Town of East Kingston, New Hampshire
Zoning Board of Adjustment Meeting Minutes
August 23, 2007

AGENDA

6:30 pm **Re-hearing on behalf of Kenridge Farm, LLC c/o Monique Waldron, 285 N. Haverhill Road, Kensington with respect to the ZBA's decision to grant a variance to Industrial Tower & Wireless, LLC and Co-Applicant Cingular Wireless from Article XV, Section D2 – Use Districts for construction of a 160" monopole and equipment area in a Residential Zone.**

Members Attending: Vice Chairman David Ciardelli, Norman J. Freeman, Peter Riley
Alternate Members: Catherine Belcher, Paul Falman
Acting Town Counsel: Peter Loughlin, Attorney

Also present were: John Champ, Site Acquisition Specialist for Industrial Tower and Wireless; Don Cody, Director of Operations for Industrial Wireless and Communications; Kevin Delaney, Radio Frequency (RF) Propagation Manager for Industrial Tower and Wireless; Jeffrey Spear, Attorney for Monique Waldron and Kenridge Farm, LLC; Bernard Pelech, representing Mr. & Mrs. Marston, and Barry Hobbins, representing co-applicant Cingular Wireless.

Mr. Ciardelli opened the meeting of the East Kingston Zoning Board of Adjustment (ZBA) at the East Kingston Town Hall on August 23, 2007, at 6:30 PM.

Mr. Ciardelli explained that the Board's first order of business would be to approve the minutes of past meetings. He announced the attendees of each meeting before presenting the minutes to the Board, as only the attendees of the meeting in question could vote on that meeting's minutes.

Mr. Ciardelli asked the Board members if they had any changes to the minutes of February 8. There being none, he asked for a motion to accept the minutes as written.

MOTION: Mr. Freeman **MOVED** the minutes of 8 February 07 be approved as submitted. Mr. Riley seconded.

Mr. Ciardelli asked the Board members if they had any changes to the minutes of April 26. There being none, he asked for a motion to accept the minutes as written.

MOTION: Mr. Falman **MOVED** the minutes of 26 April 07 be approved as submitted. Mr. Freeman seconded.

Mr. Ciardelli asked the Board members if they had any changes to the minutes of May 31. There being none, he asked for a motion to accept the minutes as written.

MOTION: Mr. Freeman **MOVED** the minutes of 31 May 07 be approved as submitted. Mr. Falman seconded.

Mr. Ciardelli asked the Board members if they had any changes to the minutes of June 29. There being none, he asked for a motion to accept the minutes as written.

MOTION: Mr. Freeman **MOVED** the minutes of 29 June 07 be approved as submitted. Mrs. Belcher seconded.

Mr. Ciardelli explained that Attorney Spear had submitted a change for the July 24 minutes. He also explained that the Secretary had listened to the tape of the meeting again and had not been able to hear the portion to which Mr. Spear was referring to corroborate whether or not his suggested correction was valid. Mr. Ciardelli asked if any of the Board members had heard the exchange and could corroborate the validity of the statements.

Mrs. Belcher stated she had been sitting close enough to Attorney Spear to hear what he had said, and that she had heard Attorney Spear make the statements he alluded to in his correspondence for the change in the minutes. Mr. Ciardelli stated that Mrs. Belcher's confirmation of Attorney Spear's statement was sufficient, and that the minutes would be changed to reflect Attorney Spear's correct statement.

Mr. Ciardelli asked the Board members if they had any other changes to the minutes of 24 July 07. There being none, he asked for a motion to accept the minutes as amended.

MOTION: Mr. Falman **MOVED** the minutes of 24 July 07 be approved as amended. Mr. Freeman seconded.

There was a collective vote by Board members to approve all the above-mentioned minutes; the vote was unanimous.

Mr. Ciardelli stated the Board had received a variation of location document from the applicant, and turned over the floor to ***Mr. Don Cody, Director of Operations for Industrial Wireless and Communications (ITW)*** for presentation to the Board.

Mr. Cody reiterated that at the last meeting, they were asked to investigate the possibility of moving the tower down the hill as per RF Engineer Mark Hutchins' suggestion. The landowner did not agree to the particular location Mr. Hutchins had suggested, but agreed to an alternative site 235' off the ridge back towards Giles Road, and deeper in to the woods. ITW has already agreed to reduce the height of the tower an additional 20' to 140', even though they feel it would lessen capacity, and with the changed location, it would lessen the amount of the tower you could see above the ridge by 15'. This is reflected in the amended plans that were presented to the Board. Mr. Ciardelli asked if the new location was down the hill to the West of the original location, and Mr. Cody stated it was West by Northwest.

Mr. Falman asked since Cingular Wireless was the co-applicant, and ITW had alluded Verizon was also interested in co-location, with the reduction in height, could they accommodate just the two carriers? Mr. Delaney stated that the tower could structurally accommodate 3-4 carriers. Mr. Cody offered that, in anticipation of co-location, the tower wouldbe built to accommodate the maximum amount of carriers and would be structurally sound.

Mr. Riley stated that there are only four carriers now that Cingular and ATT have merged. Mr. Delaney answered that there was soon to be a fifth carrier, Metro PCS. Mr. Riley acknowledged that ITW could always come back to the Board for a variance for another 20' in height. Mrs. Belcher stated they could come back to a Board; but was not sure which it would need to be, the Planning Board or the Zoning Board.

Mrs. Belcher asked Mr. Cody to point out on the plans the new distance from the proposed tower location to Mrs. Waldron's home. Mr. Cody showed the new tower location was 1,933 feet from her home. In the difficulty to find the distance to the property, it was ascertained that the address listed on the plans for the Waldron's property was incorrect. It was listed as 225, and the correct address is 275.

Mrs. Belcher pointed out that at the last meeting, the applicant had mentioned stealth antennas, and asked Mr. Cody to speak to that. Mr. Cody stated that sometimes stealth can blend in and sometimes it does not. The Board had rejected the mono-pine version previously, but ITW was more than willing to implement that if that was the desire of the Board.

Mr. Ciardelli stated that at the June 29th meeting, he had mentioned an idea he thought could please all parties involved. Mr. Ciardelli's statement from the June 29th minutes was *"...the scenario of moving the tower to the west of the proposed site, lowering the height so the top of the tower would be even with the existing tree canopy, and disguising it as a tree."* This way you would only see a "tree" with a backdrop of trees from the East Kingston Giles Road side. And from the Kensington side, the top of the tower would not break the ridge of trees." This seemed to be everybody's concern.

Mr. Cody stated that depending on the angle you were looking at a mono-pine application, it could blend in or not. If you looked at the terrain as you drive around New Hampshire, there are anomalies of trees higher those around them; all ridgelines are not the same height. So a tree somewhat higher then the rest would not be that out of place. Newer models were significantly more natural looking than the versions offered when the discussions first began.

Mr. Ciardelli stated that the pros and cons of the mono-pines had just been touched upon, and directed the attention of the applicant and the public to pictures on display. Mr. Ciardelli had taken these pictures along Route 89 in Vermont and they showed mono-pines with a backdrop of trees. This was exactly the scenario he had alluded to in the June meeting minutes.

Two examples showed a tree with a backdrop of trees, and the third was quite out of proportion and was an example of the *"bottle brush"* type of application, which certainly was not what the Board would prefer. It was not necessarily the wish of the Board to have the tower look like a pine tree, but Mr. Ciardelli wanted to demonstrate an example of what he had been speaking of.

Mr. Cody explained that they had negotiated with the property owner for the new location as requested by the Board. Placing the tower below the ridgeline would block the signal to a large part of ITW's target area, which is on the other side

of the ridgeline. If the target area is over the ridge, the tower needs to project over the ridgeline to be effective. ITW has already compromised to the Board by lowering the height of the tower and moving it from the original location.

Mr. Falman asked if the application was approved, shouldn't the final details such as stealth application be up to the Planning Board and not the Zoning Board? Mr. Ciardelli asked Mrs. Belcher for clarification on the Planning Board responsibility. Mrs. Belcher ascertained that if the site plan had changed from the original application, which it had, it would need to be revisited by the Planning Board. The Planning Board would walk through each step, along with the Town Engineer and advisors, and make sure each of the restrictions set by the Zoning Board was met.

Mr.Loughlin stated that there was always overlap by boards. The ZBA might find the five conditions for approval are met, and could set up conditions. The Board might decide that if the tower were to be stealth pine, there would be no diminution of surrounding property values. But on the other hand, if the tower was *not* stealth pine, it would diminish surrounding property values. So therefore, a condition of approval would be that the tower be a stealth pine.

Mr. Riley asked if the Board was not putting the cart before the horse; the application has been changed. Shouldn't the Planning Board look at it first instead of the ZBA making changes before it goes to them?

Mr. Loughlin explained that if the ZBA does not approve the application, it would not go the Planning Board.

Mr. Ciardelli clarified that the Planning Board had denied the application in the beginning because a variance was needed. The applicant then came to the ZBA and was approved. It was appealed and sent back to the ZBA. The Planning Board has seen a variation of this application. Attorney Pelech stated the applicant was aware they would need to go back to the Planning Board should they be approved.

Mr. Ciardelli reviewed that the current proposal for consideration before the Board by the applicant was at the new location with a tower height of 140'. Mr. Riley interjected that the Planning Board had rejected the original 180' tower. Mrs. Belcher answered that the Planning Board had never rejected the height of the tower; it had rejected the location. And to compromise, the applicant had changed the height.

Mr. Riley wanted to know if the ZBA had jurisdiction to approve or deny the changed plan without the Planning Board looking at it first. Mr. Loughlin answered that plans are amended as the process goes along, and applicants worked with the Boards. He defined it as an evolving process and it would frustrate the role of the ZBA if in trying to satisfy the ZBA, the applicant got sent back to another Board before consideration. Once the Board is in the process and the applicant tries to make the application more satisfactory to the Board, it would then be the ZBA's decision.

Mr. Jeffrey Spear, Attorney for Monique Waldron and Kenridge Farm. Attorney Spear stated that the location change and adjusted height of the tower had not changed their position towards the application. Reading the new site plan, the tower would still protrude 80' above the tree line. By his interpretation of the topographical map, the tower wouldbe only 6 feet lower than the original location and not the 15 feet lower as stated by the applicant. Standing that high above the rest of the trees, a stealth mono-pine would look like the "bottle brush" tree in Mr. Ciardeli's photos.

The tower will still protrude, still be unsightly, and still have the visual impacts as previously discussed. It was Mr. Spear's opinion that the fact the tower had been lowered to 140' had actually weakened the applicant's case. The initial argument of the applicant was that the 180' tower was to be the "be all" and "end all" of all towers at this end of town and would not function as needed at a lower height. They had stated that this one tower would eliminate the need for multiple towers as per Mr. Maxson's report. The new 140' height would cause problems to those at lower elevations as per the propagation maps from Mr. Hutchins.

Mr. Spear quoted from the Planning Board minutes of December 21st "*Mr. Smith wanted to know if the tower could be lowered to 150'. Mr. Cody reiterated his statement that the tower could not be any lower than 160' and be effective. Mr. Smith stated he has seen towers with 10-15 dishes on them and they did not appear to be as high. Mr. Cody answered that every location was different and the terrain is different; this particular location mandates a tower that is at least 160' tall.*" The applicant stated there was a need for that height then, and now the applicant was stating otherwise. One of those statements cannot be true.

Mr. Don Cody, Director of Operations for Industrial Wireless and Communications (ITW). Mr. Cody stated he took exception to Mr. Spear's remarks that he was not reliable in his comments. This was an ongoing process that has taken many, many months, and he had been very consistent and very truthful in his course of action. If the Board recalled a few moments ago, he had stated that in agreeing to drop the height of the tower it was going to compromise the ability to provide coverage for all of the carriers. ITW may need to come back to the Board as additional carriers wish to use the

tower and discuss adjusting the height in the future. It would be up to the Board whether they agreed or not Mr. Cody felt he had been very consistent in his comments.

As Attorney Loughlin had stated, this is a process of review, negotiations, compromising and trying to come to middle ground. ITW has bent over backwards repeatedly to try to do that. We are not purporting that 140' set back further is just as good as 160' set forward. We have stated very clearly that it is a compromise and degradation.

Mr. Spear continually brings up sites we have presented to this Board as unavailable. The owners were not interested or the site would not provide the coverage. Mr. Spear has alluded to but has never really gone into details about the micro-system of multiple stealth towers throughout the Town. He has not considered the technical applications, the complexity of permitting, or the cost factors in the millions of dollars; none of that has been brought forward. He doesn't seem to understand that we do our homework.

Mr. Cody passed out an FCC ruling about to become the "law of the land". The FCC has stated that because of the extraordinary disasters this country has experienced over the past few years, all cellular systems must have emergency backup power. All of ITW's sites have always had backup power. The Distributed Antenna System (DAS) is a micro-system of many antennas on telephone poles, coupled with refrigerator-sized boxes that handle the equipment, all tied back to a central office called a "hotel". The DAS system cannot comply with the new ruling. Therefore, unless they grandfather existing systems, they are no longer applicable.

The second submittal is from the DAS Forum, which is comprised of developers and manufacturers of technology for the DAS system. They have petitioned the FCC to exempt themselves from the new ruling; they readily admit they cannot comply with the new FCC mandates for backup. The FCC has not acted on the petition yet It wouldmean if there was a storm and you lost one telephone pole, the network would be down and there is no backup.

Macro systems (cell systems) usually have back-ups. Cell systems that do not have backup power will be obligated to install it as per the new ruling. The DAS system alluded to over and over without any facts, any real strategic costs, any identification of carriers willing to consider it, will be off the table in light of the FCC's new ruling. Unless their technology can be redeveloped, which they admit they cannot do right now, as of October the DAS system will no longer be allowed as a cell network.

Also included in the packet is an e-mail to Mr. Delaney from Cingular that spells out the fact that DAS is not a system that works for them. Where it was used in Nantucket, it was never meant to be a primary system but to *"fill in"* in areas that were problematic. They admit themselves that the DAS system is a last resort when a macro system cannot be built because of varying reasons, such as in the French Quarter in New Orleans, where it would be difficult to put in a tower. The DAS system is not an option; it is an illusion.

The last page is a propagation map from Cingular showing the coverage that would be gained by utilizing the site at Carmen's Restaurant. It shows it would not fill in the gap in any imaginable way. Mr. Spear has conveniently eliminated 3 of the 4 required sites and focused on one. At the silo site, the owner is not interested. Without all the sites, the gap would not be filled; so Carmen's is not a solution. Mr. Maxson suggested multiple sites, which we looked at. The cemetery was eliminated because of the set back requirements; the silo was also eliminated because the owner was not interested.

The DAS system covers only a few hundred feet under ideal conditions. With the terrain and vegetation in the area, and the multiple roads ITW is trying to cover, the DAS system cannot provide coverage. The carriers won't go on it and neither we nor anyone else could afford to build it.

Mr. Spear asked to address Mr. Cody's comments. He stated that Mr. Cody kept harping on himself and Kenridge Farm for coming forward with suggested sites. Mr. Spear stated that the burden was not theirs but the applicants. ITW has to show they considered and eliminated all the alternatives for tall towers. It was Mr. Spear's opinion that this was the first time they had heard about the DAS system, and DAS is one of many types of alternatives to tall towers, such as micro sites. A micro site, as he understands it, does have its own power and Cingular uses micro sites in Lower Marion in Pennsylvania.

Other types of alternatives are technically the same from an engineering standpoint as far as compliance with the back-up regulations, but done in a manner that complies with the ordinance such as the cupola, the silo, and the flagpole. The applicant's letters do not say any of these things are available. The applicants are stressing only towers, as stated in the letters: *"My company has expressed an interest in constructing a wireless communication tower in the area."* Obligation number one of the ordinance asks, *"What have you done to rule out alternatives to tall towers?"* This has never been addressed; none of the people have been approached with any other alternative. The applicant never said, *"We want put in a wireless service facility, we want to be compliant with the esthetics and the culture of the Town, we can put antennas in silos, into copulas, or put a big chimney*

on a house." These things should be ruled out before coming to a decision, and the Board should be concerned about an effective prohibition claim under the TCA.

Mr. Spear thanked the Board for their time.

Mr. Ciardelli asked if the Board members had any questions for the applicant.

Mr. Riley stated that the FCC ruling Mr. Cody had submitted was not law yet. It was his feeling that until it became law, the Board should not consider the ruling. Mr. Delaney answered it would become effective on October 9th, and Mr. Cody reiterated that it had already been passed, and that the implementation date was October 9th. Mr. Cody asked if Mr. Riley was suggesting they build a DAS system in the next 30 days; Mr. Riley answered that he was not suggesting the applicant do that.

Mr. Cody asked Mr. Loughlin for clarification. Mr. Loughlin was not sure if it was in effect right now, and he was not sure what impact it would have on this application. The fact the law is not in effect tonight should not have any influence on the Board's decision. He would not advise the board to ignore the ruling just because it was not in effect at the moment, and it should also not deter the Board from making a decision

Mr. Riley asked if it was fair for the Board to rely on the ruling since it was not in effect yet, and there is a chance it could be overturned. Mr. Loughlin believed that if the Board were considering the availabilty of a DAS system or micro site would in some way influence their decision to grant or deny this application, then this ruling would be important and they might want Mr. Hutchins to look at it.

Mr. Riley stated that in the packet of letters the applicant had supplied, there was no letter included to the Bodwells. Mr. Champ stated he had gone to the Bodwell's house, and they had signed the letter that they were not interested. He had presented a copy to the Board at the last meeting. The Secretary stated Mr. Champ had given her a packet of letters and they were in the file. Mr. Champ showed Mr. Riley his original copy of that letter.

Mrs. Belcher asked the applicant to explain any other options besides the DAS system, and why they had not been considered.

Mr. Cody replied that satellite systems would not solve the problem as they have limited capacity, are expensive, don't work in buildings or under vegetation, and cannot supply the service as they don't have enough channels and frequencies. They were never intended to be a replacement for ground-based systems. Small, single sites all over was another suggestion. ITW has done their due diligence; it is a part of the record that they have looked at multiple sites and the ones needed were not available. In all they looked at over 800 sites. ITW had responded to Mr. Maxson's suggestion for a combination of sites, and they were not all available.

Mrs. Belcher asked what type of technology would be used for small sites. Mr. Cody answered it was the same technology used on the tower, with smaller paterns. If a tower was installed 10' above the tree line, it could only accommodate one carrier with no opportunity for co-location. Each area to be covered would be small, due to the low height; you would need a separate tower for each. This is a rural area with rural roads. You could be looking at close to 24 sites to solve the problem. It would be cost-prohibitive and not practical to find that many locations. Also, not allowing for co-location would be contrary to East Kingston's by-laws.
Mr. Ciardelli said they had talked about a tree 100' taller than the trees around them. It has been alleged the ITW does not build silos and does not build flagpoles; you build towers. Why could you not come to my house or some other location on a hill and put up a 100' silo with a bunch of antennas on it? You would see it above the trees, but anyone driving through Town would see a silo. Mr. Maxson and Mr. Hutchins both referred to limiting factors of flagpoles since the arrays would be tight against the flagpole. Mr. Ciardelli said he understood that DAS works as a chain, and if any of the links are broken, DAS falls apart.

He stated ITW could build a silo or extend a silo that is already there, and he asked Mr. Cody if they had ever asked anyone to build a silo on their property. Mr. Cody stated that they had not. They use the same standard letter as every other developer uses. They do not offer people a *"catalog"* of options. They don't feel they are obligated to do so, and feel it is beyond a reasonable expectation.

Mr. Cody's answer to the question of the silo is that one of the problems with an existing silo is that it is incapable of handling the load. The last time Mr. Cody had heard of a stealth silo, it cost $700,000 to build, was made of fiberglass, and there was a tower inside of it. They have not addressed a silo because in this type of situation, needing to go above the tree line, you would be talking about a water tank and not a silo. He was not sure if that would make any less of an impact, but the cost factor makes it prohibitive. He feels the compromises offered by ITW have exerted a strong financial burden on

them. It is beyond their financial ability to build a silo that size for the capacity needed. Also, he could not enter into a contract with a person before coming to the Board for the variance.

Mr. Spear agreed with Mr. Ciardeli's question regarding the letters, as he feels the tone of the letters submitted does reflect on the type of response received. He stated the whole reason the stealth industry exists is because if you can disguise, hide and blend in these utilities, it is more palatable, more appealing and easier for people to deal with.

Mr. Spear reiterated a conversation Mrs. Waldron had had with Mrs. Joyce Bodwell that very day. The Bodwells are friendly with the Marstons, and are aware of the potential financial ramifications of the application. Mrs. Waldron had spoken to Mrs. Bodwell and shown her the picture of the stealth silo that Mr. Berry had submitted to the Board tonight. Mrs. Bodwell asked Mrs. Waldron what the picture was, and she explained it was a cell facility. Mrs. Bodwell stated that was not what was discussed with her by the applicant; she did not know it would look like that. When you ask people to put a tower on their property, you are going to get more no's than yes's. The ordinance requires the applicant to exhaust all possibilities.

Mr. Pelech offered that the antennas on the silo referred to were no more than 50'-60' off the ground, and the silo site would need to be part of a series of sites and would not work in this particular application. Mr. Cody interjected that Mr. Maxson's scenario for four sites keeps getting brought up; four sites are not available. In Mr. Cody's opinion, the letter ITW sent out was reasonable; the notification and inquiry are there. He has never heard anyone say in any decision that they have to go out and offer a smorgasbord of stealth applications at various sites. The application is about towers, and that is what they are there for.

Rosanne Sieler, 93 Giles Road, East Kingston. Mrs. Sieler stated that the RF engineers were all trying to come up with a scenario that would make the cell people happy. Was it the Town's responsibilty to make sure all of the gap was covered, or could the Town say yes to only part of the gap being covered?

Mr. Ciardelli explained that the reason the Board had the RF expert information is because the Town ordinance talks about exhausting all other alternatives. All this discussion revolves around alternatives to the applicant's proposal. Mr. Loughlin stated that the answer to Mrs. Sieler's question was that Federal Legislation, the Telecommunications Act (TCA), requires towns to *not* do anything that would impede or prohibit personal wireless service throughout the Town. They were discussing there tonight how to marry the desire and the right of a telecommunications company to provide that service with the reserve right of the municipality to regulate that.

It was Mr. Riley's understanding that the Board should only be concerned with coverage being provided to East Kingston; that they do not care about Kensington and Exeter. If a tower were put on the Bodwell's silo that would cover East Kingston but still left gaps in Kensington and Exeter, those gaps would not be East Kingston's concern.
Mr. Loughlin stated that his answer to that question would be yes.

Barry Hobbins, acting as a duly authorized agent of Industrial Wireless. Mr. Hobbins stated that there was a contradictory issue. Under New Hampshire law, both the town and the carrier have to give towns within a 20-mile radius notice of their application for wireless service. This is to have a coordinated effort to minimize wireless telecommunications facilities. If there was a community that had a facility in the next Town, that facility might be able to cover an adjoining Town and thereby minimize the visual impact of putting up another structure. We have looked at alternative structures; putting a facility at the cemetery does not work as per statute. The silo is not tall enough, and you did not have a willing individual to participate in negotiations at that time. The State looks at the totality of the entire state and not just the community. Mr. Spear interjected that a case in the Town of Hopkinton, other towns that were notified had an opportunity to object in what otherwise would be a local proceeding. The Town was under no obligation to cover other towns.

Mr. Ciardelli turned the floor over to Attorney Pelech to go over the five points and tie in the TCA. Mr. Pelech handed out a copy of the statute that prohibits new construction within 25' of a cemetery.

Bernard Pelech, representing Mr. & Mrs. Marston. Mr. Pelech stated that Mr. Hutchins did not dispute the propagation studies, and had stated: *"in his opinion, it was highly likely that the Town was going to have to grant not only this variance, but subsequently in the future, a second variance for a second tower to close the gap."* Mr. Maxson did not like what he said, and thought he was biased, but Mr. Hutchins was the expert the Town chose.

Mr. Pelech stated that they looking at a situation involving a use variance and the Simplex standard, and it was their responsibility to demonstrate that the five criteria have been met.

The applicant feels they have met the five criteria for the following reasons:

CRITERIA #1. GRANTING THE VARIANCE WILL NOT DIMINISH THE VALUE OF SURROUNDING PROPERTY.

The Board is familiar with the site, and it is the applicant's position that were the variance to be granted, there would be no diminution in value of surrounding properties. The monopole does not give off any smoke, odor, noxious emissions or other nuisance to surrounding properties. The only impact is a visual impact, if anything. Marsha Campaniello, Certified Appraiser, pointed out that the impact would be minimal or none at all.

CRITERIA #2. GRANTING THE VARIANCE WOULD BENEFIT THE PUBLIC INTEREST.

There is no question that providing personal communications services to individuals, and making it operative throughout the entire Town benefits the public interest. This also has benefits for safety reasons. Obviously the Federal Government believes that personal wireless services are a benefit to the public and have encouraged them. The Town understands and recognizes that personal wireless services are a benefit to the public.

CRITERIA #3. DENIAL OF THE VARIANCE WOULD RESULT IN AN UNNECESSARY HARDSHIP TO THE OWNER AND INTERFERES WITH THE APPLICANTS REASONABLE USE OF THE PROPERTY.

The reason we are here is because this location is in a residential zone. It is in a location that would allow the applicant to provide coverage for much of the area that does not have coverage. The first element is that it would result in unnecessary hardship to the property owner and interfere with the reasonable use of the property.

It is our position there are special conditions with regard to this property:

- The site has some very steep terrain, unusual topography, a transmission easement, and is not well-suited for residential use.
- The tower is a reasonable use for this site. Unfortunately, because it is in a residential zone, the zoning restriction interferes with this reasonable use of the applicant's property.

CRITERIA #3B – NO FAIR AND SUBSTANTIAL RELATIONSHIP EXISTS.

The second element is whether any fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restrictions on the property.

We believe that this is a reasonable use and that there is no fair and substantial relationship. The Town of East Kingston recognizes that wireless service is a good thing to have, but unfortunately it is allowed in such districts where it is not possible to cover the entire Town. In this particular situation, there is an appropriate piece of property located in an appropriate area that will support a facility such as the one being proposed, but it is not allowed simply because of the underlying zoning; there is no fair and substantial relationship between the ordinance the specific restriction.

CRITERIA #3C– IT WOULD NOT INJURE THE PUBLIC OR PRIVATE RIGHTS OF OTHERS.

It is clear-cut that we are not injuring anyone's public or private rights. This is a facility that is not going to create any substantial impact on the characteristics of the neighborhood, or alter the essential character of the locality. It will not threaten the health, safety or welfare of the general public. This is an unmanned facility, with the only impact being visual and we believe that is minimal.

CRITERIA #4. GRANTING THE VARIANCE WILL RESULT IN SUBSTANTIAL JUSTICE BEING DONE.

This is where the balancing test of the scales of justice takes place. You have to weigh the hardship upon the owner and the applicant against some benefit to the general public in denying the variance. If you feel that the public is going to be benefited by denying the variance, and that benefit to the general public outweighs the hardship upon the owner and the applicant, then you should vote to deny the variance. On the other hand, if you feel that the hardship upon the owner and the applicant is not outweighed by some benefit to the public in denying the variance, then you should vote to grant the variance.

In this case, I do not see any benefit to the public in denying this variance. It's almost a given that the public is benefited by the telecommunications service that would be provided. There is no other benefit in denying this application that the general public will experience. If you deny this application, the Town of East Kingston will continue to have very poor, spotty cellular service. If you balance the hardship upon the owner against some perceived benefit to the general public in

denying the variance, you will see that hardship on the owner is certainly greater and granting the variance would do substantial justice.

CRITERIA #5. THE PROPOSED USE IS NOT CONTRARY TO THE SPIRIT OF THE ORDINANCE.

We do not believe approving this application will violate the spirit and intent of the ordinance. The proposed site would have little or no impact on surrounding properties. It will not take an inordinate amount of the Town's resources; it is basically a neutral site that will just sit there. It will not generate traffic, will not require any municipal maintenance, will require no water or sewer, and is not going to be a burden on the Town of East Kingston. It is permitted where "all other reasonable opportunities have been exhausted"; therefore, if the variance were not to be granted, cell coverage in a large portion of Town will be eliminated.

We believe that this application does meet the five criteria as set forth in the Simplex case, and we would ask the Board to grant the variance.

Barry Hobbins, acting as a duly authorized agent of Industrial Wireless. Mr. Hobbins stated that Mr. Spear's brief was somewhat of a personal affront, and it was unfortunate that his comments were prepared from only a portion of unapproved minutes. Mr. Hobbins stated that he had gone to extreme detail of reading into the record what the Telecommunications Act said, and at no time had he talked solely that the tower was the issue. It is absolutely clear, under the Town's ordinance, that East Kingston looks at alternative structures before looking at the idea of building a structure that would meet the propagation criteria required by the licensed carriers in order to fulfill their obligation under their licenses by the FCC.

This is a very interesting case, considering it has been evolving for a year and a half now. Many Board members have probably read just recently of the case that occurred in Bow, New Hampshire. I have represented Cingular Wireless, who wanted to install a tower on the Blue Seal fertilizer factory. The Town of Bow had enacted one of the strictest wireless telecommunications facilities ordinances in the state. Showing no disrespect to this Board or this Town, it is interesting to note that during this period of time, this was not a good case to the wireless communications industry.

It has been demonstrated that the applicant and the co-applicant here tonight have looked at over 800 sites and the feasibilty of locating a wireless communications site at those locations. In the Bow case, the wireless carrier put their feet in cement and stated that this was the site they had identified and that was it. Unlike that situation, this carrier has attempted to provide all the information to do the due diligence needed to try to attempt to meet the criteria of the Telecommunications Act and the steps that need to be taken in order to exhaust the other alternatives, under your ordinance and under the Telecommunications Act to look at alternative sites before building another facility such as a tower.

When you look at the present ordinance in this Town, talking about covering significant gaps, the consultant the Town hired stated that there is a significant gap, and there are possibilities of attempting to fill that gap. One of the possibilities is the proposal these two applicants have made, and the other one addresses certain other alternatives Mr. Hutchins outlined in his report. I believe we have demonstrated we have taken those in good faith, and have exhausted those steps.

If we want to get down to technicalities about what the letter says about the word tower, and you are going to hold your hat on that idea that we weren't making a good faith effort and we were only going through the façade of trying to find alternative steps, I think that is incorrect. Based upon what the Planning Board wanted us to do and criticism of the opponents, we have attempted to mitigate the issue of visual impact in this case. We are saying we will accept a mono-pine, which is an attempt of a stealth application to minimize the visual impact. We have taken the placement of antennas that Cingular's propagation mapping says is essentially what they really need, which is 140'. At the Planning Board meeting, consistent with what Mr. Cody said, Cingular's representative testified that the optimum level would be 180', but they could live with 165'.

Based upon the Hutchins report, we were asked to attempt to lower the tower even further. The propagation studies show that anything below 140' would begin to degrade the signal and the coverage of the community, which would lead to the possiblity of having to place other facilities in the community to cover the gap.

Even though I am not licensed to practice in the state of New Hampshire, I am licensed in the Federal Courts, the Commonwealth of Massachusetts and in the state of Maine. I have permitted over 100 of these sites on church steeples, and towers, and on water tanks and buildings throughout the state of Maine, New Hampshire, Massachusetts and Rhode Island. During the process of the Bow litigation, the applicant argued that it was absolutely impossible for them to meet the criteria. It is interesting to note that the magistrate who issued the opinion stated that the Town changed the zoning

ordinance, worked with them, tried to find alternative sites, and the applicant didn't want to budge. They only wanted that particular site.

That is not the case with this applicant. This applicant has been willing to be flexible and attempt to mitigate those issues. The unfortunate part of this case is where there is a substantial gap, there is no way to cover that substantial gap with any type of certainty without having to meet the strict criteria of your variance. In my opinion, given the fact we have attempted to exhaust all the criteria, there is the possibility that your ordinance, as drafted and the way the state law is developed with the variance, that we are effectively being prohibited from being able to fill that gap.

If it is found that it is absolutely impossible for us to meet our objectives because of the criteria, this Board can go beyond and look to the Telecommunications Act and grant this variance based upon the impractability of our being able to meet the criteria; although personally I believe we have demonstrated we have met the criteria. The last time, both the Planning Board and the Zoning Board voted that we met the requisite criteria of the ordinances.

Mr. Hobbins thanked the Board.

Mr. Jeffrey Spear, Attorney for Monique Waldron and Kenridge Farm. Mr. Spear gave some background on the TCA. When Congress was considering the TCA, the wireless industry pushed very hard for complete takeover by the Federal Government to preempt state regulations; the Congress rejected that. Now the TCA acts as a backstop, an overlay of sorts. It is there to prevent the most egregious applications of State law that really step over the bounds. It imposes two requirements, the first being procedural. If a decision is based on denying an application, it does so based on a written decision based on substantial evidence in the record. Substantial evidence in the record is more-or-less subject to review in State court.

Effective prohibition occurs when there is a significant gap. The TCA does not require seamless coverage; there can be small gaps in service and it would not be a violation of the Act. Even if this tower were to be built, there will be gaps in service in East Kingston. The burden is on the applicant who would need to show that further reasonable efforts would be so likely to be fruitless that it is a waste of time even to try.

They must develop a record demonstrating they have made full effort to evaluate other available alternatives, and the alternatives are not feasible to service customers. In an effective prohibition claim, they must demonstrate that no alternatives were left out even though they are less desirable. The Zoning Board is not obligated to approve the application where more than half of the service coverage is outside the Town of East Kingston.

Mr. Spear talked about three cases he felt were essential to the case.

ATC Realty v the Town of Sutton. The applicant wanted to install 190' single tower. The ZBA asked about smaller towers at multiple sites. The applicant insisted that the single site was the best; trying for towers at multiple sites would increase opposition. When the applicant came back with an answer, they said in summary, less obtrusive alternatives were not proposed because they do not work, they do not accommodate co-location, they are really not less obtrusive, and they require many more towers.

The ZBA denied the variance. The applicant went to Federal Court who said, *While there may be merit to plaintiffs' contention that a single, taller tower satisfies the requirements for a special exception better than a number of shorter ones, that decision is not plaintiffs' to make. . . . such choices are just what Congress has reserved to the town." Because plaintiff's rejected, out of hand, any possibility of using multiple shorter towers, they have not shown "from language or circumstances not just that this application has been rejected but that further reasonable efforts are so likely to be fruitless that it is a waste of time even to try." Nor have they "shown that the [ZBA] will inevitably reject an alternative ... proposal with lower towers." To the contrary, the record demonstrates that the ZBA was keenly interested in exploring such alternatives.*

We can analogize that in this case the same applies to different technologies, not just different sites.

Cellco Partnership v The Town of Grafton. In this case, Mr. Maxson was the expert for the Town. The applicant had submitted a 120' flagpole design tower, and it was rejected because it was a municipally historical site. The applicant in that case said it was the only technically feasible plan.

The Town also suggested consideration by Cellco of the State Police tower. Although the applicant had stated that the State Police tower does not "appear to have sufficient structural strength" to support the necessary equipment, there is no evidence that Cellco ever tested the structural strength of the tower or sought the opinion of a structural engineer to confirm Robinson's observation. Moreover, there is no evidence that Cellco ever considered the possibility of constructing a replacement tower that would accommodate telecommunications and emergency facilities. As a final point with respect to

the State Police tower, Cellco contends that the State Police are unlikely to agree to sharing a tower with a wireless service provider. There is no evidence, however, that Cellco ever approached the State Police with an offer.

Other options may be more difficult and more expensive than a single site location, but the TCA does not offer the applicant the cheapest option. Mr. Maxson had stated *"that some existing structures may offer meaningful substitution proportionate to the proposed facility"* The court said *"it wasn't effective prohibition to deny this quantum facility when there exists the possibility of other coverage; the Town does not have to prove it and the abutters do not have to prove it. They don't' have to prove you can provide adequate or similar coverage from a variety of different sources."*

Mr. Spear asked how ITW could say they propose a tower with a certain amount of coverge, that every alternative has to be measured against it, and if the alternative coverage does not duplicate the proposed coverage, then it is not feasible. That is not the way the TCA works. It does not eliminate the possibility that there may be other than single-site solutions that will provide adequate coverage to the gap.

U.S. Cellular v the Town of Bow. Mr. Spear was involved with this case, representing the abutters. This case is now in appeal. He stated that the Bow case has a lot of similarities to this case. U.S. Cellular proposed a site; the Town proposed some alternate sites. And U.S. Cellular did do propagation studies on those sites. The propagation studies were not optimal at the alternative sites, but they were close. The Town thought these alternative sites were better, and U.S. Cellular said no, it would not be better; we will have the same problems with a big tower over there. U. S. Cellular also did not consider non-tower solutions.

The judge ruled *"that the fact the site chosen by U.S. Cellular might have been its first choice to meet the financial and technical objectives, ...against the feasibility of alternative sites in order to prove the ZBA they pursued other options, it is undisputed many alternative sites are available..."* The Court also upheld the Town's goal to protect the visual character of the Town, saying, *"It is the privilege of the Town (of Bow) to make that decision. The (Bow's) Master Plan, Capital Improvements Program, and Zoning Ordinance all intend to control and regulate development to keep the qualities typical of a small town."* East Kingston's purposes and goals are the same.
East Kingston and the Zoning Board would need to be concerned about strict application of the variance criteria if this was the only feasible plan. Under the TCA, these three cases demonstrate conclusively that we are not there. There is no chance rejection of this application is going to be reviewed as effective prohibition.

The burden of proof is on the applicant, both here and in the Federal Court. It is not enough for them to just say something; they have to prove it. Because of the agricultural nature of the Town, your ordinance allows tall towers only after other alternatives have been invalidated and shown to be infeasible. This application is absolutely inconsistent with that. The applicant themselves stated that they don't do alternatives.

The first element is ***unnecessary hardship to the owner.*** On page 4 of the applicant's Simplex criteria they stated. *"A zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting to the property in its environment..."* The analysis is not whether the applicant or the tenant of the applicant thinks the purposes are well suited to the property, it is if something is unique about the property itself. The fact that it is great for a cell tower is absolutely irrelevant; it has to be unique to the property that requires the variance.

Mr. Spear pointed out that the tax card for this property shows no restrictions on its use. The Marston's knew what the requirements were when they bought the property. There has been testimony that the owner has resisted moving the tower location as Mr. Hutchins suggested because they had future plans for that parcel for their children. That is a use, which means they can't meet the standard.

The second element is ***a fair and substantial relationship between the general purposes and the specific restrictions on the property.*** I think this is a perfect relationship. This is an agricultural area of town; there are no industrial uses, maintaining that and requiring the alternatives be exhausted before you take the drastic step of allowing something like this tower in that area is perfectly suitable. It is exactly what the ordinance is intended to do.

The applicants, in some of their statements, have tried to wrap themselves in a blanket of coverage by saying, "what we're doing here is voting on whether coverage is good or coverage is good." That is not what you are voting on. You are voting on this application and whether to put a tower on this particular site.

The third element is ***injury to the public or private rights of others.*** I think the evidence is strong here that there will be injury, to both public and private rights. The private rights of Kenridge Farms by seeing the 80' tower from a historical property, and other abutting property owners who also will see this tower. The consultant hired determined the view of the tower would have an adverse effect on the unique characteristics of Kenridge Farms as a historical property. That is both a private and public injury.

The proposed use is not contrary to the spirit of the ordinance. The spirit of the ordinance is *"to protect the health, safety, or general welfare of the community."* The applicant has done nothing to eliminate the tall tower; they have not looked at all the alternatives to tall towers.

By granting this variance, substantial justice will be done. The applicant has not demonstrated that granting the variance would do substantial justice.

Granting this variance will not diminish the value of the surrounding properties. There were conflicting opinions from the appraisers at the last meeting about the value of finished properties with houses on them. The only evidence before the Board about the effect of cell towers on undeveloped, buildable lots, which Mrs. Waldron owns, is provided by Mr. Manias. People have the ability to choose where they build their house. Mrs. Waldron was surprised to find her property was worth just shy of $2 million dollars when she had it appraised.

Mr. Hobbins asked if he could clarify some of the differences between what Mr. Spear talked about in respect to certain cases mentioned and other issues raised and contradicted. Mr. Ciardelli answered that they would take a short break and then Mr. Hobbins could clarify the issues. Mr. Ciardelli asked Mr. Hobbins to be brief, as there was little the Board had not already heard.

Mr. Cody interjected that he agreed with Mr. Ciardelli, that the Board has listened to the information many times over and in his opinion; he felt the Board had already formed their opinion. Mr. Cody stated that the Board had the record before them (to refer to), and it was his feeling that it is one of the most complete records any town has seen to review. He was ready to close the discussion.
Mr. Cody did clarify that in the Grafton case Mr. Spear had referred to, the Judge had admonished the Town, saying they could not continue to deny towers. He stated that ITW had worked with Grafton, and was building a tower there today. Mr. Cody stated ITW has have worked with East Kingston, and he thought East Kingston would be very satisfied with the efforts they have made to work with them. Mr. Cody was sure the Board had sufficient facts to make a determination.

Mr. Ciardelli closed discussion to the applicant and the public, and a short break was announced.

After the break, Mr. Ciardelli stated that the Board had seen and heard everything they expected to see and hear, and had had experts testify in order to immerse themselves in as much information as they possibly could. The Board and Town Counsel would now discuss their options.

The Board will need to discuss the five points, but Mr. Ciardelli was not sure that if they wanted to have that discussion this evening. Attorney Loughlin indicated there would be several options of how to proceed:

- if the Board members have procedural questions they feel could be better asked and discussed with counsel, that would be an option, and is one of the exceptions to the right-to-know law.

- the Board could start discussions tonight and if something came up, they could recess the meeting to discuss with counsel privately, and then come back to the meeting.

- if the Board members have a good idea of how they feel about each of the issues, they may want to discuss the issues amongst themselves and actually vote tonight.

- or the Board might want to take each point that has been brought up and discuss it and get it on the record. Then Mr. Loughlin would take all the material and put it into the form of an opinion, which the Board would have a chance to look at and add, subtract or change it, and adopt it at a subsequent meeting. The Board would not actually vote this evening, just indicate what the majority of the Board members feel on the relative points.

Mr. Ciardelli stated that he was reluctant to continue the meeting this evening because he was not sure how long the discussion would actually take and did not want the meeting to last until midnight, as the December meeting had.
He thought they were at a good breaking point, and they should continue the meeting until next month. He asked the Board members for their thoughts.

Mr. Falman agreed it would be good to continue this meeting to next month. It was his thought that if the Board members needed clarification on the TCA from Town Counsel in terms of what aspect the Board should consider in regards to the 5 criteria and the TCA, it would be wise to do that. Mr. Riley agreed there could be some issues the Board should discuss with Town Counsel for clarity. Mrs. Belcher stated she felt she would benefit from dialog with Town Counsel. Mr. Freeman agreed.

Mr. Ciardelli stated that one reason for not breaking the meeting in December was because there had been the perception that skullduggery was going on. His thought was that they had gotten beyond that now. He assured everyone that all discussions had taken place in front of the public. This forthcoming discussion with Town Counsel for clarification of the TCA was a different matter and needed to be private between Mr. Loughlin and the Board.

Mr. Ciardelli announced that they would continue the meeting until next month, and the Board would have consultation with counsel this evening in private after the meeting was adjourned.

Continuation of the Rehearing: Mr. Ciardelli asked for a motion to continue this rehearing.

> **MOTION**: Mrs. Belcher **MOVED** the hearing be continued until Thursday, September 27th at 6:30pm at the Town Hall. Mr. Riley seconded; and the motion passed unanimously.

Mr. Ciardelli reiterated that the meeting in September would have no public input, only the Board's discussion of the 5 criteria and the final vote.

The meeting was adjourned at 9:20 PM.

Respectfully submitted,

Barbara White

Barbara White
Recording Secretary

David Ciardelli
Vice Chairman

Minutes approved on 25 October 2007