

**MINUTES OF THE
MENDHAM BOROUGH BOARD OF ADJUSTMENT
January 5, 2010
Garabrant Center, 4 Wilson Street, Mendham, NJ**

CALL TO ORDER

The regular meeting of the Board of Adjustment was called to order by Mr. 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 February 5, 2009 and the Daily Record on January 29, 2009 in accordance with the Open Public Meetings Act and was posted on the bulletin board of the Phoenix House.

OATHS OF OFFICE

Mr. MacDonald, Esq. administered the following Oaths of Office:

Dennis Santo – Regular Member: 12/31/13
Steve Peralta – Regular Member: 12/31/13
Robert Ritger – Alternate I: 12/31/10
John McCarthy – Alternate II: 12/31/11

ATTENDANCE

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

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

Also Present:

Mr. MacDonald, Attorney
Mr. Hansen, Engineer
Mr. Denzler, Planner
Dr. Eisenstein, Telecom Consultant

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2010 REORGANIZATION

Election of Chair: Mr. MacDonald, Esq. assumed leadership for the election of the Chair. Mr. Seavey made a motion nominating Mr. Santo as Chair. Mr. Peck seconded. There being no additional nominations, the nominations were closed.

ROLL CALL: The result of the roll call was 6 to 0 with 1 abstention as follows:

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

The motion carried. Mr. Santo was elected Chair. He assumed leadership of the Board.

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Election of Vice Chair: Mr. Peck made a motion nominating Mr. Seavey as Vice Chair. Mr. Santo seconded. There being no additional nominations, the nominations were closed.

ROLL CALL: The result of the roll call was 6 to 0 with 1 abstention as follows:

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

The motion carried. Mr. Seavey was elected Vice Chair.

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Election of Secretary: Mr. Santo made a motion appointing Ms. Callahan as Secretary and Recording Secretary. Mr. Seavey seconded.

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

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

The motion carried. Ms. Callahan was appointed Secretary.

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Meeting Dates Approval: Mr. Santo presented the following resolution that had been included in the pre-meeting packages:

**RESOLUTION
BOROUGH OF MENDHAM
BOARD OF ADJUSTMENT
MEETING DATES**

BE IT RESOLVED that the Board of Adjustment of the Borough of Mendham will meet to discuss or act upon public business at 7:30 p.m. prevailing time on each of the dates set forth below, at the Garabrant Center, 4 Wilson Street, Mendham, NJ:

- Tuesday, February 2
- Tuesday, March 2
- Tuesday, April 6
- Tuesday, May 4
- Wednesday, June 2
- Wednesday, July 7
- Tuesday, August 3
- Wednesday, September 8
- Tuesday, October 5
- Wednesday, November 3
- Tuesday, December 7
- Tuesday, January 4, 2011

BE IT FURTHER RESOLVED that notice of any additions to the above schedule or change in the time, date or place of any scheduled meeting will be posted on the bulletin board in the Phoenix House and delivered to the official newspapers in advance as required by law.

With respect to matters presented to this Board by applicants, the public shall be heard during the hearing on the application in accordance with the procedure as established by the Municipal Land Use Law.

Mr. Seavey made a motion to approve the resolution. Mr. Peck seconded.

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

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

Ms. Callahan will make appropriate public notice.

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Designation of Official Newspapers: Mr. Santo presented the following resolution that had been included in the pre-meeting packages:

**RESOLUTION
BOROUGH OF MENDHAM
BOARD OF ADJUSTMENT**

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

WHEREAS, Chapter 231 of the Public Laws of the State of New Jersey for 1975, known as and hereinafter designated as the "Open Public Meetings Act" aforesaid, the Board of Adjustment of the Borough of Mendham hereby makes the following designations:

1. The Observer Tribune and the Morristown Daily Record having been designated by the Governing Body as the two official newspapers to receive notice of meetings required by any and all sections of the Open Public Meetings Act, it appearing that said newspapers are most likely to inform the local public of such meetings. Notices required by the New Jersey Municipal Land Use Law or the Borough's Land Use Regulations may be placed, as required by law, in either of the designated newspapers.
2. The location for posting of notices of meetings shall be the bulletin board in the Phoenix House, 2 West Main Street, Mendham, NJ, where notices of this kind are normally posted.
3. The sum of \$12.00 per year is hereby fixed as the amount to paid by any person requesting individual notice of meetings as provided in Section 13 of the Open Public Meetings Act.

Mr. Seavey made a motion to approve the resolution. Mr. Peralta seconded.

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

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

The motion carried. The resolution was approved. Ms. Callahan will make appropriate public notification.

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Appointment of Board Attorney: Mr. Santo presented the following resolution that had been included in the 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 Board Attorney 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, James H. MacDonald, Esq. has submitted a proposal indicating that he will provide legal services for 2010 in an amount projected to exceed \$17,500 (including escrows); and

WHEREAS, the anticipated term of this contract is 1 year; and

WHEREAS, James H. MacDonald, Esq. has completed and submitted a Business Entity Disclosure Certification which certifies that he has 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 him 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 James H. MacDonald, Esq.; 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 James H. MacDonald, Esq. to serve as Board Attorney for the year 2010, at a total cost not to exceed \$8,000, such sum as may be duly appropriated for the purposes in the duly adopted municipal budget for 2010: and escrows as required; 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. Seavey made a motion to approve the resolution. Mr. Schumacher seconded.

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

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

The motion carried. Mr. MacDonald, Esq. was appointed Attorney. Ms. Callahan will make the appropriate public notification.

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Appointment of Consulting Engineer: Mr. Santo presented the following resolution that had been included in the 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 Consulting Engineer 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, Paul W. Ferriero, PE & PP of the firm Ferriero Engineering Incorporated has submitted a proposal indicating that he will provide engineering services for 2010 in an amount projected to exceed \$17,500 (including escrows); and

WHEREAS, the anticipated term of this contract is 1 year; and

WHEREAS, Paul W. Ferriero has completed and submitted a Business Entity Disclosure Certification which certifies that he has 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 him 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 Paul W. Ferriero.; 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 Paul W. Ferriero PE & PP of the firm Ferriero Engineering Incorporated to serve as Consulting Engineer for the year 2010, at a total cost not to exceed \$1,000, such sum as may be duly appropriated for the purposes in the duly adopted municipal budget for 2010; and escrows as required; 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. Seavey made a motion to approve the resolution. Mr. Peralta seconded.

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

In Favor: Palestina, Peck, Peralta, Schumacher, Seavey, Smith, Santo

Opposed: None

Abstentions: None

The motion carried. The resolution was approved. Mr. Ferriero was appointed Board Engineer. Ms. Callahan will make the appropriate public notification.

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Appointment of Board Planner: Mr. Santo presented the following resolution that was included in the 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, Adrian P. Humbert, AICP/PP of the firm Adrian P. Humbert Associates has submitted a proposal indicating that he will provide planning services for 2010 in an amount projected to exceed \$17,500 (including escrows); and

WHEREAS, the anticipated term of this contract is 1 year; and

WHEREAS, Adrian P. Humbert has completed and submitted a Business Entity Disclosure Certification which certifies that he has 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 him 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 Adrian P. Humbert.; 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 Adrian P. Humbert, AICP/PP of the firm Adrian P. Humbert Associates to serve as Planning Consultant for the year 2010, at a total cost not to exceed required escrows for 2010; 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. Seavey made a motion to approve the resolution. Mr. Peck seconded.

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

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

The motion carried. Mr. Humbert was appointed Planner. Ms. Callahan will make the appropriate public notification.

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Approval of Annual Report: Mr. Santo presented the following 2009 Annual Report that had been included in the pre-meeting packages:

**MENDHAM BOROUGH
 BOARD OF ADJUSTMENT
 ANNUAL REPORT
 2009**

OMNIPOINT COMMUNICATIONS, INC. and New York SMSA Limited Partnership d/b/a VERIZON WIRELESS, use and other required variances for 120 ft. +/- monopole (flagpole) at Block 801, Lot 20, Kings Shopping Center: **Continued to 2010**

MARKHAM, RICHARD & SUSAN, application for Hardship Variance to permit construction of piers, gate and wing walls with fence that exceed the height requirement in the front yard at Block 2201, Lot 10.05, 243 Pleasant Valley Road: **Approved w/conditions April 7, 2009**

KUTLU, HAKAN & KIMBERLY, request for extension of previously approved temporary use variance to permit two principal structures until such time that the existing home is demolished at Block 2401, Lot 17, 77 Hardscrabble Road. **Approved April 7, 2009**

NOLL, KEN & NORA, application for use variance to permit construction of a senior accommodation suite at Block 1901, Lot 17, 5 Muirfield Lane. **Approved May 13, 2009 with conditions**

HORNE, CECILIA, application for Hardship Variance to permit an existing spa enclosure that violates the lot and building coverage at Block 406, Lot 20, 12 Birch St. **Approved August 4, 2009 w/conditions**

PARMELLI, JEAN & CHARLES, application for hardship variance for construction of an addition that violates the building coverage and impervious coverage at Block 401, Lot 28, 26 Mountain Avenue: **Approved September 1, 2009 w/conditions**

RICE, MICHAEL, application for Hardship Variance for construction of an addition that violates the building coverage and impervious coverage at Block 403, Lot 21, 56 Mountain Avenue.: **Approved October 6, 2009 w/conditions**

FASANO, JEAN, application for Minor Subdivision and variances at Block 2301, Lot 2, 175-179 Cherry Lane. - Extension of timeframe for previously approved subdivision and variances: **Approved December 1, 2009**

SKURATON, JAMES & SUSAN, application for hardship variance for construction of an addition that violates the lot and building coverage at Block 304, Lot 9, 8 Aster Terrace.: **Completeness Only – Carried to 2010**

**SUMMARY OF CASES
2009**

In 2009 there were 9 cases placed on the Board of Adjustment calendar. Out of those 9 cases, 7 were decided and 2 were carried to 2010.

APPLICATIONS ON CALENDAR		9
APPLICATIONS CARRIED TO 2010		2
APPLICATIONS APPROVED		7
APPLICATIONS APPROVED W/CONDITIONS OR MODIFICATIONS	7	
APPLICATIONS DENIED		0
APPLICATIONS WITHDRAWN		0

In terms of the types of variances issued, 1 application dealt with “c” variance approvals for fences, gates/pillars on the south side of town. Other “c” variances were related to lot and building coverage. One “d” was approved for a senior accommodation suite.

TOTAL APPLICATIONS COMPLETED		7
“C” VARIANCES	4	
“D” VARIANCES	1	
EXTENSION TO VARIANCE TIMEFRAME	2	

APPLICATION FEES

In 2009 the Board of Adjustment collected a total of \$49,964 distributed as follows:

TOTAL FEES COLLECTED		\$49,964
APPLICATION FEES	\$ 6,050	
ESCROW	\$43,424	
COPIES/TAPES	\$ 140	
SEWER APPLICATION FEES	\$ 350	

Mr. Seavey made a motion to approve the annual report as written and to send it to the Council. Mr. Peck seconded.

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

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

The motion carried. The annual report was approved. Ms. Callahan will forward it to the Council.

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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.

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HEARING OF CASES

Skuraton, Susan & James - Hardship Variance: **Completeness/Hearing**

Block 304, Lot 9, 8 Aster Terrace

Chair announced that the application would be carried to the February 2, 2010 regular meeting of the Board. Applicant was still completing required items.

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Peggnat, LLC - Use Variance and Site Plan Waiver: **Completeness Only**

Block 305, Lot 1, 61 West Main Street

Chair announced that the completeness review would be carried to the February 2, 2010 regular meeting of the Board. Applicant was still completing required items.

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Chair Santo recused from the Board as a resident within 200 ft. of the applicant.

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Levey, Donna & Yale - extension to previously approved variance

Block 1401, Lot 19, 90 Talmage Rd.

Present: Donna Levey, Applicant
Yale Levey, Applicant

Messrs. MacDonald, Esq. and Hansen advised the Board that there is nothing in the zoning or in the neighborhood area that has changed since the variance was granted.

Addressing questions from the Board, Mrs. Levey advised that they were requested to send out a letter to all neighbors. They obtained a new list of neighbors and utilities, and the mailings were completed on December 23, 2009. They have not had any responses. Mr. Levey stated that they are returning to the Board to extend the variance as a result of the economy. They have now started to move forward and get estimates, but have not yet gotten a satisfactory result. They would like to start the construction in 2010.

In terms of the whether 12 months is a typical extension, Mr. MacDonald, Esq. advised that it has been a case by case basis. If a project is more complicated, perhaps a longer extension is granted. The Land Use Law is not absolutely clear on the procedures for extensions. The existing variance requires that there must be action within a year so that variances can be tracked. If the variance is not extended, it would expire, and the applicants would need to come back and begin the process again. Board did not want to extend beyond one year. Mr. Levey agreed that a one year extension would be sufficient.

Addressing the Board on whether a deed restriction required in the original resolution for a one story garage had been obtained, Mr. Seavey stated that it would part of the permitting process. Mr. Hansen advised that a resolution compliance review would be conducted before construction, and the condition would need to be met in order to obtain the building permit. He recommended that the Levey's implement the deed restriction as soon as possible so that they would be ready when they wanted to begin construction.

Mr. Palestina made a motion to approve the extension for 12 months. Mr. Peralta seconded.

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

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

The motion carried. Mr. MacDonald, Esq. will prepare a resolution for the February 2, 2010 meeting of the Board.

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Mr. Santo returned to the Board. Mr. Peralta recused from the Board.

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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

Present: Richard Schneider, Esq. – Attorney for the Applicant
Robert Simon, Esq. – Attorney for Mr. Isko
George Ritter – Planner for Mr. Isko

Exhibits: A-25: Letter dated September 10, 2008: Semrau to Schneider
A-26: Letter dated September 11, 2008: Schneider to Semrau
A-27: Letter dated September 17, 2008: Semrau to Schneider
L-27: Antennae Specification Sheet as represented on A-2

Mr. Schneider, Esq. questioned the role of the two new members with the Board. Mr. MacDonald, Esq. clarified that the new members would be permitted to hear the testimony from this point forward, and they would be permitted to ask questions even though they have not participated previously. They would not be able to vote unless they made themselves eligible to vote. They would need to devote the time to read all of the transcripts in order to make an informed decision. Chair was concerned that the record is substantial and just by reading they might not get a full appreciation of the testimony that had been presented. There are also CD ROMs that they can listen to. He was of the opinion that the six members that have heard the testimony could make an informed decision at the conclusion of the hearing. Mr. Schneider, Esq. requested that since it is legally permissible, and since he requires 5 votes, that if they choose, they avail themselves of the opportunity to be eligible.

Mr. Palestina questioned whether there would be any liability to the Borough if the new members listened to the testimony but did not have the benefit of the exhibits and the context of the discussion. Mr. MacDonald, Esq. advised that he did not believe that there would be liability in terms of jeopardizing the validity of the final decision. After consideration of cases in which there have been new members appointed or appeals, his interpretation of court reviews is that the court does allow new members to vote if they do follow the appropriate procedures. A member can miss a hearing and then be on an equal footing by listening to the disc of the hearing. He is not aware of the court providing any guidance that places a limit on the number of meetings that would make that process no longer reasonable. In a case that goes on for years, it might be unreasonable, but he does not know of any case law.

Addressing Mr. Seavey on whether the new alternates are obligated to listen to the hearings, Mr. MacDonald, Esq. advised that they are not. He is not aware of any case law that places that demand. He agreed that if Mr. Ritger forewent his opportunity, that Mr. McCarthy could vote if he became qualified.

Mr. Simon, Esq. requested that he research the issue as he recalled something in the Land Use Law that created a vacancy and ramifications if a regular member missed four or six consecutive meetings. He would like to get clarification under the law.

Mr. Schneider, Esq. began re-examination of Mr. Ritter. He proceeded to clarify that Mr. Ritter relied significantly on the RF testimony of Mr. Graiff to formulate his opinions. Mr. Ritter added that he also relied on the comments of Dr. Eisenstein to the extent he was aware of them, including Exhibits ZB-1 and ZB-2. In response to Mr. Schneider on whether he agreed with Dr. Eisenstein's conclusion relating to a gap at neg 85 dbm, Mr. Ritter explained that through the testimony of Mr. Graiff there were sufficient questions raised as to the information submitted, and whether or not there was a significant gap. In terms of Dr. Eisenstein's conclusion that the proposed antenna placement would ameliorate the gap to the greatest extent possible, Mr. Ritter stated that after listening to both sides of the argument, he would disagree with the statement. Experts have stated that the facility could be located several hundred or even a thousand or more feet from its current location and provide the same level of coverage. The location is not an absolute.

Moving to address Mr. Schneider, Esq. on the third conclusion that the proposed antenna placement was at the minimum height possible to achieve the amelioration, Mr. Ritter stated that he would not fully agree as the applicant's were originally happy at 120 ft. On-going discussions

with the Board resulted in a 130 ft. proposal. In terms of the fourth conclusion that the site would be in full compliance with all FCC regulations, Mr. Ritter stated it was beyond his expertise.

Returning to Mr. Ritter's experience as a planner, Mr. Schneider Esq. confirmed with him that he had a good understanding of the NJ Municipal Land Use Law and in some cases has offered interpretation. He referred to Mr. Ritter's testimony on a case dealing with Sprint versus Upper Saddle River. Mr. Ritter advised that he had not independently identified the case, but that it had been pointed out to him.

Mr. Schneider, Esq. continued exploring Mr. Ritter's work with ordinances and his experience in drafting those related to conditional uses. In terms of the Borough's Wireless Telecommunications Ordinance, he referred to Mr. Ritter's reference to the ordinance as a planning type of ordinance as opposed to the standard site planner's subdivision ordinance. Mr. Ritter agreed that the ordinance does have a set of specified standards and specific setback, height and fencing requirements.

In terms of the Borough ordinance section dealing with "Proof of necessity for WT facilities", Mr. Schneider provided Mr. Ritter with a hypothetical stating that a carrier files an application and the application meets every one of the specified conditions of the conditional use. They agreed that the application would go to the Planning Board. Continuing Mr. Schneider, Esq. played out the scenario that the applicant's experts were heard, Mr. Isko prepared an objector case, and the Planning Board retained Dr. Eisenstein. After 23 hearings, the Board concluded that the conditions of the conditional use were met, but it determines that the standard of Section D-5 of the ordinance was not met. He questioned if then the application would be sent to the Board of Adjustment. Mr. Ritter thought that the Planning Board would deny the application as the key condition of proof of necessity was not met. It would remove the purpose for having the facility in the town.

Continuing to answer Mr. Schneider's questions, Mr. Ritter stated that the Planning Board does have the exclusive right to grant relief from failure to meet one of the conditions of the conditional use, but there are series of proofs that must be addressed and the site must remain suitable for the use given the relief sought by the applicants. If there is no need for the facility, it would be hard to meet the burden of proof and it would be grounds to deny. In terms of whether the Planning Board would have the authority to grant a variance from failure to meet one of the conditions of the conditional use or a D-3 variance, Mr. Ritter answered that if a D-3 variance is required, it would need to be remanded back to the Board of Adjustment as only they can grant relief for a conditional use variance.

Mr. Schneider, Esq. referred to Section 40:55D-67(a) of the MLUL and questioned Mr. Ritter on whether in his professional opinion section B-5 of the Borough ordinance provides sufficient certainty and definiteness to enable the developer to know their limit and extent. Mr. Ritter explained that to go through a full hearing and get to the end of the hearing and discover the applicant has insufficient proof of need would be an unusual condition. The designation of the appropriate Board is usually determined early in the process. For Section B-5 of the Borough ordinance, RF experts review the application and determine whether or not a facility is required. The statement is not ambiguous as the RF experts have a sense of what is meant by that statement in terms of the level of service. To a certain degree it could be ambiguous as relates to "avoid prohibiting or have the effect of prohibiting a provision of WT service". Those terms are undefined.

Addressing Mr. Schneider, Esq. on the prohibition standard, Mr. Ritter stated that the word "effect or prohibiting" appear to be the wording in the Federal Communications Act. He did not know if the term "significant gap" was defined in the Act, but he believed that the applicant needed to prove with a reasonable expectation that there is a significant gap in service to require a facility.

Responding to Mr. Schneider, Esq. on when the Borough Wireless Telecommunication's Ordinance was adopted, Mr. Ritter stated May 5, 2008. He also clarified that the ordinance was adopted between the time the application was submitted and the on-going hearings. He did not know why the Borough adopted the ordinance. He thought there could be a possibility that the ordinance was adopted in response to the application. Mr. Simon, Esq. objected to a line of questioning that included speculation.

Mr. Schneider, Esq. then questioned Mr. Ritter on the number of zones in which new towers were permitted or conditionally permitted. After some discussion, Mr. Schneider, Esq. stated that there are nine zoning districts in the Borough of Mendham and towers are permitted or conditionally permitted in only one. When Mr. Schneider, Esq. asked Mr. Ritter to comment on the premise that since the Governing Body potentially knew about the application, they could have chosen not

to conditionally permit new towers in the East Business Zone District, Mr. Ritter reiterated that the ordinance was designed to have the applicant go through a process of evaluating alternative sites, one of which is located in the East Business District. He did not think the ordinance either favors or is prejudice to the application in the East Business District. The location is one of the districts that they considered a possible location. It is not necessarily the site. Responding to Mr. Schneider, Esq. on how many properties in the East Business district meet the minimum lot acreage, Mr. Ritter indicated that as it is only a half acre, he thought it was quite a few, but he had not verified that. A conditional use shopping center is 4 acres.

Addressing his testimony associated with the Main Street Corridor, Mr. Ritter expressed that he thought that a wireless telecommunications facility is inconsistent with the goals of the Main Street Corridor Ordinance. It lays out the goals of protecting a town's historic character and its rural environment. Answering Mr. Schneider's follow-on question, Mr. Ritter stated that the Main Street Corridor Ordinance was adopted December 17, 2007 and preceded the adoption of the Wireless telecommunications ordinance. Mr. Schneider, Esq. added that if the Governing Body thought the site was inconsistent that they could have prohibited the siting of such a facility within the Corridor.

Mr. Schneider, Esq. reviewed the siting priorities of the telecommunications ordinance with Mr. Ritter. Mr. Ritter pointed out that the ordinance requires the applicant to establish that they could not locate on an existing structure before moving to a free standing tower. In terms of whether any existing structures would work, Mr. Ritter referred to Mr. Graiff's testimony as to the questions raised on whether or not some of the existing facilities could be reoriented and designed to cover the gap. It needed to be investigated further. In terms of existing structures on municipally owned properties, to his knowledge there would not be any to provide the required coverage. As regards the East Business District, none were identified in any of the hearings.

When questioned on the forth priority WWRHS or other education institutions in the 3 and 5 acre zone, Mr. Ritter explained that it not his job, nor that of the Board to identify them. The ordinance asks the applicant to do the evaluation. That is one of the objections they have to the application. The Board was not given the information for their consideration.

Moving to the priorities associated with the location of new towers, Mr. Schneider, Esq. questioned Mr. Ritter on whether he was aware of whether the Borough made available any municipal properties for the potential siting of a wireless communication facility. Mr. Ritter was aware that Mr. Schneider, Esq. had requested sites within 500 ft. of the proposed location, and that the site that is the closest is the police station. Mr. Schneider, Esq. produced a letter dated September 17, 2008.

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Board took a 10 minute break.

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Mr. Schneider, Esq. entered Exhibit A-25, September 10, 2008 letter and Exhibit A-26, September 11, 2008 letter.

Responding to Mr. Schneider, Esq. on whether the Borough had made the police station property available, Mr. Ritter stated that he did not think that any of the letters precluded it. The letters indicated that the Borough does not have any further suitable sites as an alternative. There is no discussion in any of the letters of the police property and whether or not the applicant would find it acceptable, or whether or not the Borough would consider having a facility on the site. Mr. Ritter continued that he could not determine whether or not the Borough was specifically precluding the police station. The letters are general and do not address the issue. After Mr. Schneider, Esq. stated that Mr. Pierson, the radio frequency engineer confirmed about a year ago that the police station would meet the technical requirement, Mr. Ritter added that he did not think that the applicant made the effort to properly inform counsel of the possibility that it could be at the police station. A direct response was not obtained.

Returning to the priorities for the tower, Mr. Schneider, Esq. referenced the East Business District. He also referenced discussion between Mr. Ritter and Mr. Humbert on the potential siting at the GPU or JCP&L substation. Mr. Ritter clarified that he thought the location at the substation in conjunction with the police station might be a logical place. Mr. Schneider, Esq. advised that the Borough would need to make the police station available, and placement at JCP&L would require a strict D-1 variance as it is not a permitted use in that zone.

In terms of his opinion as a professional planner as to whether an applicant has an obligation to provide an alternate site analysis, Mr. Ritter stated that with this ordinance, he believed it was required. The ordinance has a system of evaluating alternate sites.

Responding to Mr. Schneider, Esq. on what the statutory criteria would be for an applicant that does not meet the conditions of a conditional use, D-3 variances, Mr. Ritter stated that the normal burden of proof is that the site remains particularly suited for the use even with the granting of the required relief. Addressing the requirement that the facility be located in the rear yard, Mr. Ritter pointed out the line on Exhibit A-19. A facility probably could be located in the general area of the rear yard, but it would not comply with all the setback requirements. He was not sure if the facility would be any closer to the residential area and senior citizen project than the existing site.

Addressing height, Mr. Ritter recalled the initial height as 120 ft. It was his understanding that the tower height was increased in order to encourage possible co-locators in the future. That is an objective of the ordinance, but it also indicates that the design should be incorporated under the pole height of 120 ft. In this case, the Board wanted to avoid multiple poles in the future. While co-location is encouraged by most towns, along with that comes a responsibility to keep the facility in scale with the neighborhood and keep the negative impacts of such a facility to a minimum. In this case, co-location in the ground facilities was also not accounted for, and they would need to be expanded, having an impact on the shopping center site plan.

In terms of whether or not the incremental 10 ft. would render the site unsuitable, Mr. Ritter stated that given the sensitivity of the location, the 10 ft. is important. Consideration needs to be given to how visible it is, the goals and objectives of the Master Plan, and the ordinances of the town. The extra height should be considered a major impact by the Board.

Mr. Schneider, Esq. followed with questions on the location of the property, its visibility and the setbacks. Mr. Ritter agreed that the ordinance setback requires that the tower be located from the property line the height of the tower plus the respective side, rear or front yard setbacks. In terms of whether the ordinance requires the tower to be sited in the middle of the property based on the setbacks, Mr. Ritter stated that he did not believe so. The shape of the property drives it. Other properties might have the same thing, but the ordinance also requires that it be in the rear yard. On this property it could not be located behind any principal building. Based on his reading of the transcripts, the location was determined after discussions with the Board. He believed that the the move of the pole occurred when the Board still thought it was going to be a flagpole and it would be an important visual element. That idea was dropped. There were also some discussions about a wind mill and how to minimize the impact of the tower on the neighborhood and the Main Street Corridor. He disagreed with the recommendation that was made by the Board.

Addressing Mr. Schneider, Esq. on whether he felt that an appropriate siting consideration was the coverage in Mendham Township versus Mendham Borough, Mr. Ritter stated that in terms of who receives the benefit, "no"; however the Borough Master Plan has a general statement that if a pole was to be located in the community, the goal was that it primarily serve Mendham Borough. A significant amount of service extends beyond Mendham Borough.

In terms of whether the siting of a facility should be considered for Verizon if another carrier already had service, Mr. Ritter stated that the question the Board has to struggle with is whether or not there is a significant gap in service and whether or not that gap or the amount of service warrants a pole in the location. He did not believe that it is mandatory that all providers have equal service in every square inch of a community and have equal service. In terms of whether if AT&T had reliable service, would the Borough have the right to deny the Verizon and Omnipoint facility, Mr. Ritter continued that it is not black and white. He did not personally think that it was necessary for every carrier to be equally represented in an area in order to be described as not having service. There is some level of service in this location, and it is being provided by various wireless providers. Mr. Schneider, Esq. cited travel between communities and carriers as an example of potentially losing service.

Responding to Mr. Seavey on the rationale for his line of questioning on the Planning Board and the Board of Adjustment authority, Mr. Schneider, Esq. stated that the conditional use standard has to be specific and definite. The section that Mr. Ritter continuously relied on is a standard that is incapable of being complied with in a manner that the applicant knows that it can or cannot meet. It is not like a setback requirement. The standard invokes a Federal regulatory scheme that is separate and apart from what the applicant has to prove for a variance. The applicant has an obligation to prove entitlement to a variance under the respective provisions of the State Municipal Land Use Law. The objectors are trying to create an argument that the applicant has a higher burden than it would otherwise be required to under the State MLUL. The experts disagree, and the applicant will not have an understanding until the Board votes whether it has met the standard. That provision has created confusion in all the cases that have been interpreted.

Addressing Mr. Palestina's question on whether the Board of Education had been consulted on the high school, Mr. Schneider, Esq. was not aware, but continued that the previous applicant approached the Board, and they were not interested. The location is a lower priority in the ordinance. He did not speak with the high school as the property would not have sufficient height. It is only a higher priority to the extent that the facility is located on top of the high school. Mr. MacDonald, Esq. clarified that it was AT&T, represented by Day Pitney that made the inquiry. Mr. Seavey added that they asked for the site, not the building as it was before the ordinance.

In response to Mr. Palestina's follow on question as to whether the applicant ever made a formal request to review the police department property, Mr. Schneider, Esq. advised that the applicant indicated on the record and in the original correspondence to Ms. Sandman that the police department is within 500 ft. of the subject property. It works. The Borough is not making the police station available. They cannot compel the Borough to do it as it can only be made available by public bid under a local land and buildings law. The Borough has not issued a bid.

Addressing Mr. Palestina on how Dr. Eisenstein is compensated, Mr. Schneider, Esq. advised that the applicant posts an escrow and the Borough pays from the account similar to how it pays for Mr. MacDonald, Esq. and Mr. Hansen.

Clarifying for Mr. MacDonald, Esq. his statement about the current location being the most visible on the property, Mr. Ritter stated that the specific location on the property does not make a lot of difference given the height of the pole and the loneliness of the center. It is at a location where one enters and is downhill as one comes in. Even though it is at the rear of Kings, it is about 100 ft. in front of the door to the Racquet Club. They will have a view of not only the pole, but the ground facilities as well. In its Master Plan, the Borough has designated the shopping center as one of the prime resources of the community contributing to the visual character and historic significance. Why would one want to put something out of touch with the character in such a prominent location. There are probably better choices on the site or in the East Business District. The other sites would require the willingness of the owner, but the ordinance is written to encourage the applicant to look. He was of the opinion that the site was chosen before the ordinance went into effect.

Mr. MacDonald, Esq. requested further clarification on Mr. Ritter's use of the terminology "visual impact". He viewed people walking out of the door at the health club a different visual impact than those coming upon the gateway to the community. Mr. Ritter agreed that it is two different scales of perception of what the pole is and its potential impact. He referenced Section "E" of the ordinance that referenced historic sites, landscapes, etc. and that the facility should have no adverse visual impact on historic areas and the least visual impact on residential areas, and public right of ways. All visual impacts in the viewshed were to have been analyzed. The shopping center is included in the Main Street Corridor.

Responding to Mr. MacDonald, Esq. as to whether it would be dramatically more impactful if it were to be located in front of the Kings rather than behind Kings, Mr. Ritter referred to his past testimony where he stated that it was the worst spot short of putting it on Main Street. If it were in front of the building, it would be more prominent and more inappropriate. His opinion was that there are alternative sites, even within the site that would be more discreet. One area is located in an area tucked down to the side of the racket club lined with a significant treestand probably 40 to 50 ft. high. There is also a mass of building there. He does not believe that it abuts residential properties as the senior citizen lot is in the rear and no one would build there due to wetlands and transition areas. Mr. Ritter expressed that he did not think alternate sites had been looked at in enough detail.

Chair noted that the Board had considered the area, but thought it too close to the residential areas. He expressed that the process had begun with the Planning Board and the Borough Council and that they framed the template within the ordinance. The Board has not been hasty or rash in its deliberations.

Chair opened the meeting to questions by the public.

Ms. Kaplan requested 35 minutes to question Mr. Ritter. Chair requested that Ms. Kaplan's questions be carried to the February meeting and be condensed to one half hour. There was an exchange between Messrs. Schneider, MacDonald, Santo and Ms. Kaplan on the extent of the questions she would be permitted to ask. Mr. MacDonald, Esq. summarized that Ms. Kaplan would be permitted to ask questions dealing with Mr. Ritter's testimony. Mr. Simon, Esq. would also do redirect at that meeting.

Mr. Lupo stated that he is troubled as to why a Conifer Drive test shows continuous coverage and why the applicant's test does not seem to reflect that he and his neighbors feel they have coverage. He had reviewed the details of the Verizon 1900 megahertz parameters on page 2 of A-2. Mr. Lupo entered Exhibit L-27, the catalog pages of the antenna represented on A-2. He referred to the antenna number column. The LPD 7409 and 7904 listed are 800 megahertz antenna, but they are listed as 1900 parameters. Mr. Pierson had testified that he has been using these parameters to do his propagation studies. Both the Conifer and Daytop antennae are listed for 800 megahertz antennae.

Responding to Mr. Lupo on why Mr. Pierson is using a 800 megahertz antenna in a 1900 megahertz propagation, Dr. Eisenstein described L-27 as a specification sheet for the antennae that is listed on Conifer Drive. It is according to the specification sheet an 800 to 900 megahertz antenna. If Mr. Pierson did use this antenna to develop the parameters for the system then the propagation plots would show more coverage than if he had used the 1900 megahertz antenna. It would show a lesser gap in coverage as 800 propagates better than 1900. While he did not know for certain, he assumed that when the Conifer Drive system was put up, Verizon was a 800 megahertz provider and those were the initial antennae. Since then Verizon has acquired other bands and has put up dual banded antennas. That has happened at other sites.

Addressing Mr. Lupo on gain, Dr. Eisenstein provided the technical definition and indicated that the gain for the antennae would be around 16 dbi. They are listed in the Exhibit as between 15.2 and 16.4. The gain would not alter between 1900 or 800. Responding to Mr. Lupo on why the gain on the catalog page show 13 dbi and the spreadsheet 15, Dr. Eisenstein stated that the 13 is not dbi, but dbd. After some discussion Mr. Lupo pointed out that the spec sheet has the 15.2 listed as dbd. Dr. Eisenstein explained that the higher the gain, the worse it is for the applicant.

Mr. Palestina questioned how many other errors there might be that the Board did not know about. Mr. Peck requested that Dr. Eisenstein prepare a response to this information for the beginning of the next meeting. He wanted the question that Mr. Palestina raised addressed. And the issue resolved.

Chair expected that the Board would be moving towards summation either at the February or March meeting.

ADJOURNMENT

There being no additional business to come before the Board, on motion duly made, seconded and carried, Chair Santo adjourned the meeting at 10:35 p.m. The next regular meeting of the Board of Adjustment will be held on Tuesday, February 2, 2010 at 7:30 p.m. at the Garabrant Center, 4 Wilson Street, Mendham, NJ.

Respectfully submitted,

Diana Callahan
Recording Secretary