

**MINUTES OF THE  
MENDHAM BOROUGH BOARD OF ADJUSTMENT  
June 2, 2010  
Garabrant Center, 4 Wilson Street, Mendham, NJ**

**CALL TO ORDER**

The regular meeting of the Board of Adjustment was called to order by Chair Santo at 7:30 p.m. at the Garabrant Center, 4 Wilson Street, Mendham, NJ.

**CHAIR'S ADEQUATE NOTICE STATEMENT**

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

**ATTENDANCE**

Mr. Palestina – Present  
Mr. Peck – Present  
Mr. Peralta – Absent  
Mr. Schumacher – Present  
Mr. Seavey - Present

Mr. Smith - Present  
Mr. Santo - Present  
Mr. Ritger, Alt. I - Present  
Mr. McCarthy, Alt II – Absent

Also Present:

Mr. MacDonald, Attorney  
Mr. Hansen, Engineer  
Mr. Humbert, Planner

#####

**PUBLIC COMMENT**

Chair Santo opened the meeting to public comment or questions on items that were not on the agenda. There being none, the public comment session was closed.

#####

**HEARING OF CASES**

**Omnipoint Communications, Inc. and New York SMSA Limited Partnership d/b/a Verizon Wireless – Use and Other required variances: **Continuation****

Block 801, Lot 20, Kings Shopping Center

Chair announced that the Board would be conducting deliberations and requested any comments from Mr. MacDonald, Esq.

Mr. MacDonald, Esq. stated that in the 2006 review of the Borough Master Plan, the Public Utilities Plan was amended to include a reference to the need for wireless telecommunications attention to the zoning ordinance. As a result, the Governing Body and the Planning Board put forth Ordinance 4-08, which became the Borough's first Wireless Telecommunications Ordinance.

Continuing with his comments to the Board, Mr. MacDonald, Esq. summarized that the property is located in the East Business District. It is developed and is considered a conditional use in and of itself as a planned shopping center. The application for decision also involves a conditional use in accordance with the ordinance. The application is before the Board of Adjustment as there are two provisions of the conditional use that the applicant does not meet. One is the height at 130 ft. versus the 120 ft. that is the maximum provided for by the condition. The original application was for 120 ft.; however after analysis and reflection on the collocation objective in the ordinance, the applicant was requested to amend the height of the monopole to 130 ft. The second area of noncompliance is the requirement that the pole be located in the rear yard of developed lots. The location is proposed in the front of a second use on the property, that being

the Health and Racquet Club that has associated uses of a pool, the Kessler Rehabilitation Center and a children's care facility for people using the pool.

Advising the Board on how case law guides the analysis of the areas of noncompliance, Mr. MacDonald, Esq. stated that the Board should include an assessment based on the evidence as to whether the applicant has sustained its burden of proof that despite the lack of compliance with the conditions, the property remains suited for the permitted conditional use of the wireless antennae facility. The interested parties have raised several theories of additional areas of noncompliance related to the developed parcel itself.

The applicant would also require site plan approval. There are some bulk, or "C" variances associated with the site plan. The interested parties contend that there are 12 to 18. The applicant contends that the focus should be on the variances and deviations related to its specific proposed third use for the property, the wireless telecommunications facility.

Concluding, Mr. MacDonald, Esq. provided additional guidance based on conditional use case law. If a Board member is inclined to feel that the property does not remain suitable for the proposed conditional use as a result of the deviations, an explanation of why and how the deviations could be ameliorated on the subject property should be given. Also, discussion should take place on whether the contemplated modifications could make the property acceptable for the proposed conditional use despite the deviations.

Mr. MacDonald, Esq. ended by stating that the underlying request is a use variance requiring five affirmative votes. The Board should conduct a vote on the use variance before moving to the site plan. The "C" variances should be dealt with in connection with the site plan. The site plan and variances could be approved by four votes.

Board began its deliberations.

Mr. Ritger stated that based on the ordinance and his analysis, there is only one parcel in the East Business District that could comply, and it is the subject property. Looking at the goals of the ordinance and the Master Plan both suggest that a rear yard location is paramount. The Historic Commission has expressed something similar. Based on his analysis, the applicant has not shown that they have looked at every area of the particular lot and come away with the best location for the pole. The current location is the most obvious and most intrusive. He suggested that the back of the site be considered which would place the pole in the rear yard, thus requiring side yard relief. He referenced Exhibit A-12, the proposed site plan and explained that if the pole were placed directly behind the fitness center, it would be in the rear yard. At that location it would be close to the trees where some type of appropriate tree-like camouflage could be used. A side yard setback variance would need to be granted, but it would also solve such issues as loss of parking spaces and screening of the facility. It would still be outside of the 250 ft. required distance from the residents that appear to be 300 ft. away.

Board discussed Mr. Ritger's proposal with comments related to the height of the other trees and use of a "pine tree" pole against that background as perhaps not as noticeable. The location could cast a shadow on the pool, but it would be for a shorter period of time than the proposed location.

Mr. Palestina expressed his concern that the tower as proposed would not be located in the rear yard. He liked the location of the far corner. He noted that while the Board requested 130 ft. to try to avoid a second pole in the area, he was not sure whether that point was still valid. He requested Board input on moving back to 120 ft. A solution might be to reduce the height to 120 ft., place it in the rear corner and use the latest "tree technology" for aesthetics.

Chair Santo stated that through Dr. Eisenstein's testimony, it became clear that the likelihood of a third applicant seeking collocation would be more probable than not. While Mr. Palestina understood that, he questioned whether a rear yard location would limit room for a second pole, so that a third operator would need to incur expense to go from 120 to 130 and decide to go elsewhere. Mr. Schumacher stated that the ordinance requires that locations be provided on the pole for three wireless carriers. The pole was taken to 130 ft. to accommodate three carriers. Mr. Ritger and Mr. Peck clarified that their understanding was that a 120 ft. pole is suitable for three carriers, but the fourth would require a bump to 130 ft.

Mr. Schumacher concurred with Mr. Ritger and Mr. Palestina on the rear yard setback. The intent of the ordinance is to have the pole in the East Business District behind the building, not in an area where adults and children walk and cars are parked. There is the possibility of falling ice. In addition to considering placing the tower behind the tennis facility, there should be serious consideration for locations behind Mendham Plywood, the Ford Motor Company or somewhere

in that area. The other possibility is near the police station and JCP&L, outside the mainstream business corridor.

Mr. Smith expressed his opinion that there is a need for additional cell service based on the dual bands of 1900 mhz versus the 850. He did not think that the particular site is suited for the tower right in front of the racquet club. He did not believe that the Council wanted the compound and tower in a center location of traffic. He would be more in favor of giving rear yard setback relief behind the principal building. One will see a tower that is 120 or 130 ft. no matter where you are, but the compound is just another intrusive facility for people. His preference was to have a location near Mendham Plywood considered as it is further away from Dean Road homes, and it is centered between Cold Hill Road and Dean Road. He preferred to move it further east than west.

Mr. Peck read excerpts from the ordinance to reflect on the proposed location. Section 2A-3 talked about preserving and protecting the general visual, historic and natural environment, and preventing adverse visual impacts within historic sites and districts. Section 2A-6 referenced mitigating adverse visual impacts. Section 2A-7 spoke to eliminating any safety hazards such as attractive nuisances and the risk of falling ice. Based on those objectives, he did not feel that the location was suitable.

Continuing with his comments on the need, Mr. Peck stated that he can walk around the area and his phone works, even in the "ice cream section" of Kings, but he realizes that technology keeps improving and there are future considerations. It is difficult to overlook the testimony of the expert witnesses, particularly their own expert, Dr. Eisenstein, who confirmed the need from a technology standpoint. In terms of the potential relocation, Mr. Peck agreed that there is a likely good solution by Mendham Plywood which would mitigate the impact on the neighborhoods and the Main Street Corridor.

Mr. Seavey stated that the 120 ft. height that has been set by the governing body is a limit, and while a height of 120 ft. may eliminate many parcels in the East Business District, the governing body did not say that all towers coming here are to be 120 ft. tall. The latest technology may require an 80 ft. tower. The mathematics will be different for each tower height and property. For this tower, the extra 10 ft. was added for the additional carrier.

Continuing, Mr. Seavey stated that after 22 months he still does not understand what "substantially better than mediocre" means. For Verizon, he believed that there was probably not a need, but there are two applicants, Omnipoint being the second. The professionals have indicated that coverage is required. While he believed that some of the testimony was flawed, they did demonstrate that there is some type of need. He, however, could not say confidently that what they demonstrated based on the need, gap, technology and antennae would require a tower at 120 ft. or 130 ft. tall.

In terms of the location, Mr. Seavey did believe that the subject property is the proper site for them to be considering. He felt that the trees were at least 100 ft. and may be 120 ft. in some cases. The closer the tower is pushed back, the closer the top comes to the top of the trees based on the perspective of where one stands. The closer one gets to the tower, the higher it is going to look. In terms of trees blocking the signal, reception in Kings is either coming from the Bell Tower at Daytop or Conifer. There are a lot of trees between those locations. Signals go through the trees to Patirots Path. From the RF testimony, it appears that the tower is trying to cover south from where the tower may locate. Relatively speaking, there are not any trees to the south.

Summarizing, Mr. Seavey stated that he believes there is a gap, and there is probably a need. He did not believe that the gap or the need is as big as it was demonstrated. Lower tower or towers or trees or silos could probably cover the gap substantially better than anywhere else. In terms of the rear yard, the proposed location is not the rear yard. It impacts the site, the historic area, the corridor, the view, and he would have to deny the particular location.

Chair Santo stated that he shared many of the views and opinions of his fellow board members. He believed that the Planning Board and the Borough Council when framing the ordinance were very cognizant of where they wanted the cell tower location. It is in direct linear path with other poles and antennas along Route 24 that service this area, the residents and businesses that live here. Based on the evidence, there is a profound need for a tower, there are gaps in coverage and the need has to be satisfied today and well into the future as new technologies and great demands are made for service in the area.

Continuing, Chair Santo stated that when they began the process, it was the Board's request to go to 130 ft. and to move the pole from behind the Apothecary to the center of the shopping center site. The Board did that believing that it would create some distance in depth, and the impact

would be diminished. They did not have the benefit of public comment. He had thought that the Planning Board had the same process as the BOA and mistakenly he believed that all the residents had been noticed that the shopping center was under consideration as a cell site. They were not sensitive to the public concern, not because they did not care, but they did not know about it.

In terms of the proposed location, he now has concerns given the testimony dealing with the visual impact that the tower will have on the community. He has long thought there were other sites that could be evaluated. The rear and side yard of the racquet club is one. He would also like to see conversations entered into with Mendham Plywood. Going to the rear yard of the Racquet Club is a good one as it has minimum impact on parking, and it is a safer location as it is remote and removed from the traveled way. Mendham Plywood is equally attractive for that reason.

Responding to the Chair on whether the applicants would be willing to evaluate alternate sites discussed by the Board, Mr. Schneider, Esq. stated that they would not in conjunction with this proceeding. They needed a vote. He would like a decision, and then the applicant will make a decision as to what they will do moving forward.

Mr. Ritger added that the pole is currently a monopole, but in his discussion of putting it near the trees, in a "pole tree" configuration, the antennae become external and the height of the tower should shrink becoming less obtrusive and potentially more hidden. He also believes that there is a gap. He lives and works in the gap and has poor coverage. The visual impact analysis for the application was lacking. The locations from which they were taken do not matter much to the public. They were not from people's homes or where people lived and where people thought the town of Mendham was going to be impacted. Driving in from Morristown on Route 24 this tower would be a significant feature in the landscape on the horizon.

Mr. MacDonald, Esq. advised the Board that in preparation for the vote they should consider their comments made relative to the rear yard setback if they feel it does not comply with the ordinance. A negative vote would be in response to a motion to that effect, indicating that after deliberations they were unable to come up with an acceptable proposal to ameliorate that condition. As the Board had requested the applicant to increase the height to 130 ft., it would not be an appropriate reason to deny an application. A motion in conjunction with the use variance is the first logical step. If there is a favorable motion, then there would be a vote on the site plan.

Mr. Palestina made a motion to deny the application based on the rear yard setback, and that the application does not satisfy the requirement as stipulated within the ordinance. Mr. Seavey seconded.

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

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

The motion carried. The application was denied. Mr. MacDonald, Esq. will prepare a resolution memorializing the action for the Wednesday, July 7, 2010 regular meeting of the Board.

Mr. Seavey made general closing comments indicating that a single tower of any height should not come to a Board for a decision. It should be done in a process that is more collaborative with the applicant. There should be a round table of towns with the applicant to determine where there are other proposals.

Mr. MacDonald, Esq. requested that the case be closed as the Board could not solve the unfortunate problems associated with the interconnecting interests of the various parties related to wireless communications facilities.

Chair agreed and requested that Mr. Schneider, Esq. carry a message to the applicants, that the application was denied on failure to meet the rear yard setback. It was one of location on the site. He encouraged him to speak with his clients.

**ADJOURNMENT**

There being no additional business to come before the Board, on motion duly made, seconded and carried, Chair Santo adjourned the meeting at 8:35 p.m. The next regular meeting of the Board of Adjustment will be held on Wednesday, July 7, 2010 at 7:30 p.m. at the Garabrant Center, 4 Wilson Street, Mendham, NJ.

Respectfully submitted,

Diana Callahan  
Recording Secretary