein. He believed that the priorities had been addressed in testimony. It is the least offensive site of any of the applications in the Borough. He is positive about the application.

Mr. Ritger concluded that the issue is dependent on whether or not there is a gap, and there is no way to quantitatively determine that. The expert is advising there is a gap, and he will accept that. There are no issues with the setback requirements, and the priorities were explored. He did add that he did not believe there was enough in the Ordinance to really spell out the priorities so that they can be addressed quickly and accurately by the applicants. He recommended that the list of sites that are available should be identified. He also believed the idea of a search ring was missed in the Ordinance. If it is that important, the applicant should be required to provide it within a certain radius. While the ordinance language could be explored, he believed that they covered the priorities in this particular application, and that the site has the least visual impact. It was his opinion that the spirit of the Ordinance and the reason for limiting the number of towers and the number of facilities is related to the visual aspec, the impact of the site itself and the potential hazards involved. This site is so unique that it can incorporate all of the equipment. He was favorable toward the application.

Mr. McCarthy believed that the visual impact was addressed, and there was none. He did not see any need for height variances as it would not be above the existing height. While he acknowledged the concern of neighbors about future carriers, he noted the cross at the top of the cupola and indicated that the Sisters would probably want it to remain. Both the Sisters and the Board of Adjustment would need to approve any future carriers. There was significant testimony about the limited space for equipment in the attic and the limited space for antenna. The duty is to the whole community, not just the homeowners that are near the site. The health issue is dead. Mr. Collins testified that the emissions are 75 times below the Federal limit which is a significant finding in terms of safety. Even the objector's own expert testified that the public policy is to limit the height and number of towers, and that is what he believe approving the application does.

It eliminates the need for towers and uses an existing site which is what the ordinance directs us to try to do. He was favorable toward the application.

Chair Seavey recognized the concerns of the residents and the needs of the applicant. He acknowledged that the Board has less control over certain cases then others. The first category of applications are those such as fences where there may be neighbors that agree or disagree, but there is no FCC involvement and no major safety concerns. They try to work those applications out with the neighbors. In the cases such as the one currently in front of the Board, it is different. The safety issues are given to them and they do not get to make a determination. The coverage issue has been presented, and there are issues raised by the objectors. When one looks at the maps there may be some spots that are questionable at 850, but even at 850 there are quite a number of spots they are reaching from the cupola that are not likely to be reached from any other spot in the Borough whether that is the bell tower, the high school or Kings. The only way they would be reached with a lesser power would be to build a tall tower. He believed that the applicant chose the site as they cannot change the topography. They would otherwise need a tower. The cupola that is existing is a fantastic compromise to what is the historic fabric of Mendham Borough. He thought it to be the best alternative.

The application is invisible. One could argue that the copper wire in the cupola is not going to look like the copper-colored screen that the Board may require as a condition. There is no one who drives through this town, who will notice it.

Chair Seavey continued that it would be nice if they did not need it, but he believed that they did. He did not think that shareholders were impressed with the number of towers. They want revenues to be growing. Except for the answer given in this meeting, no one has yet been able to answer for him why a shareholder would want to see more towers. The FCC is saying that it is better for the country and the community. There are probably going to be more.

Relating the application to the ordinance, Chair Seavey stated that it applied to the fourth level of criteria. He thought it what the Borough Council had in mind when they crafted the ordinance. While there are some holes in the ordinance that may need repair, he stood behind it as a well-written ordinance with this location probably one of the Governing Body's considerations as an institution/educational/religious facility, much like the bell tower in its current location. The other locations as identified by Mr. Pierson were challenged by topography. If the objectors have a better place at 1900, they should have put it on a map and shown it to the Board. The location is unique as it is in a bowl and other spots cannot reach it based on testimony.

He was not sure to what degree, but believed there is a necessity and that the application meets the conditional use standards. It meets the setbacks. A height variance does not apply as in his opinion, it was not expanding the height, but below and within it. The aesthetic change to the screen is diminimous. In terms of detriment to the Zone Plan, he found it to be zero. He thought it might even help the Master Plan as once it is installed it may provide coverage that increases enough that it decreases the height of another tower. It may decrease the fact that we need another tower.

Chair stated that he would put conditions on the application such as the right for the provision of emergency services for police and fire. He requested that working with the engineer, the applicant would get as close as possible to match the copper/greenish wires existing in the cupola today. If the cell facility is deemed either obsolete, abandoned, ineffective or if substantially better technology comes along that it be considered for removal or modified. Mr. Ritger added that the ordinance does not speak to a schedule as to how that is determined.

Dr. Eisenstein responded that in the past he has asked that a condition be put in the resolution that once a year the applicant has to report to the clerk of the Borough that the facility is still in use and is of current value to them. It is a simple report. It is a letter that they write and failure to write the letter would start triggering the take-down provision. Mr. Lavigne, Esq. responded that he would agree with the reporting procedure, but could not agree to the reference to new technology as the determination "by whom" was an issue. Mr. McGroarty referred the Board to subsection I of the existing Ordinance language requiring reporting. Mr. Germinario, Esq. added that they should also refer to subsection L which requires removal of the facility if it has not been used for a period of six consecutive months. Mr. Lavigne, Esq. agreed to the ordinance language.

Chair Seavey confirmed that just the air conditioning units were to be located on the roof and that a new generator would not be required. Discussion followed on the fact that if anything changed from what was submitted, they would need to return at a minimum to the Board Engineer. Mr. Ritger requested that the emergency antennae also be located within the cupola. Mr. Hansen explained that they would need to do a resolution compliance package for review. If there is

something that does not agree with the approval and the finding of fact, such as a request for a new generator, they would need to return to the Board.

Board reiterated the conditions of compliance and that for the purposes of the hierarchy, only the cupola be considered the site.

Mr. Germinario, Esq. summarized the motion as to approve the conditional use based on the finding that the application does meet the conditional use requirements, and to also approve the Site Plan.

Mr. Ritger made the motion. Mr. Palestina seconded.

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

In Favor: Palestina, Ritger, Schumacher, Smith, McCarthy, Seavey
Opposed: None
Abstentions: None

The motion carried. The application was approved.

######

Zenjon Enterprises, LLC – Preliminary and Final Site Plan/Variances/Interpretation
Block 1501, Lot 11, 25 East Main St. (Historic District): **Continuation**

Present: Robert Simon, Esq., Attorney for Applicant

Given the hour, Chair Seavey announced that the Zenjon application would be carried to the Wednesday, August 3, 2011 special meeting of the Board. Mr. Simon, Esq. granted an extension of time.

######

Sansone, Ronald & Laura – Hardship Variance
Block 404, Lot 14, 6 Mansfield Court

Chair Seavey introduced the following resolution that had been provided to the Board with their pre-meeting packages:

BOROUGH OF MENDHAM BOARD OF ADJUSTMENT
RESOLUTION

6 Mansfield Court
Block 404, Lot 14

WHEREAS, Ronald and Laura Sansone ("Applicants") have applied to the Board of Adjustment of the Borough of Mendham (the "Board") for variance relief to permit the construction of an addition to the rear of the existing dwelling on property located at 6 Mansfield Court and designated Block 404, Lot 14 on the Tax Map of the Borough of Mendham (the "Subject Property"); and

WHEREAS, a public hearing was conducted by the Board on June 8, 2011; and

WHEREAS, the application was deemed complete by the Board, after granting of several checklist waivers requested by Applicants, on June 8, 2011; and

WHEREAS, Applicants have complied with all of the procedural requirements to proceed with the application for relief, including required legal notice; and

WHEREAS, testimony and exhibits were offered by and on behalf of Applicants at the public hearing, comment letters and reviews by the Board's professionals were reviewed and discussed, and members of the public were given an opportunity to be heard; and

WHEREAS, the Board has considered the Applicants' submissions for the request for variance relief, including testimony presented by and on behalf of Applicants, and the comments of the Board's consultants and from a member of the public;

NOW THEREFORE BE IT RESOLVED by the Board of Adjustment of the Borough of Mendham that, based upon all of the foregoing, the Board makes the following findings of fact and conclusions of law:

1. Applicants are the owners of the Subject Property, which property is located at 6 Mansfield Court and is designated Block 404, Lot 14 on the Tax Map of the Borough of Mendham. The Subject Property is located in the 1/2-Acre Residential Zone.

2. The Subject Property is a fully-developed residential lot with an area of approximately 0.59 acres, according to the survey submitted to the Board. The Subject Property is presently improved with a two-story dwelling, having a wooden deck off the rear, a swimming pool with concrete surround, slate walks, a rock wall, a paved drive, and several miscellaneous accessory structures and play apparatus. Present lot coverage is 26.04%, relative to a 20% maximum allowable in the Zone by Ordinance (by virtue of a variance previously granted to Applicants).

3. Applicants propose an addition to the rear southerly corner of the dwelling. The addition would add 408 square feet to the living area of the first floor (enlarging and kitchen/family room/mudroom) and 90 square feet of living space to the second floor (enlarging the master bedroom and storage area). A deck (smaller than the present deck) would be built on the newly-shaped rear of the house. The proposed addition is desired to better accommodate Applicants' growing family.

4. The result of Applicants' proposed construction would be a net increase in lot coverage of 311 square feet, bringing the lot coverage to 27.24%. This increase from 26.04% requires additional variance relief for Applicants.

5. Applicant Ronald Sansone and his architect, Jon Booth, testified that the dwelling, including the proposed addition, would be similar in size to dwellings on other properties in the neighborhood. Given the location of the proposed addition, it would be entirely behind the existing dwelling; it would not result in the appearance of a larger house from the street. Finally, given the angular splay of the improvements on lots surrounding the cul-de-sac where the Subject Property is located, there would be virtually no visual impact on adjoining properties.

6. The Board's principal concerns related to the potential that additional lot coverage could give rise to drainage or surface water management problems. This subject was explored from several directions in the course of the hearing.

7. Applicant Ronald Sansone testified that from the time the dwelling was built, lot design which included swales and drainage easements resulted in appropriate control and prevented any drainage or runoff problems onto neighboring properties.

8. With respect to drainage, runoff and surface water management issues, the Board tried to explore possible mitigation of any negative impacts. Suggestions such as removal of some walkway, removal of the rock wall or in-fill with soil, or other reduction of lot coverage were discussed.

9. A neighbor testified that he would prefer to see the rock wall (which acts to support the pool) left as is. He thought it was an attractive addition to the property and should not be filled in or covered in an effort to technically reduce the lot coverage calculation. He supported the Applicants' request for relief to put the desired addition on the rear of their dwelling.

10. There was further discussion concerning the balance of the relatively minor amount of impervious surface resulting from pathways to the pool and their practical desirability. Although Applicants were willing to remove some of the surface of the paths, it appeared to the Board, on balance, that retention of walking paths to the pool was desirable from a functional point of view.

11. Applicants did agree that the new roof drains would be tied into the existing underground piping system which carried water from the present roof drains and assisted in management of surface water.

12. The Board reviewed the April 8, 2011 comment letter from the Board Engineer with Applicant Ronald Sansone and his architect. It was determined that the pool and sheds were constructed prior to the Borough's adoption of its storm water ordinance and, further, that the construction proposed in this application is exempt from the current storm water ordinance regulations, due to soil disturbance of 2,200 square feet and new impervious surface of less than 1,000 square feet (both below the applicable thresholds). The Board Engineer did, however, request that certain plan revisions be made, which revisions were agreeable to Applicants.

13. Based upon the foregoing, the Board concluded that, although the requested relief would allow lot coverage beyond that presently on the Subject Property, this further increase was minor; that the effort to reduce the lot coverage by removal of paths to the pool would result in practical drawbacks to occupancy and enjoyment of the property and its accessory pool, and resulted in only *de minimus* increase in lot coverage; that other potential mitigation efforts such as in-filling and covering of the rock retaining wall with soil would be an undesirable treatment of a desirable feature on the Subject Property and, though technically reducing "lot coverage," would reduce the level to which the present dry-laid rock wall permits water penetration and percolation; and that notwithstanding the inclusion of the pool surface as a major portion of the arithmetic excess of lot coverage relative to the district regulation, the pool would not contribute in any manner to a drainage or surface water management problem. Further, the Board concluded that the proposed addition could be constructed without any detriment to the neighborhood and, in fact, might be viewed as an overall benefit not only to Applicants, but to the neighborhood in general.

14. As a result of all of the foregoing, the Board concluded that, with appropriate conditions, the variance relief pursuant to NJSA 40:55D-70c could be granted to Applicants to permit the construction of the proposed addition to the rear southerly corner of the dwelling located at 6 Mansfield Court without any substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan or zoning ordinance.

BE IT FURTHER RESOLVED that, based upon the foregoing, the Board of Adjustment of the Borough of Mendham approves and grants the application of Ronald and Laura Sansone for variance relief to construct a two-story addition on the rear southerly corner of the dwelling located at 6 Mansfield Court (Block 404, Lot 14) in accordance with the plans, survey and architectural plans filed with the Board, subject to the following conditions:

1. Construction is to be consistent with the plans, architectural plans and exhibits filed with the Board in connection with this Application, as well as in conformance with the testimony and exhibits presented to the Board at the public hearing held on June 8, 2011, the findings and conclusions of the Board set forth herein, and the conditions of approval as detailed in this Resolution.

2. Applicants shall obtain all other required permits and approvals from any Board, body, or agency, whether municipal, county, state, or federal, having jurisdiction over the Subject Property or this project.

3. All municipal taxes and charges, as well as fees in connection with the application and construction of the project shall be paid and kept current.

4. Applicants shall comply with the Board Engineer's April 8, 2011 technical review comments with respect to filing a sealed survey as well as providing plan revisions with regard to disposition of soil, updating the zoning table, depicting or noting the required tie-in of roof drains to the underground piping system, and providing the required approval signature lines.

5. The path from the wooden deck to the pool area shown on the submitted Plan to be removed, shall be replaced with a path of stepping stones, having a maximum total surface of 60 square feet.

6. In accordance with Section 124-22 of the Board Ordinances, the variance relief granted herein shall expire one year from the date of this memorializing Resolution, unless the construction of the improvements requiring variance relief has actually been commenced during that time period.

BE IT FURTHER RESOLVED THAT this Resolution, adopted this 6th day of July, 2011, memorializes the action, as set forth above, taken by the Board at its meeting of June 8, 2011.

The undersigned does hereby certify that the foregoing is a true copy of the Resolution adopted by the Borough of Mendham Board of Adjustment on July 6, 2011, memorializing the Board's action at its meeting of June 8, 2011.

Mr. Smith made a motion to approve the resolution. Mr. Schumacher seconded.

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

In Favor:	Palestina, Ritger, Schumacher, Smith, Seavey
Opposed:	None
Abstentions:	None

The motion carried. The resolution was approved.

ADJOURNMENT

There being no additional business to come before the Board, on motion duly made, seconded and carried, Chair Seavey adjourned the meeting at 12:00 a.m.. The next regular meeting of the Board of Adjustment for August 2, 2011 was cancelled. The Board will hold a special meeting at 7:30 p.m. on Wednesday, August 3, 2011.

Respectfully submitted,

Diana Callahan
Recording Secretary