

**MINUTES OF THE
MENDHAM BOROUGH BOARD OF ADJUSTMENT
July 7, 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 – Absent	Mr. Smith – Present
Mr. Peck – Absent	Mr. Santo – Present (Omnipoint)
Mr. Peralta – Absent	Mr. Ritger, Alt. I - Present
Mr. Schumacher – Present	Mr. McCarthy, Alt II – Present
Mr. Seavey - Present	

Also Present: Mr. MacDonald, Attorney
Mr. Hansen, Engineer

#####

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.

#####

APPROVAL OF MINUTES

On motion by Mr. Seavey, second by Mr. Smith and all members being in favor, the minutes of the June 2, 2010 regular meeting of the Board were approved as written.

HEARING OF CASES

Omnipoint Communications, Inc. and New York SMSA Limited Partnership d/b/a Verizon Wireless – Use and Other required variances: **Resolution**
Block 801, Lot 20, Kings Shopping Center

Mr. MacDonald, Esq. presented the following draft resolution to the Board:

**RESOLUTION OF FINDINGS AND CONCLUSIONS
BOARD OF ADJUSTMENT
BOROUGH OF MENDHAM**

WHEREAS, OMNIPOINT COMMUNICATONS, INC. and NEW YORK SMSA LIMITED PARTNERSHIP d/b/a VERIZON WIRELESS have applied to the Board of Adjustment of the Borough of Mendham for a Use Variance and Site Plan Approval to permit the construction and installation of a Wireless Telecommunications Facility at the King's Shopping Center located on East Main Street which property is also known as Lot 20 in Block 801 on the Tax Map of the Borough of Mendham and, which premises are in the East Business Zone; and

WHEREAS, the Board, after carefully considering the testimony, reports, exhibits, questions, opinions and legal arguments presented by the Applicants, the Board Consultants and various Interested Parties at a series of Public Hearings held on June 4, 2008, July 1, 2008, September 3, 2008, October 7, 2008, December 2, 2008, February 3, 2009, March 3, 2009, April

7, 2009, May 13, 2009, June 3, 2009, July 7, 2009, August 4, 2009, September 1, 2009, October 6, 2009, November 4, 2009, November 17, 2009, December 1, 2009, January 5, 2010, February 2, 2010, March 2, 2010, April 6, 2010 (Attorney Summations) and June 2, 2010 (Board Deliberations and Vote) has made the following factual findings:

1. According to the public record and the application materials the subject property is currently owned by V-Fee Realty Investment, LLC (Thomas Maoli, Managing Member). The Record indicates that the current owner purchased the property from Mendham Investment Company, LP on or about December 20, 2005.

2. The prior owner(s) have processed several applications before the Borough Boards over the years and the Borough files contain a "Sealed Survey" prepared by Gary V. Marmo (NJ License # 37599) as an employee of D.P. Sweeney & Associates. This Survey is originally dated September 26, 2005 and it has been revised through May 25, 2007.

3. Based upon the D.P. Sweeney Survey (hereafter "the Survey") and the various Exhibits in this Record, the Board is able to deduce that the property (which is most commonly referred to as "the King's Shopping Center") is 13.65 acres and it is located on the northerly side of the primary east/west roadway running through the Borough of Mendham which is known as East Main Street, Route 24, County Road #510, etc.

4. The Survey indicates that the shopping center has 508 feet of frontage on East Main Street and extends northerly to a depth of approximately 1,198 feet. The first 750 feet of the property contain the "King's Shopping Center" which generally includes three (3) separate primary buildings along with the parking areas and access driveways associated with the supermarket (which occupies all of one 27,504 square foot building). The other two buildings shown on the Survey contain several retail and service businesses including: the Bank; the Apothecary; four (4) eat in restaurants; a deli; a liquor store; a dry cleaner; a book store; a jeweler; and, other similar uses.

The rear 450 feet of the property contains separate additional improvements and parking areas commonly known as the "Mendham Health and Racquet Club". These additional improvements include a 53,914 square foot building, an outdoor swimming pool with related patios and play areas, a 677 square foot trailer (that appears to be used as a babysitting facility) and a small to moderate sized physical therapy facility in the left rear (northwest corner of the principal building).

5. The applicants, Omnipoint and Verizon Wireless, with the consent of the Owner, have requested municipal zoning permits and approvals as necessary conditions precedent to obtaining construction permits to install and erect a Wireless Telecommunications Facility at the King's Shopping Center site.

6. In late 2007, when the Borough of Mendham became aware of the applicants' intention to file this joint request for Variance and Site Plan approvals, it advised counsel for the applicants that the Borough Governing Body and the Borough Planning Board were in the final stages of developing and adopting a "Wireless Telecommunications Ordinance" in furtherance of the 2006 review and update of the Public Utilities Plan Element of the Borough of Mendham Master Plan. The final version of the Borough's first Wireless Telecommunications Ordinance (Ordinance #4-08) was adopted by the Borough Council after second reading on May 5, 2008. As noted above, the first of several Public Hearings on this matter was conducted one month later on June 4, 2008.

7. The applicants presented expert testimony and approximately 29 Exhibits to the Board in connection with radio frequency and system design issues related to the desired location and height of their proposed monopole/stealth flag pole, the related equipment compound, the site design and engineering issues related to placement of the facilities, the criteria and methodology related to site selection for this facility, photographs of the proposed site from various perspectives and related photographs depicting possible views of a simulated version of the stealth flag pole tower.

8. The Board spent considerable time reviewing what became a six (6) page set of drawings that were signed and sealed by Robert J. Foley, Prof Engineering License #GE-038356 on behalf of the CMX engineering firm. The Drawings were originally dated April 12, 2007 and were eventually revised through November 19, 2008. Mr. Foley's Site Plan materials refer back to the above mentioned D.P. Sweeney Survey as a data source. Sheet 2 of 6 of the CMX plans labeled Z-1 "Site Plan & General Notes" sets forth the Bulk/Setback requirements of the East Business Zone and the additional setback related Conditions associated with a Wireless Telecommunications Facility which are now codified at Section 215-12.6B (7) & (8) of the Mendham Code.

9. The applicants initially proposed, and the CMX plans depicted, a 120 foot flagpole style monopole to be located at the northerly end of Building "C", where the "Apothecary" business is located. That initial monopole was proposed at 59.9 feet from the side property line, as opposed to 135 feet, as required by the Conditions of the Wireless Telecommunications Ordinance. That initial location also failed to comply with Section 215-12.6B (9) which states: WT towers shall only be located within the rear yard of developed lots or within the rear half of the building envelope for undeveloped lots. {The Board interprets this property to be a developed lot.}

10. In an effort to avoid interference with the use of parking lot aisles, parking spaces and with customer foot traffic, the Board requested that the applicants amend their plans to locate the monopole and equipment shelter to an area further north and away from Building "C". The alternate location was adjacent to the semi landscaped parking median to the rear of Building "B" (King's) and in front of Building "D" (the Health & Racquet Club). This alternate location still required a variance from Section 215-12.6B (9) as not being in the Rear Yard of the property, as that term is defined in Section 215-1 of the Mendham Code.

11. In an effort to minimize the total number of wireless telecommunications towers within the Borough, the Board requested that the applicants investigate the possibility of increasing the height of the monopole to 130 feet even though Section 215-12.6C (2) sets forth the Condition that:

No WT tower shall exceed a height of 120 feet.

12. The applicants amended their plans to reflect the alternate location for the Equipment Compound and the monopole and they added the additional 10 feet of height to the monopole. The applicants technically amended their application to request a deviation from the Height Condition and deleted the need for a deviation from the side setback Condition. As noted above, relief from the Rear Yard Condition was still necessary.

13. In addition to the input and reports customarily received from the Borough Engineer and the Borough Planner, the Board enlisted the services of Bruce A. Eisenstein, Ph.D., P.E. of The Consulting Group. Dr. Eisenstein is a Professor of Electrical and Computer Engineering at Drexel University in Philadelphia, PA. The Board has relied upon Dr. Eisenstein's advice and expertise in interpreting the testimony, exhibits and arguments related to radio frequency propagation, telecommunications and cellular telephony.

14. In support of their burden to prove that the property remains suitable to be used by each of them as a Wireless Communications Facility despite an inability to comply with one or more Conditions of the Mendham Wireless Telecommunications Ordinance, the applicants presented Testimony and 29 Exhibits from: Glenn Pierson, General Manager of PierCon Solutions LLC; Robert A. Foley, P.E. from CMX engineering in connection with the above described Site Plans; Timothy M. Kronk, a NJ licensed Professional Planner who provided a May 21, 2008 Planning Report and an April 25, 2008 Visual Analysis; and, an RF Compliance Assessment and Report by Daniel F. Collins of Pinnacle telecom Group, LLC.

15. Mr. Irving Isko, who is a long time resident of Mendham Borough and a former member and Chairman of the Board of Adjustment, participated as an Interested Party during the hearings and deliberations on this application. Mr. Isko was represented by counsel who participated by cross examining the applicants' radio frequency expert, presented a separate radio frequency expert in rebuttal, cross examined Dr. Eisenstein, presented a separate planning expert in rebuttal and set forth several legal arguments generally in opposition to the application. Mr. Isko presented approximately 26 Exhibits into the Record including various resolutions, transcripts and pleadings from other wireless applications in the Borough and other municipalities.

16. In addition to the foregoing, Mr. Isko and his former counsel, David Schechner, Esquire, presented Testimony and presented several of the above described pleadings and transcripts in support of an argument that one or more of the applicants before the Board had made a binding and enforceable agreement or settlement that included a stipulation that they, or it, would not construct any additional Wireless Telecommunications Facilities in the Borough of Mendham. Due to the paucity of any clear and precise documentation related this technical legal argument, the Board is unable to arrive at an informed finding and conclusion. The Board also notes its reservation as to whether it has jurisdiction to make such a determination. The Board has not factored this issue into its final decision herein.

17. Several other members of the public attended many of the Public Hearings. As the Transcripts indicate, the members of the public raised various questions and made several statements related to their concerns and preferences related to the application.

18. Mr. Frank Lupo who resides on Dean Road in Mendham Borough, elected to vigorously participate in the proceedings. Mr. Lupo was not represented by counsel, although he was given considerable leeway to question witnesses, present Exhibits (approximately 29), make statements and champion the cause of Alternative Telecommunications Systems, particularly what are known as Distributed Antenna Systems (DAS). Mr. Lupo was particularly vigilant with regard to reviewing the antenna design specifications.

19. The Board reviewed the relevance of Alternative Telecommunications Systems with its expert and it is in favor of continued follow up of that concept by the Governing Body. The Board does not find that the current applicants have an obligation to install such technology.

20. The Board has considered the conflicting testimony regarding the quality of service in around the proposed site and whether a "gap" exists. The Board has considered the opposing views on how testing and modeling should occur in connection with determining the need for an additional tower. The Board is cognizant that these technical conclusions should not be determined by anecdotal evidence. The Board takes into account the conclusion by Dr. Eisenstein that a gap in appropriate design coverage exists and the proposed facility is located to address that deficiency.

21. The Board has considered the fact that the applicants are both FCC licensed carriers.

22. The Board has considered that the Borough has declined to make the Police Station property available to the applicants for installation of a wireless telecommunications facility.

23. The Board is aware that numerous parties have objection to the visibility of a monopole at this location. The Board has attempted to balance that objection with the imputed knowledge that the Planning Board and the Governing Body would have understood that at least a portion of any permitted 120 foot monopole in the East Business District would be visible from the Main Street Corridor and various historically relevant locations in the Borough

24. The Board does, however, find that the combined uses of the King’s Shopping Center and the Mendham Health & Racquet Club on this one property do render it the busiest public use property in the Borough. The only property that might compare in size and intensity of public use would be the High School on a busy school/activity day.

25. The Board interprets the Rear Yard Condition to address a dual zoning and planning purpose: A] assistance with the goal of visual screening by having a WT facility behind a building; and, B] removal of a WT facility from the busiest pedestrian use areas of a property by having it in the rear yard.

WHEREAS, the Board has determined that the Use Variance and related Site Plan Approval requested by the Applicants, OMNIPOINT COMMUNICATIONS, INC. and NEW YORK SMSA PARTNERSHIP d/b/a VERIZON WIRELESS, **cannot** be granted without substantial detriment to the public good or without substantially impairing the intent and purpose of the Zone Plan and Zoning Ordinance of the Borough of Mendham for the following reasons:

1. After considering all of the factual testimony, expert testimony, and expert opinion and after reviewing and analyzing all of the Exhibits, the Board finds that the inability to comply with the Rear Yard Condition due to the unique and expansive development of the King’s Health Club property renders it unsuitable for this Conditional Use.
2. After considering all of the factual testimony, expert testimony, and expert opinion and after reviewing and analyzing all of the Exhibits, the Board concludes that there are no available conditions or alternatives that it might suggest or impose to ameliorate the degree and impact of the deviation from the Rear Yard Condition.
3. The Board interprets the recent amendments to the Borough Zone Plan to indicate the legislative intent that Wireless Telecommunications Facilities are now permitted Conditional Uses in the East Business District. The Board however, finds that the unique facts of this property render it inappropriate to accommodate this additional use.
4. The Board acknowledges that it requested consideration of the 130 foot monopole height and confirms that is not a basis for this negative decision.

NOW, THEREFORE, BE IT RESOLVED, by the Board of Adjustment of the Borough of Mendham on this 7th day of July 2010, that the Decision made by this Board on June 2, 2010 to DENY, for the reasons set forth herein, the Use Variance applications (the related Site Plan application having become moot) of OMNIPOINT COMMUNICATIONS, INC. and NEW YORK SMSA PARTNERSHIP d/b/a VERIZON WIRELESS, be MEMORIALIZED herein in accordance with the requirements of *N.J.S.A. 40:55D-10g*.

Responding to Mr. Ritger’s question as to why he had chosen to indicate that location in the rear yard was “impossible”, Mr. MacDonald, Esq. clarified that there is no suitable location. He referenced a previously submitted informal analysis that indicated the presence of wetlands and buffers. It could not be placed in the side yard, actual rear yard or wetlands/transition areas, unless there might be some previously paved areas. There are many problems given the development of the site.

Mr. Seavey 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: Schumacher, Smith, Ritger, Seavey, Santo
 Opposed: None
 Abstentions: None

The motion carried. The resolution was approved.

#####

Chair Santo announced that as he had previously advised the Board, with the completion of the Omnipoint application, he was resigning after 17 years of service. A letter of resignation has been provided to the Mayor. He turned the gavel over to Vice Chair Seavey who assumed leadership.

#####

Michael C. Farina – Use Variance
Block 203, Lot 84, 65 West Main St.

Present: Michael C. Farina, Applicant
Mary Anne Farina, Applicant

Mr. MacDonald, Esq. reviewed the public notices and advised that the Board has jurisdiction to proceed.

Mr. Hansen reviewed the Ferriero completeness review letter of June 16, 2010 with the Board. He recommended the requested waivers. There being no comments or questions by members of the Board, a vote on completeness was taken.

Mr. Smith made a motion to deem the application complete. Mr. Ritger seconded.

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

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

The motion carried. The application was deemed complete. The hearing would commence.

Mr. Farina testified that he currently lives in Randolph and has three children. He is a self-employed CPA with a tax practice. He has had an office in Jockey Hollow for 14 years. The location is owned by his uncle who is now selling it. The Travis home, 65 West Main St., would be perfect as a family home and an office.

He continued that there is a 1,248 sq. ft. office that was used for a dental practice for 30 years. His accounting business is less intensive than the dental business. As he was Mr. Travis' accountant he knows that he had 15 to 20 patients. Most of the accounting business is conducted by mail and his traveling to Florida. He has a smaller client base. During the peak season of February 15 and April 15, he would expect to have 2-3 clients visit per day on average. The other 10 months there would be 2 to 3 per week. There will be fewer cars and traffic.

Addressing the number of employees, Mr. Farina stated that Mr. Travis had 2 to 3. He would need two, a full time secretary and a part time bookkeeper. There are no associates or partners. He did clarify that his father owns 2% of the business, but it has been transferred to him with his father spending October through May in Florida, coming back to visit.

In terms of the site itself, Mr. Farina explained that he has no plans to change the outside of the property. There are currently 8 parking spots and a garage. He would need two parking spots. He would not affect the floor plan as he would move in with minimal minor changes. There is a sign post located at the end of the driveway with a lamp on the top of the post. The size of the sign, 2 sq. ft., is within the existing sign ordinance. He would propose only the wording "65 East Main, CPA Accountant". There would not be a name. He distributed a picture of the sign to the Board.

In deliberations, Board was favorable to the application stating it was a de-intensification of the existing use.

Vice Chair Seavey opened the meeting to questions by the public. There being none, the public session was closed.

Responding to Mr. Seavey on the hours of operation, Mr. Farina stated that his business is mainly conducted during the day. In the busy season he may have 3 appointments after 5 p.m.

Mr. Ritger made a motion to approve the application subject to a limitation on sign size based on 215.E. Limitation will be 2 full time employees. Mr. Smith seconded.

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

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

The motion carried. The application was approved. Mr. MacDonald, Esq. will prepare a resolution memorializing the action for the Tuesday, August 3, 2010 regular meeting of the Board.

#####

106 Mendham LLC – Use Variance
Block 801, Lot 12, 106 East Main St.

Present: Anthony Sposaro, Esq., Attorney for the Applicant
Robert Berlant, Property Owner
Joseph Jaworski, Engineer for the Applicant
Robert Romeo, Barbershop Owner

Mr. MacDonald, Esq. reviewed the public notices and advised that the Board has jurisdiction.

Mr. Hansen reviewed the completeness items as identified in the Ferriero Engineering letter dated June 21, 2010. Board had no questions or comments.

Mr. McCarthy made a motion to deem the application complete. Mr. Ritger seconded.

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

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

The motion carried. The application was deemed complete. The hearing would commence.

Mr. Sposaro, Esq. provided a history of the property for the Board stating that the Planning Board approved the site plan in 2008. The new building has replaced two older buildings. The plans were for a bank to occupy 8,250 sq. ft., Coldwell Banker, 5,000 sq. ft. and creation of a one bedroom COAH apartment. Coldwell Banker has rethought their use of space and is not using 1,136 sq. ft. of the space. The proposal is for a barbershop to occupy that space.

Continuing, Mr. Sposaro, Esq. stated that a use variance is required for the barbershop use. It is not a permitted use in the Limited Business Zone. In addition to the variance for the use, a variance is needed for a barber pole and for parking. The applicant will be going to the Planning Board for review of a larger freestanding sign or the addition of a third freestanding sign. The pending bank occupant is requiring a larger sign. The proposed storage shed is to store the Coldwell Banker signs. He also noted that based on a letter from Morris County, the site plan was exempted from County approval on April 7, 2008. He assumes that this plan will also not require approval as there are no changes to the site.

After a short discussion among Mr. Sposaro, Esq., Mr. MacDonald, Esq. and Mr. Seavey on whether the parking and barber pole associated with the barbershop should be considered by the BOA or the Planning Board. After discussion, Vice Chair Seavey recommended that since the Planning Board reviewed the original site and knows the past testimony on signage and traffic patterns, they should decide the parking and the signage, i.e. the barber pole. Messrs. Sposaro, Esq. and Mr. MacDonald, Esq. agreed.

Mr. Romeo testified that he has been a barber for 34 years. He has had a shop in Chester for three years and before that was located in Morristown with two shops. "Men of Mendham" will only be for men and boys. It will provide the services of hair cutting and neck and side burn shaves. There will not be any hair dying or other like services that are done in a full service beauty parlor. He plans on having four chairs.

Utilizing A-1, the Floor Plan, Mr. Romeo described the set up of the space. He pointed out the four chairs, reception area, waiting area, quiet waiting area, office, shampoo station with one sink, bathroom and utility closet. Men rarely ask to have their hair washed. The hours of operation will be Monday – Wednesday 9-7; Thursday/Friday 9-8; Saturday 8-5 and Sunday 10-4. The peak hours are 11-2 and after 5 on weekdays with a steady stream of people on the weekend. He prefers appointments, but will take walk-ins. The average hair cut takes 20 minutes. He will start with himself and possibly one other barber. The maximum would be four barbers. The shop will be upscale conducive to the area.

Commenting on the floor plan, Mr. Ritger suggested that the back door facing the parking lot would have made a better entrance.

In discussion on the parking, Mr. Sposaro, Esq. stated that worse case he would require 21 parking spaces including barbers, receptionist and patrons. Mr. Jaworski explained that from an ordinance standpoint the 1136 sq. ft. for a retail unit would require 7 spaces. There is no specific requirement for a barbershop. Currently as an office use 4-5 spaces are required representing a difference of two. There are 33 spaces on site and a drive-through for the bank. They do expect different peak times for the businesses.

Responding to Mr. Seavey on his request for further clarification on people waiting, Mr. Romeo stated that from his experience they may leave or call for an appointment. He is planning on getting a camera for internet transmission so that people can see if there are others waiting. Addressing Mr. Ritger on whether parking would be assigned, Mr. Sposaro, Esq. stated that it would not. Mr. Berlant added that there would not be any assigned spots, but the person renting the COAH unit has a stipulation in their lease to park as far from the door as they can to keep open commercial spots. He explained that the barbershop offered another professional use in the building and would have off peak hours compared to the other businesses.

Mr. Sposaro, Esq. requested that they maintain flexibility with the location of the door either on the side or in the rear. That would flip the location of the waiting area. Mr. Hansen advised that he had no issue with that, but that there would need to be a formal plan filed.

Mr. Hansen reviewed the Ferriero technical report. In response to his question on the Historic Preservation review, it was noted that there was a review and a report was generated.

Vice Chair Seavey opened the meeting to the public. There being no public comments or questions, the public portion was closed.

In deliberations, Board members were in favor of the use, but some did have a concern with the parking. Mr. Ritger stated that when Coldwell Banker has a meeting, the lot is filled. Mr. Schumacher noted that there is no on-street parking. Mr. Seavey noted that when economic times change Coldwell Banker will be selling more homes.

In terms of the use, Mr. Seavey noted that there had previously been a beauty parlor in one of the old buildings on the site. Mr. Berlant confirmed the beauty shop use and added that there had also been an apartment above it. They now have the COAH unit in the new building. Board noted that there had previously been two barbers in Mendham and now there were none. There was a barber pole. There is a need in the Borough.

Mr. Schumacher made a motion to approve the application subject to submission of the variance plan and parking and signage approval by the Planning Board. Mr. Smith seconded.

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

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

The motion carried. The application was approved. Mr. MacDonald, Esq. will prepare a resolution memorializing the action for the August 3, 2010 regular meeting of the Board.

ADJOURNMENT

There being no additional business to come before the Board, on motion duly made, seconded and carried, Vice Chair Seavey adjourned the meeting at 9:20 p.m. The next regular meeting of the Board of Adjustment will be held on Tuesday, August 3, 2010 at 7:30 p.m. at the Garabrant Center, 4 Wilson Street, Mendham, NJ.

Respectfully submitted,

Diana Callahan
Recording Secretary

