



PLANNING BOARD
TOWN OF EAST KINGSTON
NEW HAMPSHIRE

2006-2007:
James Roby Day, Jr., Chairman
Catherine Ellen Belcher, Vice Chairman

MINUTES

(Public Hearing Minutes of 21 December 2006)

AGENDA:

7:00PM - **Board Business**

7:05PM - **Public Hearing** for annual review of Zoning Ordinance Article XII – ELDERLY HOUSING

7:15PM – **Continued Public Hearing** for Jeffrey and Susan Marston, 38 Giles Road (MBL 16-4-1) and *Industrial Wireless and Communications, LLC*, Marshfield, MA for a site plan proposal to build a telecommunications tower (EKP#06-OC)

8:30PM - **Adjournment**

CALL TO ORDER: Chairman Day called the regular meeting of the East Kingston Planning Board to order at 7:00PM. This meeting was held at the East Kingston Elementary School, 5 Andrews Lane, East Kingston, to accommodate the large crowd expected.

ROLL CALL: Mrs. White called the roll.

Members present – Vice-Chairman CE Belcher, Chairman JR Day, Dr. RA Marston, Mr. RF Morales, ex-officio, and Mr. RA Smith, Sr.

Alternate members present – Mr. EA Lloyd, Jr., and Mr. DF Sullivan

Advisors present – Dr. JR Robinson, Senior Planner, Rockingham Planning Commission (RPC)
Mr. Alan Mazur, East Kingston Fire Chief
Mr. LK Smith, Chairman, East Kingston Conservation Commission

Mr. Day noted that Mr. RR Donald, East Kingston Building Inspector, was not present but had provided his comment with regard to the cell tower application to the Chairman. He also noted that Chief Mazur would be representing the Fire Department from now on.

BOARD BUSINESS:

Minutes – Mr. Day noted that the Board would be approving the minutes from 9 November and 16 November, and polled the Board for any changes/additions to either of the two sets of minutes. Mr. Day's and Mrs. Belcher's changes have already been noted, and there were no other changes brought forth.

MOTION: Mr. Morales **MOVED** the Planning Board approve the Planning Board work meeting and public hearing minutes of 9 November 06 as amended. Mrs. Belcher seconded, and the motion carried unanimously.

MOTION: Mr. Morales **MOVED** the Planning Board accept the Planning Board regular meeting minutes of 16 November as amended. Mrs. Belcher seconded, and the motion carried unanimously.

Mr. Day suggested that the 14 December minutes be addressed at the January meeting, to which all agreed.

BOARD BUSINESS

19 December 06 ZBA Meeting. The ZBA met on Tuesday to consider a land use variance application in regard to the Marston cell tower, and had reached a decision.

Town Center District Photos. Mr. Day had finally tracked down the last property owner for permission to include his house photo in the Town Center District appendix. This having been done, Mr. Day reported that all parties approached were delighted to have been included.

Town Meeting Warrant. Mr. Day reported that there are five proposals going to the Legislative Body, and that no citizen petitions requiring a hearing have been received this year. He reported that sufficient information regarding Growth Management and the Town Center would be provided for the public to review at Town Meeting.

January Planning Board Agenda. Mr. and Mrs. Ford have been placed on the agenda for 7:15pm, and there is also the possibility of a compliance hearing to be added.

PUBLIC HEARING FOR THE ANNUAL REVIEW OF ZONING ORDINANCE ARTICLE XII – ELDERLY HOUSING

Mr. Day announced that the first item on the agenda was the annual review of the Elderly Housing Zoning Ordinance. In referring to the information regarding the annual review, he had questioned the need for a public hearing. Upon conferring with Town Counsel, it had been ascertained that a public hearing was *not* necessary, but if the Board decided to make changes during the review, a public hearing must follow. Mr. Day suggested that in the future, the Board could hold this review earlier in the year to allow time to schedule any necessary hearing.

Mr. Day suggested the Board not continue with the review as a public hearing, as it was not necessary, but to simply conduct the review. He directed the Board to an excerpt from the article describing the parameters to be reviewed. He stated that the pertinent information was the current number of standard dwelling units in Town and the number of elderly housing units approved and built to date.

Mr. Day read Paragraph B3 of Article XII – Elderly Housing: *“The total number of elderly housing units contained in any elderly housing development in the Town of East Kingston shall not exceed four percent of the total number of standard residential dwelling units then existing in the Town of East Kingston. (The number of existing elderly housing dwelling units shall not be included in calculating this four percent.)*

This means that any individual application cannot propose to have more than 4% of the number of conventional, residential dwellings in the development itself.

This provision shall be reviewed annually by the Planning Board to ascertain whether the balance between the number of standard dwelling units and elderly housing units continues to reflect the stated goals of the East Kingston Master Plan and the community’s long-term planning intentions. (Amended 3/04) The total number of elderly housing units shall not exceed twenty-five (25%) percent of the total number of standard dwelling units in the Town of East Kingston. (Added 3/04, Amended 3/05 and 3/06)

The official number of standard dwelling units in the Town of East Kingston is 750. There are presently 132 elderly housing units built, with a total of 153 approved. If the Town receives no additional applications other than those previously approved, there will be a total 153 units. Twenty-five percent of 750 is 187 elderly housing units permitted today, so the Board could conceivably see a proposition to build another 34 units. Any given application would be limited to 30 by virtue of the 4% rule.

Mr. Day stated that the question for the Board is whether the parameters still reflect the Master Plan goals and the community’s long-term planning intentions, and asked for Board discussion on the matter.

Mr. Morales recapped that the Board had conducted lengthy discussion on the matter at the work sessions and since nothing had changed, he felt it still met the goals and the Board should stay with the parameters as defined.

Mr. Day noted that in reading the information, the dramatic increase in the number of residential dwelling units had jumped out at him. As long as the number of residential units grows, so shall the amount of permitted elderly housing units, thereby maintaining a balance.

Mr. Smith noted that enough time had not passed to build more elderly housing units. The ordinance calls for 20 acres, with 2 units allowed per acre. Only fifteen acres would only be needed for the 30 units available, but since 20 acres were required as per the ordinance, they would not be able to build with only the 15 acres.

There being no further discussion, Mr. Day concluded, and the Board agreed that no revisions to the ordinance article were necessary at this time, and closed the review.

Smoking on the EK Elementary School grounds. Mr. Day reminded all present that there was no smoking allowed anywhere in the building or on the school grounds, as this had been a problem at the meeting held on Tuesday, December 19. Smoking was allowed across the street, off the school grounds.

CONTINUED PUBLIC HEARING FOR JEFFREY AND SUSAN MARSTON, 38 GILES ROAD (MBL 16-4-1) AND INDUSTRIAL WIRELESS AND COMMUNICATIONS, MARSHFIELD, MA FOR A SITE PLAN PROPOSAL TO BUILD A TELECOMMUNICATIONS TOWER (EKP#06-OC)

Mr. Day opened the public hearing, reviewed with the Board members new materials that had been received for this hearing. These materials included a letter from Avitar, the Town assessors; several letters from concerned friends and neighbors; and a new page from the applicant for their provided Market Analysis.

Dr. Marston stepped down from the Board as a voting member, as he is an abutter. Mr. Day stated that the voting Board for this hearing would consist of Mr. Smith, Mr. Morales, Mr. Lloyd, Mrs. Belcher, and himself.

Mr. Day began the proceedings by sharing some perspective. He noted that in 1776, Adam Smith wrote a book entitled *An Inquiry into the Nature and Causes of the Wealth of Nations*, in which he described how a free market economy worked. Smith observed that, for it to work, government had a necessary, but limited, role to play. Limited, that is, to foreign policy, national defense, and ensuring there was an even playing field for free competition in the marketplace. Smith also recognized that in order for free competition to work in an ordered society, two things needed to happen. There had to be property rights which were respected, and the rule of law must prevail, otherwise a free market economy could not work.

Mr. Day observed that, fundamentally, our economy today is unchanged. One of the twists along the way, in our living together, has been the imposition of zoning and how it affects land use. It has been argued that zoning of any kind is a taking of property rights, and municipalities must be very careful when imposing ordinances and regulations. Equal protection arguments have also been made where uses were permitted in some districts, but not others. Yet zoning, per se, has survived constitutional muster, and in New Hampshire, the enabling statute is RSA 674:17.

Tonight the Planning Board has to work out how our zoning law applies in light of the Marstons' and others' property rights, while attending to the rule of law. In the final analysis, the Board must determine what is truth, what is fiction, what is fact, and what is contrivance. The Board must hold the applicant to the highest standard, respecting the legitimate concerns of both the landowners and their neighbors. In the end, the Planning Board must be able to say to all parties concerned, that it attended to the property rights of all, within the limitations of the law. The ideal outcome would be that all parties are satisfied, but there can be no guarantee of that.

Mr. Day reviewed the procedure for the hearing with the Board, the applicant and the public:

Mr. Day will recap the situation, the Planning Board will review some new and old materials, the applicant will have an opportunity to present updated information to the Board, the floor will be opened to public comment (for a limited length of time), the Board will ask for advisor comment, and then the Planning Board will deliberate and come to a decision.

The outcome for this hearing will be either an approval or denial, or the applicant may request a continuance.

Mr. Day described the events which have brought the proceedings to this forum. The original proposal by the applicant was denied in April 2006 because it violated the ordinance on its face. An appeal was made by the applicant to the Zoning Board of Adjustment (ZBA) and a variance was granted; it then came back before the Planning Board as a second application. The ZBA's decision was challenged in Superior Court, and because of a jurisdictional defect, the court remanded the issue back to the ZBA. Mr. Day noted that the court never addressed the substantive questions in the suit because of the defect. Last Tuesday night, the ZBA met to consider the question, and once again granted a variance. As a consequence, the question of a cell tower in a residential zone is off the table for this Board to discuss or consider; it is a non-issue.

Mr. Day requested Mrs. Belcher to convey what happened at the ZBA meeting for clarification.

Mrs. Belcher reported that the ZBA had met on Tuesday December 19th, with five voting members. The Board listened to compelling testimony by both the applicant and the public. They had reviewed the five criteria (one with 3 prongs, for a total of seven), which the applicant needed to satisfy. Board members were split on their decision on some criteria, but the majority of the Board voted that each of the criteria had been satisfied, and the variance was granted. Mrs. Belcher felt Mr. Ciardelli did a good job explaining the tasks that the Zoning Board was charged with.

It was Mrs. Belcher's perception that most people did not understand what the Zoning Board of Adjustment was charged with. She explained that the ZBA is not charged with representing neighbors, abutters or applicants; they are there to adjudicate what the state says about criteria law and interpret the zoning ordinances, and there are restrictions on what they can look at.

Mrs. Belcher felt there were two compelling arguments that could not be addressed. FCC rulings and the Telecommunications Act of 1996 prohibit any state or local agency from denying or predicated any decision based on environmental or health issues because of emissions from telecommunications towers.

One abutter indicated a loss of business, but since the documentation she presented referenced RF emissions, the matter could not be considered. There was also a resident with a medical condition who lived down the road from the proposed site, who felt the tower emissions would be personally injurious to health. The question could not even be discussed because of the federal statute.

It was Mrs. Belcher's feeling that the Board members were not pleased about that situation, and she herself felt burdened to not be able to consider these issues. The ZBA felt, based on the evidence presented to them on behalf of the applicant, the criteria was satisfied, and they had no authority but to grant the variance.

Mr. Lloyd asked if it might not be prudent to review the criteria reviewed by the Zoning Board for the public's understanding, and to identify those issues that are off the table for the Planning Board. Mr. Day agreed to review the criteria, but suggested discussion of those items that were off the table be addressed prior to abutter comment.

The five criteria are:

1. No decrease in value of surrounding properties would be suffered.
2. Granting the variance must not be contrary to the public interest.
3. Denial of the variance would result in unnecessary hardship to the owner seeking it; this criterion has 3 prongs.
4. By granting the variance, substantial justice would be done.
5. The use must not be contrary to the spirit of the ordinance.

The Planning Board, in full knowledge of what those criteria are, must conclude from the ZBA's decision, that they were satisfied. As such, the Board cannot and will not address those kinds of questions and issues.

Mr. Day gave the floor to Mr. Cody, Director of Operations, *Industrial Wireless and Communications, LLC*, who addressed the Board.

Mr. Cody stated that Mr. Day's summary of the process was very well articulated. He introduced the people with him as the experts in their fields, who were there to answer any of the Board's questions. The group consisted of Mr. Kevin DeLahney, Radio Frequency (RF) Propagation Manager; Mr. John Champ, Site Acquisition Specialist; Mr. Rick Voci, Site Plan Development Specialist; and Mr. Hobbins, Counsel for *Cingular Wireless*. Mr. Hobbins, agent for *Industrial Tower's* co-applicant *Cingular*, will also speak to their particular concerns and needs.

Mr. Cody described the application's intent for the Board. The property is a 27-acre, heavily wooded site; the topography is steep terrain and not suitable for other purposes. Mr. Cody stated that he was at the meeting tonight because there is a significant gap in telecommunications services in the area. Industrial Tower provides a wide range of services for a single site solution. If this were not the case, there could be five different carriers demanding their own towers and facilities, with a federal right to do that. The application tonight is a solution to meet the need of solving that gap in service.

Mr. Cody noted that zoning is off the table, but does not go away. More favorable locations were looked at, but found they would not work. This is a carefully chosen parcel with large tree cover, which would shield the entire ground structure. It is already stressed with a high-tension wire easement. The balloon test showed the tower would be seen. Wherever it is located, someone will see it, as it must be above the trees to work. As to how the facility will impact the neighborhood; it does not create noise, smoke, an additional traffic burden, or have hazardous materials; it is a benign structure. After a while, it is not noticed, just as telephone poles and high-tension wires blend in.

Mr. Cody stated that they had provided the Board with an additional property value report in the form of a Market Analysis as part of the record, and a report received from the Rockingham Planning Commission (RPC) states they have met the criteria and are in compliance with the spirit of the ordinance.

Mr. Day thanked Mr. Cody and opened the floor to public comment. He asked that all questions and comments be directed to the Chair, who will in turn address it to the applicant or the Board.

He explained that comments would be limited to 5 minutes, and persons would only be allowed to speak once in order to afford everyone an opportunity to speak. The Board had heard a great deal of public input, and has catalogued and digested it. Only new concerns and new questions will be accepted tonight. For purposes of tonight's comments, the following will not be heard: the ZBA decision about the tower in a residential zone; any concern or regard surrounding the health question and RF energy; property devaluation; or air navigation hazards. The Board already has ample evidence on the visual impact; there has been lengthy discussion about the taxation question, and it is known this particular piece of property will be taxed as real property.

Matthew Dworman, 36 Pheasant Run, East Kingston – Mr. Dworman requested if before his time to speak started, could the Chair review the primary duties and responsibilities of the Planning Board.

Mr. Day stated that the first and foremost responsibility of the Planning Board is the Master Plan. The Board has spent a great deal of time and effort on that, and last year had conducted visioning sessions to establish goals and a vision as the Town sees itself. Next year the Planning Board will be working on an agriculturally oriented farm-friendly chapter for the Master Plan. The secondary reason is to hear applications for site plans and subdivisions. Hand-in-hand with that is crafting and presenting to the legislative body, the voters, ordinance proposals, and we have been busy at that this year. In a nutshell, that is what the Planning Board is supposed to do.

Mr. Dworman started his five minutes. He stated: Given that, I feel that it is a very complex issue that's been brought before you, but a very simple decision you have to make tonight. If your number one goal is to preserve and further the Master Plan, then we look at the number one goal of the Master Plan – which is to preserve East Kingston's rural and residential character. Putting a 180' tower in the

middle of a residential area is a complete contradiction to Goal #1 of the Master Plan. That one reason alone is enough for you to deny this application.

The ZBA met on Tuesday night to discuss a variance for Paragraph D2 of Article XV, but there are several other articles which are in violation that need to be considered. All of these are additional reasons it is your duty to deny this application.

- ◆ 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...” I think putting a 180’ tower in the middle of a place where it should not be is a violation and is not reasonable.
- ◆ Article VII, General Provisions, Paragraph A states, “Any use that may be obnoxious, injurious or in the nature of a nuisance by reasons of production of emissions... or that is dangerous to the comfort, peace, enjoyment, health or safety of the community or lending to its disturbance or annoyance, is prohibited.” I think a 180’ monopole in a place where it should not be, with a blinking light that I am going to see every night is the barking dog, is an annoyance, and is prohibited. It is your duty to deny this application.
- ◆ Article XV, Telecommunications Facilities, Purpose and Goals, 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...” The applicant has not done this. At their demonstration the other night, they showed us maps with coverage showing that there are other providers that have coverage in the areas they do not. Therefore, Verizon and these other coverage providers have explored opportunities which Cingular has not. Cingular has not done their job to fulfill its requirements. They further showed us that putting a monopole in a place where it is allowed, which they called Commercial Zone 1, did provide substantial coverage. It did not provide 100% coverage, but it provides substantial coverage. This alone should be a reason to deny the application.
- ◆ Article XV, Telecommunications Facilities, Siting and Standards, Paragraph D.1. states, “...All such uses must comply with other applicable ordinances and regulations of East Kingston...” Mr. Dworman has gone over other ordinances which are in violation.
- ◆ Article XV, Telecommunications Facilities, Height Requirements, Paragraph D.3. states, “...The height requirements may be waived through the Conditional Use Permit process only if the intent of the Ordinance is preserved...” If putting a 180’ tall tower in commercial zone 1 is not enough, perhaps we should look at a 200’ tower in commercial zone 1. This is where it belongs; a residential area is not a reasonable location. There are other options that have not been weighed out, and before we go and make an unreasonable decision, all the other reasonable options should be continued to be discussed.
- ◆ Article XV, Telecommunications Facilities, Conditional Use Permits, Paragraph G.2. Issuance of Conditional Use Permits states, “...to minimize any adverse effect of the proposed tower on adjoining properties, and preserve the intent of this Ordinance.”

These are further paragraphs that were not in discussion in the ZBA meeting that are also in violation. I propose that the Planning Board must require variances for every single one of the articles I have discussed tonight. In summary, there are multiple reasons, many of which have already been discussed, that I feel the reasons I brought up tonight are more than enough to provide you with adequate denial for this application. I believe it is your duty to protect our Town and the rights of our residents by denying this application. I feel very strongly about this.

Mr. Day reminded Mr. Dworman the application was for a 180’ tower, which, by FCC rules, is not required to be lighted.

Mr. Tim Berry, 285 North Haverhill Road, Kensington. Mr. Berry stated that at some of the previous meetings, there was a problem with facts. He had brought new, additional material to the Board that addresses some apparent misstatements. Mr. Berry presented a compilation of two tax maps with the distances shown on them from the proposed tower location to the existing residences of the abutters and his horse barn. Mr. Berry stated that a member of the Board who also sat on the Zoning Board Tuesday night stated that none of the residents of Giles Road would have a direct visual of the cell tower. He shows the locations of the abutter’s houses on the map, and also the distance to his barn, which is 1,039’ from the proposed tower location. This information was asked of the cell tower people, but never provided.

Mr. Berry also presented pictures to the Board showing the crest and the shoulder of the hill from several abutter locations, showing it would be visible. Mr. Cody had stated at an earlier meeting that the tower would rise above the tree line 120’.

Mr. Berry stated that the balloon test was conducted on a hazy day and was inconclusive. He stated he had witnessed a balloon test in Salisbury where they put up two balloons. When the Zoning Board was not satisfied with that, the applicant was required to put up a crane to see how tall the tower was going to be. This was an issue of a cell tower located in a junkyard on Route 1. Apparently Salisbury is a little more concerned on a municipal level in locating cell towers.

Mr. Berry stated that Mrs. Belcher and Mr. Cody had spoken of the high-tension lines. They are not high tension lines; they are transfer lines owned by *Unitil*, constructed with 40' telephone poles that take street voltage and transfer it across country rather than down the street. Mr. Berry presented the Board with a photograph of the lines he was referring to and directed the Board's attention to the relationship of the height of the poles to the height of the trees. He thought this a good picture for the Board to have as it mirrors the view from the base of the hill up the proposed access road.

Mr. Berry stated that the Chairman of the ZBA had to recuse himself from the second meeting; he clearly acted in conflict of interest. In his opinion, there is a problem with the Planning Board and Mrs. Belcher should not be sitting on the Board for this hearing. He stated that after he was removed from the ZBA meeting, he had people ask if Mrs. Belcher represented the Town or Mr. Cody and Mr. Marston. Clearly, there is a feeling in the community that Mrs. Belcher sitting on both boards is quasi-illegal. Just as you are a quasi-judicial Board; you are not judges, you are pseudo judges.

The Zoning Board had one decision that was remanded by the Superior Court. The fact of the matter is we have not filed papers to appeal the second decision yet because we don't want to have to spend any more money. We don't want the Town to spend any more money; we want the Planning Board to do the right thing.

In summary, Monique Waldron and I have a feeling that the right thing is not going to happen with Kathleen (sic) Belcher on Planning Board. She has acted inappropriately; she has acted on behalf of the petitioner rather than being purely objective. Her statements are subjective. Let's save the Town and us some money and do the right thing.

Mr. Day stated that for the record, the statute to which Mr. Berry alluded is RSA 673:7. It is quite clear in its direction that a Planning Board member can sit on another board. In fact, before he was the Planning Board Chairman, he sat on the ZBA. He stepped down because he didn't want any perception of a concentration of power or authority. Mrs. Belcher was functioning as a legitimate member of the Zoning Board, and he is personally proud and confident of the work she does there, and on the Planning Board.

Mr. Day further noted that if the Town incurs legal costs in the process of land use deliberations, that's the price of doing business. He observed that in the 10 years he has been involved with the boards, these costs have accelerated.

Monique Waldron, 285 North Haverhill Road, Kensington. Mrs. Waldron wanted to clarify something she said at the Tuesday meeting in regard to her business, which was apparently misunderstood by Mrs. Belcher. She noted that nowhere in the letter from a client of hers did it mention RF emissions; she does not even know what they are. The reason she was concerned about continuing her business with me is explained in the letter I will read to you tonight. Also, it is in the ordinance that the Planning Board is supposed to consider the preservation of property values. When I wrote this, I did mention the word Market Value.

Summarizing Mrs. Waldron's letter, she stated that she was concerned with property values, and said a person who worked for Avitar, the Town's assessing company, stated that property values near the tower site would go down. She has two buildable lots near the proposed site. Her outdoor arena is 400' from the proposed tower site, and she is worried about the welfare of her horses and the horses she boards. She wants to know if she will be compensated for loss of business during the construction, as her arena would be rendered useless for the duration. Also two of her clients will leave and find other accommodations if the tower is built, resulting in a financial loss for her. It is Mrs. Waldron's opinion that Tuesday's ZBA meeting was tainted, as she saw members of the Board referring to the minutes of the first meeting and referring to John Daly. She stated that if she needs to sell one of her properties to fund a lawsuit to prevent the tower from being built, she will. She said the Board was ignoring the ordinance, which strictly prohibits cell towers in residential districts. In her opinion, the Chairman of the ZBA had a conflict of interest from the first meeting. Mrs. Waldron's 13-page letter dated December 21 in its entirety is attached to the minutes as part of the record. Mrs. Waldron also submitted a photograph and a slide show presentation from Avitar that was shown at the Tuesday meeting.

Mrs. Belcher asked to address the allegation of a misquote by Mr. Berry. Mr. Berry stated Mrs. Belcher said no one on Giles Road could see the cell tower. That is not true. What she said was that she did not believe any home on Giles Road, Joslin Road, John West Road, NH Route 108 or Autumn Lane was constructed and positioned on their lots specifically to view the ridgeline. The reference for that comment was about view tax. The allegation was in reference to a view tax; that the property was diminished based on the purpose of your house facing a specific area.

Mrs. Belcher addressed the statement by Mrs. Waldron that she had misquoted Mrs. Robinson's letter as referring to RF emissions. Mrs. Belcher apologized and stated that Mrs. Waldron was correct; Mrs. Belcher had stated RF and Mrs. Robinson had not mentioned that in her letter. Mrs. Robinson did state in her letter, "*I am very concerned over the possible health effects on my horses and daughter, and under no circumstances take chances where their well-being is concerned. Their health being my priority, I will find another barn to locate my business.*" Mrs. Belcher stated that she assumed the health issues cited in Mrs. Robinson's letter were in regard to RF emissions.

Deborah Marston, 45 Giles Road, East Kingston. Mrs. Marston stated she felt there was a big gap in coverage that impacts her business negatively. She believes that there are many people who have only cell phones, especially the elderly, who have them because of the lower cost. Mrs. Marston is in favor of getting the gap covered.

Nancy Howaniec, 24 John West Road, Exeter. Summarizing Mrs. Howaniec's letter, in her opinion, she feels threatened by the proposed tower and feels the neighborhood is expected to "bear the burden" for the entire Town. She also feels it is discriminatory to their public rights. She feels there could be multiple "stealth" towers located elsewhere. Mrs. Howaniec listed 11 points she feels important for the Board to consider. She stated a Board member had stated that the town has already lost its rural character and charm and there were no beautiful land views and view sheds worth preserving. Mrs. Howaniec thinks this is an unacceptable attitude for a Zoning Board official. She asks the Board to consider the abutters' public interests and help protect their property rights. Mrs. Howaniec's 2-page letter dated December 19 in its entirety is attached to the minutes as part of the record. She also submitted a copy of a 3-page letter dated December 19 and addressed to the Zoning Board, stating she will need to alter her building plans because of the tower, and a 1-page letter dated December 19 to the Planning Board and the Selectmen.

Mrs. Howaniec said she was at the Zoning Board meeting and believes Mrs. Belcher has a conflict of interest. She says Mrs. Belcher was very concerned about having one monopole, and making sure she could put every last single antenna array possible on that pole so that it would not be in another area of Town, especially commercial area #1, which she lives near. Mrs. Belcher also stated at that meeting, "Oh, if we put it over near me, people would be really upset." Mrs. Howaniec thinks maybe it is Mrs. Belcher who is really upset.

Peter Merrill, 275 North Haverhill Road, Kensington. Mr. Merrill asked that Mrs. Belcher seriously consider recusing herself from the vote. He believes that there is much to call into question about Mrs. Belcher's race to embrace the tower.

At very early points, even before decisions were even being called upon, there was tremendous positive voicing from Mrs. Belcher in both the ZBA and Planning Board meetings Mr. Merrill has been involved in. In Mr. Merrill's opinion, Mrs. Belcher has acted in less than an arbitrary fashion, and thinks she should really consider recusing herself from this decision. As far as cell coverage, he knows it can be difficult sometimes. Most cell phones have an antenna plug on them which is a way to increase coverage. Also, he wants it known that his house *was* designed and built to view that ridge. He has 60 square feet of window that points specifically at that ridge from his great room. And he will bathe in the basking beauty of that monopole. He is not against it for that reason for his own purpose, but he thinks it wrong to say that no ones' house anywhere around was designed to look at that ridge.

Paul Kimball, 21 Kimball Road, Kensington. Mr. Kimball's view is directly at the area where the tower is going to be built. Mr. Kimball wanted to know what side of the power line the tower was going to be constructed, the SW side or the NE side. Mr. DeLahney stated that it was on the SE side; Mr. Kimball stepped closer to the map to see the exact location. Mr. Merrill remarked that it was not possible for it to be on the southern side of the power lines. After looking at the map, Mr. Kimball found that the location of the tower in relation to his property was not where he had thought it was. Mr. Kimball was concerned with the view of the tower when the leaves are off the trees, as he was putting his land into a conservation easement. Mr. Kimball would like to keep the Town looking as it is, and in his opinion, the tower will destroy that part of the conservation easement.

Ron Terrill, 59 Giles Road, East Kingston. Mr. Terrill stated his house was directly in line to where the monopole is proposed. Mr. Terrill had lived in West Newberry near high-tension lines, and it was very difficult to sell his house for that reason. When he moved to East Kingston, he figured there would be no poles in the residential area. He asked that the Board not approve the pole in the residential area.

Mr. Merrill asked to bring up a piece of new material. Mr. Day agreed. Mr. Merrill reported to the cell tower people that if they were turned down by the Planning Board, the Congregational Church in Kensington was seriously interested in being considered as an alternative site to locate the tower.

Mr. Day closed the floor to abutters.

Mr. Day turned over the floor to Mr. Cody to address any concerns raised by the abutters.

Mr. Cody stated that most of the concerns were addressed by the ZBA, and their determination stands on record.

Mr. Cody will try to persuade the Board that they have a solid argument for their application, and he understands that the Board needs to look at the facts. He has presented factual information to the Town, based on sound technical and legal reasons.

Mr. Cody showed the Board a simulation photo of a monopole on a ridgeline. There will never be a tower that can't be seen. The location was chosen because it made technical sense and good sense for the town; it is a large lot, a wooded area. The height is reasonable, since there needs to be 10' between carriers so there is no interference, and the pole needs to be above the trees to work.

Mr. Cody stated that Richard House, RF Specialist from *Cingular*, reported that if the pole were below 165', there would be weaknesses in the signal for NH Routes 107 and 108 areas. Mr. Cody brought this up because he wanted to work with the Town. He proposed that they

be approved for 180', but not exceed 160'; just leave off the last 20'. He would only use the last 20 feet if additional capacity demanded it. He still needed height to accommodate for co-location, but had some room for adjustment. In answer to the question of why it could not just be a 160' tower in the first place, Mr. Cody and Mr. Voci stated that the foundation of the shorter pole would be different and not configured the same as the 180' one.

With regard to a stealth tower, a tower is a tower. The Board had discussed a pole disguised as a pine tree and decided it would be more noticeable. The tower would create no noise, smoke, odors, or hazardous materials. The barn that was referenced would be 1,000' away. Mr. Cody stated he had one customer who wants the pole next to his barn.

Mr. Cody went over the ten factors to be considered from the ordinance book and reviewed why he thought each had been met. Mr. Cody stated he had all his staff present if the Board had any questions, and asked Mr. Hobbins to close.

Messrs. Kimball and Berry were looking at the site map, and Mr. Day suggested that they might want to hear the summary by the applicant.

Before Mr. Hobbins could proceed, Mr. Berry interjected loudly that he was not admitted to the New Hampshire bar. Mr. Day apologized to Mr. Hobbins for the disruption and interruption, and Mr. Barry Hobbins explained that the abutter who stated that he is not licensed to practice law in the State of New Hampshire is correct; he is not. He is acting as an agent for *Cingular* in this case, and will be speaking only to the Federal Telecommunications Act of 1996 tonight.

Mr. Hobbins explained that the Telecommunications Act gave rights to the carriers, and quoted from 47USCA, Section 332C7B11, stating, "*A state or local government or regulation may not discriminate among providers of functionally equivalent services.*" If Cingular Wireless cannot get service in this Town, and can prove a substantial gap, they have a right to petition the Planning Board and the ZBA, and cannot be discriminated against.

The Telecommunications Act intended there to be a free market and have licenses so carriers would be competitive. Under Federal law, availability would be provided so states and local communities would be able to benefit by cheaper, more efficient and more effective services.

Under the old law, it was very difficult to permit a telecommunications site under local zoning. The Telecommunications Act of 1996 changed the playing field. You cannot effectively prohibit by a statute or an ordinance. What the ZBA found is that there wasn't adequate coverage in the commercial and business zone of this community to meet the requisite requirements of the Telecommunications Act and the licensing requirements of carriers who hold their licenses through the FCC.

The backdrop of the Telecommunications Act provides a federally mandated framework within which these carriers may seek to locate wireless facilities within the community and municipal buildings. Planning Boards and Zoning Boards can regulate them, but you have to consider the Telecommunications Act as well as your local ordinances. The burden is higher on communities because the Act mandates that any denial for request to develop a wireless site must be "in writing and supported by *substantial evidence*".

Mr. Hobbins stated he respected the comments and opinions of the persons present, but also asked them to respect the rights of other individuals in neighboring communities and this community to have a public safety access through a wireless telecommunications device and to have the ability to communicate.

Mr. Kimball asked to speak for a moment to clarify a point, and Mr. Day allowed him to do so. He stated that the star shown on the map provided by the applicant was neither the location of the proposed site nor the location of the Town of East Kingston. He went to the map with the applicants for clarification. After reviewing the map, Mr. Kimball acknowledged that the map *was* correct.

Mr. Day closed the floor to abutters.

Mr. Dworman asked to speak again, and Mr. Day explained that he had already had an opportunity to speak. If he allowed him to speak, the floor for abutter comment would have to be reopened.

Mr. Cody wanted to make sure the Board was satisfied they had sufficient evidence with which to make their decision. In regards to the National Environmental Policy Act, he brought to the Board's attention that they have filed and are in the process of that procedure, dealing with the NH Historic Commission at the present time. Mr. Hobbins stated that one of the conditionals of approval was that they would submit a written letter of agreement to the Board that they will act in good faith and negotiate with other carriers to ensure the spirit of the co-location provisions of the Ordinance.

Mr. Day announced that the rest of the hearing would be deliberation by the Board, including soliciting input from advisors, which included the Conservation Commission, the Building Inspector, the Fire Department, and the RPC's Senior Planner. In the course of deliberations, questions may be asked of the applicant.

Mr. Morales stated that Article XV, 3.c.2. states, “*Substantial evidence that the existing towers are not of sufficient height to meet the applicant’s engineering requirements, and why.*” Mr. Morales did not remember hearing what the heights of the other towers were, or if it was a feasible option to raise the height of the existing towers to cover the gap, and asked for clarification from the applicant.

Mr. DeLahney answered the that height of the tower on Rt. 107 was 180’, the tower at the John Deere dealership was 198’, the tower in Exeter was a rooftop one, and the tower on Rt. 125 in Kingston was 150’. He stated that if the tower height was increased to 250’, it would still not bridge the gap because of the terrain in the area.

Mr. Morales stated that the applicant had referred to a maximum radius at the Zoning Board meeting, and that he understood the maximum radius was not proportional to the height of the tower; that the radius would be the same no matter the height of the tower. Mr. Cody agreed that was the case.

Mr. Morales also asked if all the major carriers were on the existing poles, believing that Cingular was the only one in East Kingston. Mr. Cody said he could not speak for the other carriers in other locations, but did explain that the coverage plots shown to the Board included all the carriers. If all the carriers were on the poles, there would still be a gap.

Mr. Morales stated he understood that each carrier had a different technology and were not compatible, meaning if he was a Verizon customer and only Cingular was on the pole, he would not get any benefit. Mr. Cody said that was the case.

Input from the Conservation Commission Chairman, Mr. LK Smith. Mr. Smith stated that his only concern had been the impact on the watershed. The proposed tower is 940’ to the closest location and in his opinion will not impact any of the surrounding area. In regard to the Endangered Species Act, he had spoken to the NH Fish & Game office in Concord and they reported that towers such as this normally attract wildlife; osprey liked to build their nests on the tops of the poles and towers. From that aspect, they are not a deterrent to wildlife.

Input from the Building Inspector, Mr. RR Donald. Mr. Day reported that the Building Inspector was unable to attend the meeting, but did give his input. He had no concerns in regard to the structure, how it would be placed, or how it might be maintained.

Input from Fire Department Fire Chief Mazur. Chief Mazur reported that all the plans submitted to the Fire Department have been reviewed and meet all fire department requirements.

Input from RPC Senior Planner, Dr. Jill Robinson. Dr. Robinson stated that the applicant had addressed her question regarding the submission of an environmental assessment in accordance with the National Environmental Policy Act. It would satisfy her concerns, and she suggests that a letter to that effect could be a condition of approval. Her only other concern had been the possible need for a drainage easement, and the Conservation Commission Chairman had spoken to that issue. Dr. Robinson stated it was the only item she had found outstanding from the review of the materials. Dr. Robinson explained her report also directed the Board to her summary of the information the applicant has provided for the listed factors of G.2.c., and the conclusion that a conditional approval could be appropriate.

Mr. Day asked if the members of the Board had any question or comments for any of the advisors or the applicant.

Mr. Lloyd stated that one of the public concerns raised the potential for a periodic measurement of RF emission from that tower and asked the applicant to comment on that issue.

Mr. Cody explained that the RF emissions are less than ½ of 1%, and under FCC rules, a cellular tower does not reach the threshold of being required to monitor emissions. Mr. Cody provided the Board with a copy of the FCC Guide to RF Emission Safety.

Mr. Cody further explained that if the antennas are 33’ above the ground, emissions are dissipated to a point that they are not of any concern to the public. He could have the emissions reports generated, but they would be the same from year to year since nothing changes, and will show the emissions to be well within compliance.

Mr. Champ added that the emissions were so low, that there could be 100 towers at the same site and the emissions still would not exceed the FCC guidelines.

Board Discussion

Mr. Day stated the Board had the paperwork associated with the application, including a catalog of public comments and concerns that have been read and reviewed, with a summary sheet. He reviewed the concerns listed in numbers 1-25 with the Board. Materials received this evening include a letter from Avitar, letters from Rosanne Seiler, Beverly George, 3 letters from Nancy Howaniec; a report from the applicant on RF emissions safety; a map and photos from Mr. Berry, and letters and a photo from Mrs. Waldron.

Mr. Day explained that the Board had to decide whether or not the conditions as specified by the ordinance are met for this application. The Board has three options; to request a continuation for the applicant to gather more information; to grant some sort of approval; or find grounds to deny the application.

Mr. Day noted that in an earlier hearing, a question of the nature of a permit was raised. This ordinance was crafted by a lawyer, who presented it to the communities. Many of these communities took it as a boilerplate and tailored it to their own uses, which is precisely what East Kingston did in 1997. The nature of a conditional use, as we have come to understand it, simply means that we are proposing to allow a use in a zone that is a single use zone. By virtue of that, we are conditioning the use.

Mr. Cody has addressed the factors to be considered in granting such a conditional use. It would be somewhat misleading to suggest it is something other than a conditional use permit; that is what it is.

Mr. Day suggested the Board discuss whether the application itself was complete enough to consider a decision.

Mr. Lloyd stated in his opinion, the application was complete.

Mr. Day addressed the public comments/concerns. Health risks and RF emissions were off the table and could not be considered. The Board understands that there is a visual impact. In Mr. Day's assessment of the information, it cannot be substantiated unequivocally that there is any impact on the value of property. Land values were compared before and after the existing cell tower was built, and there was no evidence to show that property values were adversely affected. The danger to navigation is not an issue, as there will be no light on the tower as per FCC requirements. FAA rules mandate that planes need to fly at 500 AGL unless they are in a landing zone defined by an airport. The environmental impact appears to be minimal, in so far as the wildlife is concerned. The Conservation Commission Chairman indicated that drainage into Great Brook watershed was not a concern. The issue of legal costs is not for the Board to be concerned with. They cannot draw conclusions and make decisions predicated on whether or not it will incur legal costs, for whatever reason.

Mr. Day expressed concern that some people might be losing confidence in their public officials. He is concerned because it is apparent to him that they may not fully appreciate or understand what the Board is charged with to do. The Board acts on what the voters themselves have put into place, and what the State allows us to do or not to do. As far as the approval process, it is straightforward and well spelled-out in the statute and the Planning Board's Rules of Procedures. He noted that the Senior Planner's recommendation is that this application is complete, and the Board should consider a conditioned approval of some kind.

Mr. Morales read a prepared statement, which indicated he could not support the cell tower in the proposed location, citing the adamant opposition of "a large group of citizens". He further indicated that, as a selectman, he would prefer to defend a Board decision as a "united" community (see attached).

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.

Mrs. Belcher recused herself from both the discussion and voting on this application citing that at the recommendation of community members, she did not want to give an appearance of a conflict of interest. Mr. Lloyd stated he had spent a long time going through the material and the public comments and concerns. He had come to the same conclusion as Mr. Day in terms of the items that the Board needs to consider to make personal decisions relative to accepting or denying the application; the remainder of those are either answered for us in the law or answered for us on the testimony of our advisors. He spent a lot of time thinking about the remaining items, and he does come down on the side of recommending approval of this application. Mr. Lloyd strongly recommends that the reduction in height be built into the conditions, as well as periodic testing for RF emissions. He stated that the other applicant that doesn't get talked about too often is Jeffery and Susan Marston, who want to make use of their land. Mr. Lloyd cannot find any reason that this Board has the power to tell them they cannot use their land in this fashion.

Mr. Day asked the Board if there were any further questions or concerns in the comments that would warrant further discussion. Mr. Day would not suggest the tower be disguised as a tree, simply because it would accentuate its presence.

Mr. Day asked if Mr. Sullivan would agree to act as a voting member for this application. Mr. Sullivan agreed.

Mr. Day entertained a motion to for a decision.

MOTION: Mr. Sullivan **MOVED** the Board grant conditional approval to Jeffrey and Susan Marston, of 36 Giles Road (MBL 16-4-1), for a site plan involving the erection of a 160 foot telecommunications tower (PB#06-OC). Mr. Lloyd seconded the motion. The motion passed 4 to 1.

Mr. Day asked for a role call vote. Mr. Morales – no; Mr. Smith – yes; Mr. Day – yes, Mr. Sullivan – yes, Mr. Lloyd - yes

Mr. Day stated that the Board would now define the conditions of approval. The conditions were discussed and reviewed with the Board and the applicant.

Mr. Hobbins suggested that they build a 180' tower and not build out the last 20', thereby making it a 160' tower. This is because the structure of a 160' tower is different for the wind load and stress capacity load than the 180' tower. The base of the shorter pole is different. Mr. Lloyd clarified that they would like to build a 160' tower that structurally has the ability to hold the load of a 180' tower. Mr. Hobbins agreed with that statement.

An annual test and inspection for RF emissions was discussed as a condition of approval, and reports of the results were to be submitted to the East Kingston Code Enforcement Officer and Planning Board. It was ascertained that a measurement would be taken of the site before construction for a baseline.

Mr. Day asked the applicant what sort of anti-climbing device was included on the perimeter fence around the compound. Mr. Cody explained that the webbing on last two feet of the 10' fence had a smaller mesh, which would not enable a foothold for climbing.

Fire Chief. Mazur asked that the applicant install a Knox Box on the compound for the Fire Department in case of emergency. The applicant agreed to do that.

Mr. Day reviewed with the applicant that pages A1 and A3 would be recorded. Mr. Voci stated he would need to take off the contour lines before he could record page A3, and Mr. Day explained he could just take out the lines around the writing, or move the writing to a blank space on the page.

Mr. Voci stated he thought the topography plan page would not be accepted for recording, since it is not stamped by the land surveyor, and the land surveyor won't stamp it because it does not have meets and bounds included on it. Mr. Day told Mr. Voci to try to record it.

Following is the final list of conditions:

Conditions:

1. Land use variance approval to be described in a note on a final plan set page to be recorded.
2. Any legal impediments to be resolved prior to plan implementation.
3. Environmental assessment in accordance with the National Environmental Policy Act completed.
4. Letter of review and approval from East Kingston Fire Department regarding fire safety provisions for tenant/lessee.
5. Note on final plan set stating an annual test and inspection for RF emissions shall be conducted with a report of the results submitted to the East Kingston Code Enforcement Officer and Planning Board.
6. Note on final plan set stating tenant/lessee shall agree to periodic inspection of premises by the East Kingston Fire Department for fire safety provisions.
7. Town Engineer inspection and acceptance of any completed roads and related infrastructure prior to the issuance of structure building permits.
8. Note on final plan set page to be recorded stating that a 160 foot tower will be constructed which can accommodate an additional 20 feet of height after review and approval by the Planning Board.
9. Elevation drawings of equipment shelters showing structural dimensions to be included in final plan set.
10. Town Counsel review of tower co-location agreement with carrier lessees.
11. Town Counsel review and approval of site lease agreement.
12. Bonding for tower removal and site restoration agreed to with the East Kingston Board of Selectmen.
13. Final plans to include a note on the sheet(s) to be recorded indicating they are a part of "X" number of pages in the approved plan set on file with the Town.
14. Final mylar(s), together with full-sized and 11x17 copies of the final plan set, to be submitted to the Planning Board for chairman signature and recording.
15. All outstanding or future fees and charges due the Town in connection with the subdivision, including but not limited to the reviews of Town Counsel, Town Engineer, RPC Senior Planner, Building Inspector, and Fire Department, and administrative costs incurred by the Town be fully discharged.

Mr. Day entertained a motion to the conditions for approval as described.

MOTION: Mr. Sullivan **MOVED** the Board accept the 15 conditions as described. Mr. Lloyd seconded, and the motion passed unanimously.

Mr. Day closed this public hearing.

OTHER BOARD BUSINESS

Dr. Marston resumed his position on the Board. He was heartily welcomed back by all after his long absence.

ADJOURNMENT:

MOTION: Dr. Marston **MOVED** the Planning Board adjourn. Mr. Smith seconded, and the motion carried unanimously at 10:30PM.

Respectfully submitted,

Barbara A. White
Recording Secretary

James R. Day, Jr.
Chairman

Minutes approved January 18, 2007

Enclosures

Distribution: PB file(s); PB members; ZBA members; Board of Selectmen; RPC Senior Planner; Conservation Commission; Department Heads

Statement of Selectman Ronald F. Morales (attachment to minutes):

12/21/06

The conundrum that I am faced with tonight is what is the best decision for the applicant as well as the citizens of EK? The answer to this question is the most difficult one that I have faced as an elected official as well as a member of this board. I have considerable effort into digesting the copious amounts of information from both the applicant and the citizens of EK. I have done my best to keep an open mind in reviewing and analyzing this information. I have listened to and had discussions with many citizens who have contacted me in person, by phone, as well as in writing. All have been in opposition to putting the cell tower in this location.

The perceived benefit from this cell tower is to provide coverage to an area in EK and surrounding communities that presently have a gap in cell phone coverage. Users of cell phones deserve to have full service. However, a large group of citizens, from both inside and outside the immediate area in EK with this gap in cell phone coverage, have been adamant in their opposition to erecting a cell tower in the proposed location. Our zoning ordinance states that cell towers are to be in a commercial zone. This ordinance was voted in by the citizens of EK. Mr. Dworman's comments (*at Tuesday's ZBA meeting*) accurately reflect the wishes of the community, as well as the intention of the Ordinances and the Master Plan voted on by the citizens of EK.

As an elected official and as a member of this board, I am responsible for the health, safety, and wellbeing of all of the citizens of EK. No matter how I or this board votes, someone will be upset with the decision made. This cannot be a factor in arriving at an informed and well thought out decision. If we must defend our decision, to whom should that be, the citizens of EK or Industrial Communications Engineering?

With much deliberation over this matter, I have arrived at a decision that supports the residents in EK who oppose the cell tower in the proposed location. I cannot and will not support a cell tower in the proposed location. I urge my fellow board members to deny the application of "Jeffrey & Susan Marston, 38 Giles Rd. (MBL 16-4-1) and Industrial Communications Engineering, Marshfield, MA."

If we must defend this decision, let us do so as a united community to protect our scenic views, our way of life, and most importantly our citizens. Thank you!