

**Town of East Kingston, New Hampshire
Zoning Board of Adjustment Meeting Minutes**

December 19, 2006

AGENDA

**7:30PM Industrial Tower and Wireless, LLC
and Co-Applicant Cingular Wireless
40 Lone Street
Marshfield, MA 02050
MBL #16-4-01 (36 Giles Road, East Kingston)** (2006-06)

Members Attending: Vice Chairman David Ciardelli, Norman Freeman, Ed Cardone, Paul Falman, Tim Allen and Cathy Belcher

Others Attending: Mr. John Cody [Representative], Mr. John Champ [Site Acquisition Specialist], Mr. Kevin DeLahney [RF Specialist] representing Industrial Tower and Wireless, and Mr. Barry Hobbins [Counsel for Cingular Wireless].

Mr. Ciardelli opened the meeting of the East Kingston Zoning Board of Adjustment (ZBA) at the East Kingston Elementary School on December 19, 2006 at 7:30 PM to consider the application from Industrial Tower and Wireless seeking variance from Article XV, Section D.2. – USE DISTRICTS for construction of a 180-foot monopole and equipment area in a Residential Zone.

He explained the history of the case, how and why it came back before the Zoning of Board of Adjustment, and also clarified the responsibilities and limitations of the Planning Board and Zoning Board to the public.

Mr. Ciardelli stated that in concept, the ZBA was starting all over again, and noted that seldom does a Town have a meeting with this much interest generated, have six months of dialogue on a subject, and then have a meeting all over again. He stated that was happening and there was a golden opportunity to get everyone's input and take advantage of it.

Mr. Ciardelli explained that by statute, all the Board members had to be residents of East Kingston. Tonight's meeting involves an application for a use variance. One of the powers levied on the ZBA is the granting of a variance from a local Zoning Ordinance, where justified. The Board, however, does not have the power to amend the Zoning Ordinance.

Mr. Ciardelli explained that there were five criteria points that the applicant would need to meet to be granted the variance, and that all five would need to have been met in the eyes of the Board. He referred the public to the variance criteria listed on the display board and handouts provided. The Telecommunications Act was established in 1996, and 2001, the New Hampshire Supreme Court had found Point #3 of the hardship test too restrictive, and had loosened the restrictions by creating sub-points. Mr. Ciardelli explained that each of the sub-points would have to be met for the hardship to be proven.

Mr. Ciardelli explained that the Planning Board and the Zoning Board operate under the auspices of New Hampshire State law, and quoted the statute, "*For the purpose of promoting health, safety or the general welfare of the community.*" He explained that tonight's case is also governed by Federal law and the Telecommunication Act of 1996 which states, "*No State or local government or instrumentality thereof, may regulate the placement, construction and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the commissions' regulations concerning such emissions.*" Therefore RF emissions are an illegal topic for the Board to deal with tonight.

Mr. Ciardelli explained that although tonight's meeting was a redo of the May meeting, since that time, much additional information has been submitted to the Board for their consideration.

Mr. Ciardelli went over the rules for tonight's meeting, explaining that the applicant would give their presentation, the Board would discuss among themselves and ask any questions of the applicant, there would be an open forum session for questions and comments from the public, then the Board would discuss the points to be met and vote on them.

Mr. Ciardelli asked the public to address the Chair, state their name and address clearly, keep comments brief and non-repetitive, and not talk among themselves while others were speaking.

Mr. Ciardelli stated that the applicant, Industrial Tower and Wireless, is seeking a variance from Article 15, Section D2 – Use Districts, for construction of a 180' monopole and equipment area in a residential zone. Section D2 of Article 15 of the Zoning Ordinance prohibits cell towers in a residential area.

Mr. Ciardelli turned the floor over to Mr. Cody, Industrial Wireless and Communications.

Mr. Cody, Director of Operations for Industrial Wireless and Communications, addressed the Board, giving a history of the involvement of Industrial Tower and Wireless LLC. He explained that they make co-location for service providers available. He also explained the need for coverage in East Kingston in areas not covered by towers in zoned areas, and described how the company verified lack of a signal, and had searched for an appropriate site. Mr. Cody mentioned that there had been changes since the original presentation due to additional information, and he introduced the others who would be speaking to the Board.

Mr. Kevin DeLahney, Radio Frequency (RF) Propagation Manager for Industrial Tower and Wireless, showed a PowerPoint presentation that illustrated current signal coverage and lack thereof by various companies (i.e., Sprint, Nextel, Cingular, T-Mobile, and Verizon). He explained how the coverage was determined, and that the various colors on the presentation denoted certain signal strengths at that particular location. The presentation showed definite blank spaces in the northerly area of East Kingston and parts of adjoining Kensington, and demonstrated how a tower on the proposed property would fill in the dead areas. He explained that all the major carriers have a need for coverage in a certain area on Route 108. He also referred to a Propagation Study performed, which showed that if the facility was installed in either of the commercial areas where presently allowed, service would not reach the needed area on Route 108.

Mr. Champ, Site Acquisition Specialist for Industrial Tower and Wireless, explained that he had looked at several other properties beside the proposed location, and found the locations either not suitable or the owners were not interested. He then addressed the site plan and explained that Mr. Marston owned both sections 17-3-1 and 16-4-1, but lived on section 16-4-1. He stated that the proposed 27-acre site was 1,600 feet from Giles road, and that the property was already compromised by two utility easements.

Mr. Champ described the proposed site, the driveway leading to the site, and specified that the 100x100' compound would have a 10' chain-link fence around it, with a 10' high gate. The base of the compound would be made of gravel topped with crushed stone, and the compound would be comprised of 12x22' equipment shelters and a 180' monopole.

Mr. Cody stated that there was a need to find a location for coverage to be effective, and explained that they were one of the many companies that bring carriers together to co-locate to meet the needs of the Telecommunications Act. He stated that the variance is warranted, as the by-laws were not able to project what the needs for the Town would be in the future. Times and technology have changed, and today, cell phones are part of our culture. He then described the value of being able to utilize a cell phone for emergencies in the event of power outages.

Industrial Tower had chosen the remote, heavily wooded site with utility easements that had limited usage because of those easements. The tower would need to be above the tree line in order for the signal to be effective, and installing a tower in the existing industrial area would not provide the coverage needed.

Mr. Cody directed the Board's attention to the site plan and pointed out the steep gradients on both sides of the property. He reminded the Board that there was limited usage for the lot. He explained that "hiding" the location of a tower was one of the things they looked to achieve, and in his opinion, the tower could be hidden adequately on the 27 acres. He referred to the balloon test conducted in the summer, which showed the proposed tower location primarily visible from a long distance away. He reported that all locations concerned were at least one-half a mile away from the proposed location. Mr. Cody reiterated that the tower needed to extend above the tree line in order for the communications to work.

Mr. Cody stated that cell phones were now part of our society and culture and are used every day in business, for personal use, for public safety, and to keep in touch with our children.

Mr. Hobbins, Counsel for Cingular Wireless, introduced himself, providing some background, and explained that the coverage as shown by Mr. Champ for all the competitors is a true representation. He also stated that communities have great input for a competitive system for carriers, this variance would not give one carrier an advantage over another, and it meets the needs of all the carriers. He stated that the site meets the Simplex Technology decision. Mr. Hobbins explained that providers looked first for alternative locations on water tanks, church steeples, buildings and existing poles, for example. Mr. Hobbins discussed in great length, the Telecommunications Act and changes that had been made to the five criteria. He explained that the Telecommunications Act gives towns the right to regulate cell towers, but not prohibit them, and that carriers try to locate the towers in non-invasive areas. In East Kingston, coverage could not be met by locating towers in the areas they were allowed.

He then addressed the five criteria and gave his reasons he considered them to be met.

#1 – No diminution of property values. Mr. Hobbins stated that the site meets all setbacks and easements established by the Planning Board, has existing tree coverage, and there is negligible effect on property values, according to the Market Analysis the applicant has provided to the Board for the surrounding area as supporting information.

#2 – Not contrary to the Public Interest. Mr. Hobbins stated that the carrier looks at the coverage to be in the public interest of the safety of the community, and thereby not contrary to public interest. He acknowledged that in Maine, the Governor had assigned a task force to look into providing a seamless wireless network across that state.

#3a – Unnecessary hardship – interferes with applicant's reasonable use of property. Mr. Hobbins quoted Simplex vs Newington, and stated that denial of the variance would result in an unnecessary hardship to the owner because of the special circumstances and unique setting of the property. He stated the proposed wireless facility is a reasonable use of the property given the unique characteristics, under the same standards as Simplex. He explained that as leaseholder, the applicant is entitled to the use. It would enable the wireless provider to provide optimum coverage to its customers and fulfill licensed coverage needs.

#3b – Unnecessary hardship – no fair and substantial relationship exists. Mr. Hobbins explained that wireless facilities are not permitted in a residential zone even though coverage objectives are not met, which is not fair and reasonable. Coverage would not be met if located in permitted areas. The applicant offers co-location to other carriers.

#3c – Unnecessary hardship – would not injure the public or private rights of others. The variance would not injure public or private rights as it would not create additional traffic, would be unmanned, and the visual impact on the community is minimal.

#4 – Substantial justice would be done. If the current variance application is not allowed by the Board, a significant gap of coverage will exist. Granting the variance will achieve the substantial justice of allowing the applicant to provide reasonable coverage, while at the same time, given the nature of the facility, would protect the Town's best interest. The height of the tower will permit co-location, and minimize visual impact by reducing the necessity for additional sites.

#5 – Must not be contrary to the spirit and intent of the ordinance. Article XV land use ordinance provides for siting possibilities beyond the jurisdiction of the Town. The eight criteria are consistent with the spirit and intent of the ordinance.

Mr. Hobbins explained that the 1996 Telecommunications Act must also be considered, in addition to the criteria. The Telecommunications Act gives the states the right to regulate, but not prohibit cell towers in a community. If local ordinance prohibits construction of a cell tower in a residential area, you must then look to the Telecommunication Act. Mr. Hobbins made this statement so the record would be clear in regards to the Telecommunication Act.

Mr. Cody submitted a memo from the Rockingham Planning Commission in regards to the tower, and asked he Board to read it even though it was addressed to the Planning Board. He then thanked the public for their patience and respect in listening to both the presentation from Industrial Tower and Mr. Hobbins.

Mr. Ciardelli opened the floor to the Board members for questions and comments to the applicant.

Mrs. Belcher asked if there was a Federal law mandating a minimum distance between towers. Mr. Cody answered that local ordinances would cover that issue. Federal law gives them the right and obligation to provide coverage and fill the gaps, and in densely populated areas, poles are sometimes a mile apart to provide adequate coverage.

Mrs. Belcher reiterated she understood that Federal law mandates that the applicant be allowed to fill in the gaps. She inquired if the applicant was also allowed to not only to fill the gaps, but when the coverage was saturated, did they have the right to install another tower to fulfill the coverage, also considering the lack of coverage a gap.

Mr. Hobbins explained that the issue was coverage. When the cases came down in the late 1990s, most of the issues dealt with gaps in coverage. Unfortunately, because of the fact there are 200 million wireless devices now, the issue of capacity is the next issue that will be addressed. He believes this is consistent with the Telecommunication Act and the requirements of the carrier's license to provide optimum coverage. Therefore if there is capacity issue, there is a dropped call, which is the gap. So the answer is yes, it would be considered a gap.

Mrs. Belcher asked if there was a number of cell phone users tied to a tower. Her concern was if the tower would meet the Town's needed capacity in 10 years, and if coverage would be adequate should a major emergency arise. She also wanted to know what the distance for coverage was to the next tower.

Mr. Cody answered that there were typically 3 faces on each array, each supporting 1,000 users, and the distance of coverage was 2 miles in each direction. He stated that sometimes signals overlap, helping to ensure undropped calls

Mr. Hobbins stated that the system is built for one antenna array to hand off the signal to the next antenna array. Also, that the higher the frequency used, the closer together the antennas would need to be. Mr. Cody stated that carriers are always trying to search out ways for greater capacity, and that coverage provided should be adequate.

Mr. Falman asked the applicant to address what would happen if changing technology required dismantling the tower. He wanted to know who would be responsible for bearing the cost of the removal.

Mr. Hobbins answered that the Town's own ordinances provide for that possibility, and that there would be a bond to cover the costs if the provider failed to remove the tower.

Mr. Ciardelli opened the floor to abutters at 9:00 pm.

Matthew Dworman, 36 Pheasant Run, East Kingston - Mr. Dworman stated that the applicant does not meet the criteria and that the application violates more than paragraph D2. The applicants came requesting a variance to paragraph D2 of Article XV, but there are other violations which would require additional variances which have not been addressed, such as:

- ◆ Article I of the Zoning Ordinance, Purpose states, "*... to preserve and improve the attractiveness of the Town of East Kingston as a rural, residential, and farming community...*" Mr. Dworman thinks putting a 180' tower in the middle of the community is quite the opposite.
- ◆ Article XV, Telecommunications Facilities, B.2. Purpose and Goals, states "*... to provide such services to the community quickly, effectively and efficiently.*" Mr. Dworman stated that obviously this has not been the case, as there has been much concern about this.
- ◆ Article XV, B.2. also states, "*Reduce adverse impacts such as facilities may create, including, but not limited to; ... aesthetic...*" Mr. Dworman stated putting a 180' tower in the middle of the community impacts the aesthetics.
- ◆ Article XV, B.4. states. "*Permit the construction of new towers only where all other reasonable opportunities have been exhausted, and to encourage the users of towers and antennas to configure them in a way that minimizes the adverse visual impact of the towers and antennas.*"

Mr. Dworman stated that the applicant has shown this is a prime location for them, but has not demonstrated that putting in smaller towers in multiple permitted areas would still provide the same coverage. The Town had voted on not having cell towers in residential areas, permitting them in light industrial and commercial districts only. This is the Town's public interest, since it had been voted on.

◆ Article XV, Paragraph G.9. "*Visual impacts..* ", and Paragraph G.10. "*... alternative tower structures and siting locations.*" Mr. Dworman stated the applicants have shown that Verizon provides an area where there are no dropped calls in that same area, demonstrating that obviously other providers have found alternative coverage.

◆ Article XV, P. 3, "*... a scaled elevation view, showing topography...*" The applicant has not shown what the tower would look like with a proposed elevation view.

It is Mr. Dworman's opinion that anyone who can see the tower should be considered an abutter, not just those whose land abuts to proposed location.

The East Kingston's Master Plan is to preserve East Kingston's rural, residential character. This application for variance completely violates the number one goal of the Master Plan and the number one goal of the Zoning Ordinances.

Mr. Dworman also rebutted the five required criteria, such as:

#1. "*No decrease in value...* " The applicant explained they chose the property because it was unique. Mr. Dworman takes that statement to mean that they were the only property owners that would work with them. Also, the opinion they received that property values would not be decreased is an opinion they paid for. Mr. Dworman stated he pays more to live here than in Concord, for example, because this is where he wants to live. 1% of what his house is worth comes to \$4,000 and 2.2% is over \$8,000; that a lot of money and a decrease in value.

#2. "*... not contrary to public interest.*" Mr. Dworman stated that everyone here tonight is applauding what I am saying because *it is* contrary to public interest. The public interest has demonstrated it is clearly not desired.

#3. The landowner is using the property as a residential lot. The ordinance is specifically designated against it, making the tower not a reasonable use. Visual impact, minimal or not, it is still an impact; minimal cannot be justified.

#4 – A substantial injustice would be done if the tower were allowed to go through. We have demonstrated why this is contrary to several paragraphs in the ordinance and contrary to the number one goal in the Master Plan. If that goal is violated, a severe injustice will have been done to the Town.

#5 – I have already demonstrated why this is completely contrary all of the points outlined in the Zoning Ordinance.

The Town has already made it clear they do not want cell towers in residential areas. If the applicant needs to install multiple towers in designated zones at more cost, they will still be making money in the long run. Or they could be located on Town-owned land, which had not even been brought up tonight.

Deborah Marston, 45 Giles Road, East Kingston. Mrs. Marston stated that that on September 28, her husband Bob had a medical emergency and almost died. She stated that during the 3 weeks her husband was in a coma on a ventilator, the doctors would call her. She carries her cell phone all the time and stated there is no coverage in the area a lot of times. She said there is such bad cell phone coverage, that when doctors tried to get in touch with her for permission for procedures and provide her with information, the calls would be dropped, which made the whole situation much more difficult than it should have been. Mrs. Marston stated she knew it was a very emotional issue for all present, but said her whole situation has been a nightmare for her with the lack of cell phone coverage. She stated it was a new world now; she never carried a cell phone before, but now does. She is for the cell tower.

Mr. Sumner Kalman, Attorney, Plaistow, NH. Mr. Kalman represents Kendridge Farms, and provided a book of information to the members of the Zoning Board. Included in this information are his reasons he thinks the five criteria are not met, tax cards, letters from concerned citizens and appraisers, and information regarding the *Chester Rod and Gun Club, Inc. v. Town of Chester* and the *Simplex Technologies, Inc. v. Town of Newington* court cases. He also provided a CD presentation from Mr. Gary Roberge of Avitar regarding views.

Mr. Kalman reviewed with the Board the reasons he feels the criteria are not met. He also stated, "*As far as the presentation made by the applicant this evening, that somehow their issue concerning the cell tower business and their issues why it would be desirable for them to be able to get this variance and not have to conform to the zoning ordinance, somehow we've twisted*

certain words in the criteria to kind of fit concepts that laymen may get confused by, but I don't think the Board will be confused by." [sic] A CD presentation from Avitar was shown for the public.

Mr. Kalman stated he thought the applicants had not met their obligation or burden of proof to establish that they can meet the elements necessary to be granted a variance under these circumstances, and respectfully asked the Board to deny the applicant's request for variance in this case.

Mr. Ciardelli looked through the information provided by Mr. Kalman and noted that the Board members had already seen most of the letters included, as they had been forwarded to the Zoning Board members previously. He reiterated his request to the people who wanted to speak to be brief so all would have a chance to speak.

Robert Murphy, 5 Greystone. Mr. Murphy stated he is in favor of granting the variance and thinks things need to be put into perspective. He stated that the attorney had alluded to a tower being put into someone's front yard, which was not the case; they were talking about a tower 1/4 of a mile off the street, up into the woods, which you might be able to see a tip of if you looked at it at the right angle. At his house, he needed to go outside in order to guarantee a signal for his cell phone. He stated that perhaps the people who were strongly objecting there tonight had a strong signal at their house.

He too had had a life and death situation in his home, where his wife had fallen off a ladder and hit her head and was bleeding. If it had been at a time when there had been no power, he would have had to leave her side, and go outside and try to reach emergency services on his cell phone, which could have been a very tragic situation. His house is 350 feet from the street and the wires go through the trees; when there is a storm, he loses power quite often.

He came to the meeting to listen with an open mind, his main concern being aesthetics. Like most people, he does not want to see a tower in someone's front yard as he drives down the street; he thought that would be detrimental to the public interest and the property values. He feels as the proposed tower is going to be 1/4 of a mile from the street, he does not think it will negatively impact the community or property values. He would like the variance to be approved so people like himself who have no coverage in this community would be able to enjoy the benefits of personal communication wirelessly.

Monique Waldron, 285 North Haverhill Road, Kensington. It is Mrs. Waldron's opinion that granting the variance for the cell tower would diminish her property values, and affect her business as a horse farm and training facility. She also states that she would have the tower as a view from 75% of the windows in her house. Her 3-page letter is included in it's entirety in the "Use" Variance book of information provided by Mr. Sumner Kalman.

Kim Casey, 109 Giles Road, East Kingston. Mrs. Casey read a letter from Maggie Wood Hassan, District 23, advocating on behalf of Rosanne Seiler and her daughter's photosensitive epilepsy and the proposed cell tower. This letter in it's entirety is attached to the minutes as part of the record.

Mrs. Casey then read a letter of concern from herself, which replaces the letter included in the "Use" Variance book of information provided by Mr. Sumner Kalman. This letter indicates the application for the cell tower variance is not in the spirit of the community's desire, and would negatively impact property values. She stated she thought the five criteria had not been met, and wanted to know if tax abatements would be considered for those affected by the tower.

Mrs. Casey asked if the companies acquiring the land and building the tower were private companies, or if they were public entities that could acquire property by eminent domain. Mr. Ciardelli affirmed that they were a private company.

Mrs. Casey stated that Federal law almost seemed to require that these applications be approved, almost like an eminent domain issue. In other words, the gentlemen in a private company leases a piece of property and turns to the Zoning Board and says, "Well, you have to grant a variance because we've leased this property and have to have it for a cell phone tower." Mrs. Casey stated that in her mind, this creates a type of eminent domain, even though they are not a public company, but are private and it is for their personal and private financial gain if they do so. She feels uncomfortable and hopes the Board will take that into consideration. It is her stance that this is not an eminent domain issue. It is very clear that the Board does not have to do anything since they are not public.

Mrs. Casey also stated, in looking at prior minutes, there were a lot of comments such as, "Well, I think..." and "It seems to me that I've never been bothered by...". She feels it inappropriate in this particular case to use personal opinions about what a Board member thinks about cell phone towers, when obviously so many people are affected by this.

Nancy Howaniec, 24 John West Road, Exeter. Mrs. Howaniec owns property at 38 Giles Road in East Kingston. It is Mrs. Howaniec's opinion that granting the variance for the cell tower would ruin the scenic nature of the area, impact development options for her property, diminish her property values and lower the buyer pool potential. She feels that the gap in service is not significant enough to warrant the tower, and that the applicant would not be providing the Town of East Kingston with the least intrusive solution for coverage. This 3-page letter in its entirety is attached to the minutes as part of the record. Mrs. Howaniec also submitted 5 photos and materials from residents of Giles Road stating they see York Hill for the file.

Curtis Jakes, 43 North Road. Mr. Jakes owns three properties in East Kingston. For background, Mr. Jakes stated that at one time when he had Neighborhood, the only service available in Town at the time, when he called for service, he was routed first to India, where they did not speak English, and then to Texas, where they spoke only Spanish. With no competition, the service could do pretty much what they wanted to, and you had no other choice. In Mr. Jakes' opinion, the Town needs to have competition with cell phone services, which will lower the rates we pay.

Davis Farmer, 97 Giles Road. Mr. Farmer stated that he lives on his cell phone, but also buried the wires going to his home. He is convinced that the tower would decrease the value of his home. He asked if the Board had solicited independent advice in reference to the applicant's appraisals. Mr. Ciardelli answered it had not. Mr. Farmer also wanted to know if property values went down after the tower was installed, would the Town take down the tower. Mr. Ciardelli stated he could not answer that question.

Mr. Barry Hobbins, counsel for co-applicant for Cingular. Mr. Hobbins referred to the Market Value Report submitted to the Board and stated that the appraiser who authored the report confirmed he also conducted a formal survey of New Hampshire assessors, asking if they had observed or were aware of: 1) any loss in residential property value due to the presence of a cell tower, 2) any appeals filed in the last 2 years claiming property value loss due to the presence of a cell tower, or 3) any property value loss due to the ability to see any part of a cell tower from a residential property, regardless of distance. Of the 26 communities polled, all answered NO to all of the above three questions.

Mrs. Howaniec refuted Mr. Hobbins' Market Value Report information, stating that the assessor's job was to raise revenues for the Town and that they would never take away value from the properties. She stated she did not see any letters from appraisers, or any of the involved properties being appraised. She believes the applicant is misleading the Board by using an assessor's report. She stated that an assessor has a different job than an appraiser, and that assessors are *not* appraisers.

Mr. Tim Berry, 285 N. Haverhill Road, Kensington. Mr. Berry stated he had driven all over the State getting tax cards for properties with cell towers and adjacent properties in other towns in Southern New Hampshire. He stated that Mr. Cody had made an incorrect statement, as the properties with cell towers were not taxed as personal property; they were taxed as out-buildings. Mr. Berry stated he had looked at 500 photographs, and personally driven to over 75 cell tower locations. He could not find one scenario as onerous as this one was. Mr. Berry referred to his photographs of the hill with the cell tower shown. He stated it was generated with an 8-million mega pixel [sic] digital camera and that by using the white plastic fence as a reference, they had super-imposed the proposed tower onto the picture.

Mr. Ciardelli closed the discussion to the public.

Mr. Ciardelli announced that the next step would be open discussion among the Board to address the use variance criteria. He then established that the voting members would be Mrs. Belcher, Mr. Cardone, Mr. Freeman, Mr. Falman and himself. Mr. Allen would be included in the comments, but would not be voting.

Question #1 – *There (would-would not) be a diminution of value of surrounding properties as a result of the granting of this variance.*

Discussion – Mrs. Belcher stated that although there had been comments on expressing opinions, the Board members would be expressing their opinions and voting their conscience about what they believed about the ordinance. She further explained that when she prefaces her statements with "In my opinion", it means that her conclusion is based on the evidence she has heard.

Mrs. Belcher looked at the applicant's Market Analysis and report stating there was no measurable impact on value, the abutter's letter from Beverly George indicating properties were valued based on the view they had, a professional opinion from Tara Paige that the presence of a cell tower on abutting property would impact the sale of property, and numerous

abutters' concerns regarding diminution of their property values, and was considering both sides as unbiased. Mrs. Belcher stated the property value was an issue for the Planning Board as well, and they had conducted a property value comparison in the area of the present cell tower, before and after the tower installation and found there to be no diminution of property values. She believes it to be a different situation if you build your house on a lake or on a mountain and the view *would be impacted* if you built your house to face a scene. It is her opinion that none of the houses of Giles Road were built to face the ridgeline, but parallel the road, and that the view tax does not hold in this instance. She feels the power lines have already impacted the ridgeline. Going by the Town's records, and the evidence presented, Mrs. Belcher does not believe that there is diminution of property values.

Mr. Falman referred to the Board of Adjustment in New Hampshire Handbook for Local Officials, which he thought provided good guidelines and case study. One item brought up was the potential impact on the rural and farming community. In the Town, through the course of development, and how the Town has developed and progressed, they have already lost the farming communities and that view; Maplevale Farm, for example. In his opinion, that is more of a direct impact, impacting views, than a structure put up in the woods. Mr. Falman is not denying it is going to be seen or could degrade someone's view. Also, the issue of view tax has been a hot item, but the State says there is not an official view tax in the State of New Hampshire. Mr. Falman found no evidence to conclusively lead him to believe that a cell tower in the vicinity will diminish property values.

Mr. Ciardelli asked for a show of hands on Criteria #1. The vote was 4 (*would not*) and 0 (*would*).

Question #2 – *The granting of this variance (would-would not) be contrary to the public interest.*

Discussion – Mr. Falman stated that the Board had heard different views and public opinions at tonight's meeting. Public opinions ranged from the interest of abutters from the standpoint of view, possible effects of radio frequency waves from the cell tower, lack of cell phone coverage in case of emergencies, and other cell users trying to get coverage. It is Mr. Falman's belief that the public interest is not confined to only an area within the Town; it is a broader view encompassing all of East Kingston and the community at large. Mr. Falman believes the variance would not be contrary to public interest.

Mrs. Belcher agreed with Mr. Falman. Although the abutters do not feel the cell tower is in their public interest, and the cell phone users who oppose the tower indicated they could live with the service problems they have, the applicant had made a compelling case of bridging the gap. It was not just about the people who live in that particular area that would be affected, but the overall public interest being served.

Mrs. Belcher had done some research on her own and contacted the New Hampshire Office of Energy and Planning. In looking at the resources, one of the issues covered was zoning board variances and cell towers. A community had posed a question about allowing cell towers in one area of town over another, and their concern was the FCC Act, which overrides the ordinance. The Office of State Planning had given their professional response, which was that under the Telecommunications Act, municipalities cannot act in a way as to prevent service from being provided, which means you cannot enforce a blanket prohibition against towers, nor can you enforce a provision that allows service to be provided in one area of town but not another. This means, according to Federal Law, you have to allow the service provider to fill in the gaps. It does not mean you have to roll over and play dead; you *can* impose reasonable, *strong* restrictions on location, height, appearance, etc. It is Mrs. Belcher's opinion that the totality of the public interest outweighs the interest of those only in the direct area.

Mr. Ciardelli asked for a show of hands on Criteria #2. The vote was 4 (*would not*) and 0 (*would*).

Question #3a – *The zoning restriction as applied to the property (interferes- does not interfere) with the reasonable use of the property, considering the unique setting of the property in its environment.*

Discussion – Mr. Allen does not see this particular property as unique, and wanted to know what made this property different than any other property in Town with a hill or with elevated property.

Mr. Freeman stated he believed one of the factors was the distance from other towers.

Mrs. Belcher stated she thought the zoning restriction did interfere with the reasonable use of the property, not just because of the slope, but due to the power lines, easements, and water running across the property, and that the grade of the property itself prohibits residential development. In her opinion, the totality of all those things makes the property unique. She stated

that the question the Board needs to ask is not if it is a reasonable use of the property, they need to ask, under the Simplex court case, is the proposed use a reasonable use of property based on the topography, layout and the other aspects of the land?

Mr. Falman reminded the Board that this was a use variance, and not an area variance. The slope of the land does not allow the development of that property as a residential lot.

Mr. Ciardelli asked for a show of hands on Criteria #3a. The vote was 4 (*interferes with*) and 0 (*doesn't interfere*).

Question #3b – *There (is- is not) a fair and substantial relationship between the general purposes of the zoning ordinance and the specific restriction on the property.*

Discussion – Mrs. Belcher stated she had originally had a hard time understanding what this meant, because it asks if there is no substantial relationship as the question is posed in a negative way to get a positive response. She stated that it really asks if the restriction on the property is necessary in order to get the full effect of the ordinance. In other words, the only way this proposal could be approved is if it frustrated the ordinance, meaning there is not a relationship between the ordinance and the proposal.

The fact that the proposal does not fit into the ordinance is another type hardship. There are no special conditions or exceptions, and no leeway in the ordinance that would allow them; it is black and white. The ordinance says no cell towers are allowed in residential zones. She feels this criterion is satisfied because of these reasons, and that there is no fair and substantial relationship.

Mr. Ciardelli agreed it was a confusing statement.

Mr. Falman stated that the Board had struggled with the wording of this question at the last meeting. He was not sure he understood what the meaning was and asked to research his notes.

Mr. Falman stated he found in his minutes from the last meeting, that Chairman Daly had reiterated the question as: "Is the proposed use a reasonable use which does not necessarily exclude all other possible uses".

Mr. Ciardelli did not think that statement applied and read a portion of the "Zoning Handbook". Under "No fair and substantial relation exists...", the last paragraph states "*This test attempts to balance the public good resulting from the application of the ordinance against the potential harm to a private landowner. It goes to the question of whether it creates a necessary or 'unnecessary' hardship.*"

Mr. Ciardelli asked if the Board understood the interpretation of the statement "There is not a fair and substantial relationship between the general purposes of the Zoning Ordinance and the specific restrictions on the property" to mean that there is a hardship. Mrs. Belcher agreed it would create a hardship; there was no other way to allow the proposal unless the ordinance was frustrated.

Mr. Ciardelli stated it as such: "*There is not a fair and substantial relationship between the general purposes of the zoning ordinance and the specific restriction of the property*" and explained when he asks for a show of hands, this statement is saying there is a hardship.

Mr. Ciardelli asked for a vote, but Mr. Falman needed more time to understand this criteria.

Mr. Falman said he understood this to mean a hardship in relation to the current zoning restrictions on the use of that land as proposed. Mrs. Belcher clarified that the hardship is to the application. As Mr. Ciardelli stated, you could break it down to, "*This test attempts to balance the public good resulting from the application of the ordinance against the potential harm to a private landowner.*"

Mrs. Belcher stated she understood this to mean, if the Board balances the public good from it versus the financial downfall or potential harm to a private landowner, it goes to the question of whether it creates a necessary or unnecessary hardship.

Mr. Falman thought he would abstain on the voting, and Mrs. Belcher asked if he wanted to discuss what he felt it meant.

Mr. Falman said they were saying there was a fair and substantial relationship. Mrs. Belcher said they were saying there is *no* fair and substantial relationship.

Mr. Falman stated they were concluding there was no other way to satisfy the hardship, by the current Zoning Ordinance; no other way to overcome the restrictions. He now understood, but abstained from voting.

Mr. Ciardelli asked for a show of hands on Criteria #3b. The vote was 3 (*is not*), 0 (*is*), 1 abstain.

Question #3c –The variance (would-would not) injure the public or private rights of others.

Discussion – Mrs. Belcher stated that the applicant proposes the tower would not create an undue traffic hazard or interfere with pedestrian safety, is an unmanned facility with no employees, will not create excess demands on municipal services, and will not create any hazards on the health, safety or general welfare of the public. There were abutter's concerns in regard to health issues, RF emissions, construction noise, and private rights to view the ridgeline. By law, the abutter's concerns in regard to health issues and RF emissions cannot be considered in this decision; to do so would only allow the aggrieved party grounds for appeal.

The area is up in the woods, where there is already a power line easement. It is on a steep slope, where the compound will not be seen. If the compound were to be located in a place where it could be seen, that would be viewed as a different matter. There was a balloon test conducted, which showed that the balloon would be seen from several locations. This means that the tower will be seen. The Planning Board and the Zoning Board have the right to impose necessary restrictions. Taking into consideration the telecommunications demands of today, the Town would be satisfying the Federal regulations. It is Mrs. Belcher's opinion that granting the variance would enhance the public interest for telecommunication usage. Looking at all the evidence and information, she is not convinced that the cell tower is violating private rights.

Mr. Freeman stated that someone brought up the point that you would not want a cell tower on a residential lot; that would not be allowed on a 2-acre lot because the setbacks could not be met. The lot in question is a 27-acre lot and the tower location could be 1/2 to 2/3 of a mile away from the road.

Mr. Falman was still deliberating. He knew there were public rights, which are clearly stated in regard to cell phone coverage and the lack of coverage. There is also a question that in the future, the Town's own communications abilities would be enhanced, since services had been requested on the tower, but he was unsure on the private rights of others. The Board had heard comments from abutters that the erection of the tower could affect future use and value of their property.

Mr. Ciardelli stated that the Board would give Mr. Falman some time to go over that materials and move on to the next criteria. They would then come back to point 3c.

Question #4 –By granting this variance, substantial justice (would – would not) be done.

Discussion – Mrs. Belcher stated that as per the official handbook, to determine whether or not substantial justice would be done "*The guiding rule is that any loss to the individual that is not outweighed by the gain to the general public is an injustice.*"

Mr. Ciardelli confirmed that they were stating that by granting the variance, substantial justice would be done; that the benefits experienced by the public outweighed the trouble experienced by the property owner. Mrs. Belcher agreed. In her opinion, the overall totality of the project outweighed any injustice.

Mr. Ciardelli asked for a show of hands on Criteria #4. The vote was 3 (*would*) and 0 (*would not*).

Question 5–The use contemplated by petitioner as a result of obtaining this variance (would– would not) be contrary to the spirit of the ordinance.

Discussion. Mr. Ciardelli stated that in all of the discussions over the previous meetings and this evening, sometimes what was heard was "not in my back yard" (NIMBY). But the nature of the community and the residential area is such, that if you lived here for a long time and participated in the vote not to allow cell towers in residential areas by a substantial margin, you would have an expectation that that is how it is going to remain. New people coming in to the Town have a reasonable

expectation not to see a cell tower in a residential area; there is not one there now and the Zoning Ordinance prohibits it. NIMBY, relative to the spirit of the ordinance is important to this.

Mr. Ciardelli read the statement from the handbook, "*The use must not be contrary to the spirit and the intent of the ordinance.*"

Mr. Falman read further from the handbook, "*However, when the ordinance contains a restriction against a particular use of the land, the Board of Adjustment would violate the spirit and intent of the ordinance by allowing that use. If an ordinance prohibits industrial and commercial uses in a residential neighborhood, granting permission for such activities would be of doubtful legality. The Board cannot change the ordinance.*"

Mr. Ciardelli stated he felt strongly about this point, and did not think the Board could rewrite the ordinance, which states that cell towers are prohibited in residential areas. Mr. Cardone agreed with Mr. Ciardelli that it would violate the spirit of the ordinance.

Mrs. Belcher stated she could go both ways. On one hand, she felt allowing the cell tower on already altered land was not contrary to preserving the rural character of the community. When the Telecommunications Act came about, all the towns were told to adopt a blanket ordinance in regards to cell towers. The Telecommunications Act gave telecommunication companies special rights enabling them supercede state ordinances in order to get the coverage they needed.

If the Board intended to deny the variance on any of the criteria, they needed to make sure they were accurate, since they needed to stay within the guidelines of the Federal law, as well as the Zoning Ordinances.

Almost 10 years later, and with the advance of wireless technology, cell towers are more or less considered as utilities. Switching stations and transfer stations allowed for electricity in residential neighborhoods are not considered as commercial, they are considered as utilities.

On the other hand, the ordinance states clearly "*... in order to preserve and improve the attractiveness of the Town of East Kingston as a rural, residential and farming community and continue its desirability as a place in which to live and do business and to promote the health, welfare, morals, convenience and safety of its citizens.*"

Mrs. Belcher stated she thought the attractiveness of this particular location was already compromised. The issue that had not been addressed was not the *general health* of the *population*, but of a particular person. As an example, if the variance being considered was for a peanut farm and a neighbor had a severe allergy to peanuts, she thought that would be against the rights of the person who already lived there. She had some questions in this area and wanted to know if the Board would give her the latitude to ask them in order to finish processing how she felt about the situation. Mr. Ciardelli reminded Mrs. Belcher that health issues and RF emissions were illegal topics for the Board to discuss.

He stated that the ordinance does not even give marginal approval in a residential area; it prohibits cell towers in residential areas. He stated that for whatever reason they might have, people liked the guideline like it was. The ordinance states that towers are prohibited and whether the ordinance is right or not, he is not questioning the ordinance. The handbook gives the Board the latitude to change the ordinance; but Mr. Ciardelli does not believe that the Board has the latitude to rewrite it. Mr. Cardone agreed with Mr. Ciardelli. He thought that although it might cost more money, he felt there were other options. Mr. Allen agreed that there were other options available.

Mr. Falman stated that when the Town adopted the Telecommunications Ordinance in 1997, it was trying to stay ahead of developing communications and restricted the towers to commercial properties. He also stated that there is commercial zone in the middle of the Town Center which would garner more of an outcry to try to build the cell tower there than where it is now proposed as it would be more visible.

No one can predict changing technologies. This is why the Zoning Board of Adjustment exists; you cannot possibly go back to the Town every time you want to change an ordinance or grant a variance. Mr. Falman feels that the ordinance passed in 1997 was based upon the information and understanding available at the time. Technology has changed since then, and the practicality of the ordinance is useless because the commercial zone in the Town Center is very limited.

Mr. Ciardelli agreed that it was not the Board's responsibility to find an alternate location. There is a restriction that says it's prohibited in a residential area, and that's what the Zoning Ordinance says. He does not believe the Board has the right to change the ordinance. Mr. Cardone agreed with Mr. Ciardelli.

Mr. Freeman agreed that the ordinances couldn't be rewritten, but stated the reason the Zoning Board existed was to adjust the ordinances that do not fit, and a variation is a relaxation of an ordinance. He agreed with Mr. Falman.

Mr. Ciardelli asked Mr. Belcher for her opinion. She stated that if she was not allowed to investigate the other side of the fence, she could not base her decision on that information since she did not know enough about it. The definition of variance, from the Zoning Handbook, is "a relaxation or a waiver of any provision of the ordinance authorizing the landowner to use his or her land in a manner that would otherwise violate the ordinance and may be granted by the board of adjustment on appeal. Variances are included in a zoning ordinance to prevent the ordinance from becoming confiscatory or unduly oppressive as applies to individual properties unique situated." This draws into the uniqueness of the property. If the five criteria are met, the Zoning Board can grant the variance.

Mr. Ciardelli asked for a vote on Criteria #5. The vote was 2 (*would*) and 3 (*would not*).

Mr. Ciardelli then went back to Criteria 3c. Mr. Falman asked to review it again.

Mr. Ciardelli reiterated he felt that granting the variance would injure the public and private rights of others, and so did Mr. Cardone. Mr. Falman asked what his opinion was based on.

Mr. Ciardelli stated from the Zoning Handbook, "This is perhaps similar to a "no harm - no foul" standard. If the granting of the variance would not have any negative impact on the public or on private persons, then perhaps this condition is met. Stated differently, would the granting of the variance create a private or public nuisance?"

Mr. Falman stated there was a difference between nuisance and rights and that we all have individual private rights.

Mr. Ciardelli stated that a private right was having a cook-out in your backyard, swimming in your pool and not looking at a cell tower. This is a private right that people were enjoying right now and is somewhat subjective.

Mr. Falman explained this was difficult for him to grasp, as they had already discussed public interest in criteria #2; it was like they were trying to lump public and private rights together here.

Mrs. Belcher suggested Mr. Falman look at the comments on the court cases included in the handbook to see if it would help him understand.

Mr. Ciardelli read, "A nuisance arises from use of property, either actively or passively, in an unreasonable manner. A nuisance can be either public or private. A private nuisance is described as an activity which results in an unreasonable interference with the use and enjoyment of another's property; while the public nuisance is an unreasonable interference with a right common to the general public. A public nuisance is behavior which unreasonably interferes with the health, safety, peace, comfort or convenience of the general community. Conduct which unreasonably interferes with the rights of others may be both a public and private nuisance."

Mr. Falman finished reading the paragraph, "In order for a nuisance to exist, the interference complained of must be substantial, that is, the harm alleged must be in excess of the customary interference a land user suffers in an organized society, however, not every interest in the use and enjoyment of the land is actionable."

Mrs. Belcher read, also from the Handbook, "This requirement, to some degree, overlaps with the requirement that the granting of the variance not result in a diminution of value of surrounding properties."

For the record, Mr. Falman stated that he felt the comment made about the cell tower affecting someone's business was not factual evidence for consideration, but he struggled with the fact that potential future use of someone's land may be impacted.

Mr. Falman asked Mr. Ciardelli and Mr. Cardone to review their reasons they thought it violated the private rights. Mr. Cardone answered he thought it violated the private rights because he did not think someone had to look outside their

window and see a cell tower if they did not want to. Mr. Falman reiterated Mr. Cardone was viewing it as a passive nuisance, as opposed to a business next door with traffic.

Mr. Ciardelli read from another piece of guidance, *"The specific reference to the private rights of others raises the scary possibility that the ZBA may now have to consider and actually rule on challenges to variances brought by opponents who claim that the proposed use is prohibited by private covenants in a deed, and because the boundary of a property is disputed, for example. We can only hope that the court did not mean to include that kind of dispute."*

Mr. Ciardelli stated he feels that the public and private rights of others, to enjoy our property the way we expect it to be in a residential area, are the foundation of the Zoning Ordinances. He does not feel that it is a hardship.

Mr. Falman asked Mrs. Belcher to review the basis for her decision. She stated she felt it did not fall into the element of a nuisance. She felt if the entire compound could be seen, it could be considered a nuisance. She considers it to be more of a utility than a commercial use. She does not think anyone has the right to tell another person what they can and can't do with their property, unless it interferes with how they can live a comfortable life on their property. Mrs. Belcher does not believe there is injury to public or private rights.

Mr. Falman stated he interprets the intent as referring to an active nuisance, and not a passive one, and he considers the visual as a passive nuisance. He stated it is difficult to state a specific right that would be violated by a variance. The property is not in close proximity to anyone's property. It would be difficult to protest that someone's right was injured if they would not see the entire sky because of the cell tower.

Mr. Ciardelli asked for a show of hands on Criteria #3c. The vote was 3 (*would not*) and 2 (*would*).

Mr. Ciardelli reviewed the voting totals for the five criteria with the Board.

Mr. Ciardelli asked for a motion.

MOTION: Mrs. Belcher **MOVED** that based on the evidence presented, deliberation by the Board, all five of the criteria being satisfied, the Board grant the variance request for Industrial Tower and Wireless. Mr. Freeman seconded the motion. The vote was three "ayes" and two "nays, and the motion carried.

Abutters turned in petition pages to the Vice Chairman, which will be made part of the file.

The meeting was adjourned at 11.50 PM.

Respectfully submitted,

Barbara A. White
Recording Secretary

David Ciardelli
Vice Chairman

Minutes approved 1/11/07