

**BOROUGH OF FAIR LAWN
ZONING BOARD OF ADJUSTMENT
Special Meeting
Of October 11, 2007**

Following are the minutes of the Fair Lawn Zoning Board of Adjustment's Special meeting held on October 11, 2007.

Chairman Scott Levy called the special meeting to order at 7:30 p.m. and declared that the meeting was being held in accordance with the Open Public Meeting Law.

Roll Call: Present were: Chairman Mr. Scott Levy, Vice Chairman Mr. Douglas Charipper, Secretary Mr. Joseph Meer, Mrs. Jane Spindel, Mr. Todd Newman, Mr. Sy Kara, Alt. #2 Mr. Gary Saccinelli, Alt. #4 Mr. Marvin Diner

Absent: Mr. John Nakashian, Alt. #1 Mr. Benny Salerno, Alt. #3 Mr. Brian Blecker

Also in attendance were William Soukas, Board Attorney; Karen Kocsis, Court Reporter; Ann Peck, Assistant Zoning Officer, Cheryl Bergailo, P.P., Mark Kataryniak, Traffic Engineer

Chairman Levy:

I also want it noted on the record that those who had to read transcripts regarding this application have filed a signed Affidavit stating so. Is that right, counsel?

Mr. Soukas:

That's correct, Mr. Chairman. I'll just note for the record that Mr. Meer executed and Affidavit that he read the November 20, 2006 transcript. You, Mr. Chairman, signed one indicating that you read the December 18, 2006 transcript. Mr. Charipper executed an Affidavit indicating that he's read the November 20th, '06 and May 29th, '07 transcripts. Mr. Karas executed and Affidavit indicating that he's read the transcript of July 12, '07.

Chairman Levy asked that all electronic devices be turned off and explained the ground rules for public comments. After which the counsels will give their summations.

Chairman Levy opened public comment

Myrna Beck – 5-18 Estler Court Fair Lawn, NJ

Mrs. Beck was previously sworn in.

Mrs. Beck:

I have several points to make. The VFW property as it stands right now is already out of character with the neighborhood. A 62-foot pole on that property would even be more so. The VFW also has enjoyed tax exempt status in the town. If they enter into a commercial lease, should they continue to enjoy tax exempt status?

Now I want to question this 25 year lease that Omni point would like to enter into with VFW. The VFW has a declining aging membership. I think we have a right to question what would happen to this property when this chapter is no longer viable.

What usage would be possible with this tower outside, but more to the point with equipment cabinets inside on the second floor? Who would buy such a building? It would just be an albatross. It just doesn't belong. The cell companies have three sites that area approved, they have antennas on those sites, and if they need boosters along the way, they can use other technologies for those boosters. They don't have to put towers in the midst of a residential area. This tower would have a very close proximity to the sidewalk and the street. There was no impact study that was done at any time. There is no indication of what would happen in a major hurricane. If conditions are really bad, a very common occurrence is a power failure. There is no battery backup plan for this cell tower, so it would not serve the community at all in a major storm. Now, just from a very personal point of view, I have a deck that sits right outside my dining room and when I sit on that deck, unfortunately I have to look at that ugly water tower, but it sort of blends into the sky if I decide to tune it out. There is the traffic from T.J. School that isn't the greatest. Having a pole that's 63 feet high there would be a negative impact. The planners have spoken about layered effect. This would have an effect on real estate values.

I think that if it can happen in one area here, it can happen anyplace in Fair Lawn, and I believe that the Zoning Board basically has the obligation to maintain the character of our neighborhoods. Thank you.

Chairman Levy:

Thank you. Anyone Else?

Chairman Levy swore in:

Michael Reinheimer – 5-17 Carl Street

Mr. Reinheimer:

Good evening. I strongly object to this cell tower. It's totally out of character for the neighborhood. This is not an auto dealership on Rt.17. This is a beautiful residential neighborhood and I hope that the Planning Board will help us keep it that way.

Chairman Levy:

Zoning board

Mr. Reinheimer:

The Zoning Board will help us keep it that way. Thank you.

Chairman Levy:

Anyone else from the general public?

Chairman Levy swore in:

Sylvia Boussi – 4-02 McKinley Street

Mrs. Boussi:

I live right down the block from the VFW building. Over the last year, I've handed out flyers, talked to people about the issue, and everyone that I have met – I haven't met one person who is in favor of this, for whatever reason, safety reasons, health reasons, an eyesore, whatever the reason is. If most of us are against it, I can't even imagine why any of you would vote in favor of it. I'm here to say that I personally am not. Thank you.

Chairman Levy:

Anyone else from the general public?

Chairman Levy swore in:

Norman Mulkowsky – two block away

Mr. Mulkowsky:

I live about two blocks from the VFW. I can't get in my mind if weigh the benefits against the detriments that anyone can come to the conclusion that this tower should be able to be built at that point. The only benefit that I've heard, and the company has spoken many times, is that there seems to be a fairly minor gap in the service, but it is nothing that would be a detriment to the community as this tower and this 62-foot flag would have on the community.

If you put yourselves in their place and have something like this built right across from your hoe, I don't think any of you --- if we asked you one at a time if you would want one of these built across from your home, I doubt if even one of you would say yes, that's a food idea. So I would ask that you just weigh the benefits and the rewards against the detriments to that community. Even though it's only a small part of the town that will be affected, it's an important thing to each person that lives in that part of town. Thank you.

Chairman Levy swore in:

Richard Ashton – 31-08 Southern Drive

Mr. Ashton:

Number one is the respect of the flag, which we all should have

Number two is that this tower that's going up, it's not a flagpole. It's nothing but a pole that is hiding all of these wires and such for cell phones. That's all it is. If we want to

respect the flag the way we should let's put it on a regular flagpole, not something that's going to hide something. That's my opinion. Thank you.

Chairman Levy:

Thank you. Anyone else from the general public?

Chairman Levy swore in:

Mr. Shemesh – 4-01 McKinley Street

Mr. Shemesh:

I've lived in this neighborhood since 1980. When we came here, the VFW was here and the water tower was there. We chose this neighborhood. We have no problem with the VFW, even the parties, private parties. This tower if it was there at the time, I would walk away from that neighborhood. I want you to understand that. We chose this neighborhood because of the way it is, the residents.

We've had T-Mobile for the last five years. I didn't have any dropped calls. So I'm questioning why this tower is needed on this street. Thank you

Chairman Levy:

Thank you.

Chairman Levy swore in:

Irving Sklaver – 32-07 Morlot Avenue

Mr. Sklaver:

I've lived in Fair Lawn for 48 years in the same house. I moved in 1959. I just strongly object. I would like to see the neighborhood stay as it is. It is a beautiful area. That's why I didn't move. Now there are parties and things like that, and I never object. I would like to leave it the way it stands. I really object to put up a pole in the front. That is facing my house.

Now I have all of my savings in the property. As soon as I see this pole go up, the property will go down. So I would appreciate very much you to take into consideration all of the area in which we live. It's a nice area. Thank you so much.

Chairman Levy:

Thank you. Anyone else from the general public?

Chairman Levy swore in:

Maurice Young – 36-19 Lindsay Road Fair Lawn

Mr. Young:

First of all, we have to understand that the property in question is not a commercial property. By putting the tower over there, we're creating a commercial property in my

opinion. AT & T and Verizon don't have any antennas, I believe, in the area. We have excellent reception with those companies. This one is a cheap solution, perhaps, just to put up an antenna, and the residents will suffer from it.

This property doesn't contribute to the town as far as taxes. Now, you put an antenna, I wonder if they understand they probably will have to pay some taxes. If this antenna can be put over there in a residential property, then we can put it any residential property.

Now the question is will it reduce the value. Of course it will reduce value.

We have the water tower. We can say it was there for many, many years.

I don't know any town that has any antenna in a residential area. This has to be considered by the board as well as the devaluation of the property.

This company has many antennas I town, not just one. There must be another solution that they are not looking into because AT & T doesn't have. We don't worry about the VFW. They are nice neighbors, but that has nothing to do with it. This is a bad user of property. It doesn't add to the neighborhood.

There are definitely other solutions. For this people, it's a business opportunity.

We have about ten houses of worship in this town. This will open up a great opportunity for those people. They don't live in it. How can you – if you don't stop this one, how can you stop two synagogs. We'll com next week with an application like this. It makes money, but money is not everything. It's the well being of the community. This is the worst eyesore I could even imagine. Its 60 feet.

They should definitely find another place for this. No question about it. There is no need for it.

This is a solid residential area. I don't even have one commercial property within a mile, not even on commercial property.

We have an obligation in town to deny this application. Fully deny it. Fully vote to deny. If you ask for a vote from the residents of this town, I don't think you will find one person that would say maybe it's good. Not even one. None of the people in this room would say yes. Let's say no. Thank you

Chairman Levy:

Anyone else?

Claude Bienstock was previously sworn in.

Mr. Bienstock:

My suggestion is to find another solution to this problem. I don't have the answers, but I don't think it's advisable to have cell towers in that location in a residential neighborhood. Being a real estate agent for 33 years, it will make the business decline I that neighborhood, which I don't want to see. I'm opposed to cell tower development with lights on all evening in this area. I'm not opposed to the VFW building. It has been there for many years. I'm not asking that it be torn down or demolished, but I'm very much opposed to the construction of big cell towers at that location. Thank you, very much.

Chairman Levy swore in:

Patti Lakin – 37-02 Lenox Drive

I want to just say thank you to this board for the patience that you've shown in listening to so many of our neighbors. I grew up in this town. When I moved back to Fair Lawn 17 years ago, I chose to live in the same area on Lenox Drive mainly because it was such a great neighborhood. As far as the VFW, I understand their predicament as well and how things are changing and that it's difficult for them to afford their property, but I have to say from my heart that I don't think looking at the cell tower is going to benefit anyone in this neighborhood for all the reasons that you've heard, but most of all, gosh darn it, it's going to look ugly. I don't think that any one of you would feel that it's a great thing to have around the corner from your homes. I even would say that those who represent Omni point might feel this same way.

I wish there was an easy answer, and I know that there isn't, but I know that this is going to be ugly, and I know that watching the number of kids walking in that neighborhood after school, it's going to be darn dangerous because the reality is now not only is there one crossing guard at Philip Street and Morlot Avenue, but there are now two crossing guards dealing with the amount of children that there are to cross and the volume of traffic. Let me tell you, plenty of the hang out and play on that cannon. So I know that the impact of what's not there yet is going to become horrific if this goes forward. I just ask you as a neighbor if you would vote no. Thank you.

Chairman Levy:

Thank you. Anyone else from the general public?

Chairman Levy swore in:

Joan Seniker – 78 Garwood Road

Mrs. Seniker:

I live over near Glen Rock, so I'm not immediately affected. It's a very busy intersection. So I feel having a cell tower there would only add to the drivers not paying attention. Thank you

Chairman Levy:

Anyone else from the general public? Seeing no one, I will close that portion of the application. Counsel, just for the record there was from our traffic engineer a report that was submitted dated October 1, 2007. Did you receive that?

Mr. O'Neil:

Yes, we did.

Chairman Levy:

No comments or questions regarding that?

Mr. O'Neil:

We would agree with the conclusion that there is no negative traffic impact from placing the tower where we're proposing.

Chairman Levy:

And no other person to present?

Mr. O'Neil:

No, I will attempt to sum up very quickly because I know the Board has heard extensive testimony concerning this site. It was said, and it has been said all through these hearings, that there is no need for towers in residential neighborhoods. The fact of the matter is there is need for coverage in residential neighborhood because the networks in New Jersey are mature, the overlays have already been built out and now all of the carriers are targeting the residential neighborhoods for the people who are utilizing their phones in their residential homes. This is the wave of the future. All of the gaps that were shown to you in our exhibits by Mr. Penesso as open gaps needing coverage will need to be filled. Some of those are in residential neighborhoods.

Now, here in Fair Lawn, the Council has adopted a wireless ordinance and designated the C-A zone. You have three properties that can be utilized for wireless telecommunications installations. Omni point is on all three sites. The original ordinance when it was adopted contained six properties, and one of those properties was the water tank which is immediately adjacent to this proposed site. That was removed by the Council along with two other sites. We attempted to get on the water tank, as we testified to, and we were denied that opportunity.

The water tank and the VFW Hall are two of three non-residential uses in the neighborhood, the other being the school, which is too far outside of our target area, and by the way, also no a permitted use.

Omni point has a gap in the immediate area that needs to be filled. Our expert spoke about it. It has been confirmed. There is a gap that needs to be filled, and this is a non-residential use inside that area that is appropriate and fills perfectly what we are trying to do.

This proposal is to place antennas within a camouflaged flagpole that is replacing an existing flagpole which has a flag that flies all the time and which is lit. It is not going to be the most significant visual component to the skyline here in Fair Lawn. What is still the dominant component is the water tank. Any affects on the neighborhood about visual impacts have already been taken by the water tank. Nothing can diminish the water tank. The tower that we are proposing will conform to the use that is on the site in that we will be camouflaging it in a way that is appropriate for what is going on the site. Its placement is appropriate given the use already pre-existing on this lot both with the parking and the building.

The test in New Jersey is, number one, does a carrier have a gap. The Board has to make a determination as to whether or not Omni point has a gap. Once the Board determines that a carrier has a gap, the Board treats wireless applications the same way they would treat an inherently beneficial application. The Board is to apply the Sica balancing test. What we have done in accordance with that balancing test was run through by our Planner is we have already accommodated visual concerns by camouflaging this pole and making it blend in with the current flagpole that is already there. There is not going to be

any additional noise from the flag because you have a flag flying already. There's not going to be any additional light from the light shining on the flag because you have a flag flying already. All of these conditions are existing in the neighborhood as is the non conforming height of the water tank.

This site is perfect for the use because it is the only non residential use in the residential neighborhood that needs to be targeted.

I think it goes without saying that there are some obvious concerns by the public about safety issues coming from this tower. The tower fully complies with all FCC regulations. We would hope that because of the accommodations we've tried to make here to try and make it blend into the neighborhood that the Board would see fit to approve this application. I thank you for your time.

Mr. Soukas:

Counsel, if I may, I have one question on the positive criteria in terms of the particular suitability of the site and the extent of the search.

What is the applicant's position in terms of that legal aspect of the analysis?

Mr. O'Neill:

There are three non residential uses in the subject area. The water tank. The water tank is not available.

The school – this site is centrally located for our gap and being a non commercial use in a residential area, that's why it was selected.

With the installation as we proposed it, at the minimum height necessary to fill that gap it does in fact fill and solve Ominipoints needs in the area

To the positive criteria. As the Supreme Court has said any number of times, is because they want proofs that the site is needed to fill a gap. They just don't want sites thrown up for no good reason. Once the carrier demonstrates that the site fills that gap, under New Jersey law that carries the positive criteria.

The only negatives that are possible are the visuals from the site and we've accommodated that with the camouflage

Mr. Chairriper:

Just to follow up with that are you familiar with the Lakewood case?

Mr. O'Neill:

Yes

Mr. Charriper:

In response to counsel's question, would you say that the applicant made a reasonable and good faith effort to find alternative, less intrusive sites?

Mr. O'Neill:

As I pointed out, we examined all of the non commercial sites in the immediate area, including one that was not even in the immediate area

Mr. Charipper:

In your own words. Under the Lakewood decision, what reasonable and good faith efforts did the applicant make to find alternative, less intrusive sites?

Mr. O'Neill:

The only site that would be less intrusive would be the water tank. A presentation was made to the municipality about utilizing the water tank, even though the water tank had been previously removed from the permitted uses of the site. That was denied. The only other site that would be appropriate would be the school which is too far outside of our search area to allow us to utilize it. Once you eliminate those sites, all you have left are residential sites.

Mr. Charriper:

You mentioned the school. If the school wasn't an appropriate site, why did you make the effort in the first place? You introduced a letter that you wrote to the school that was not responded to. What reasonable efforts were made after that letter was not responded to?

Mr. O'Neill:

The fact of the matter is that the school is a site that was not as preferred as the site we're going on now for technical reasons outlined by Mr. Penesso. The reason the school was contacted is because it's a non residential use in a residential neighborhood. There is no reason to pursue a site that is not going to satisfy the technical requirements as well as a site you already have, which is the VFW Hall.

Most of the efforts originally were concerted about getting the water tank, which would have been the best site, but that was not available.

So they moved to the next available site, as Mr. Penesso pointed out, by location and by the extent of the gap which is existing in the area. If you try examine these sites, the only difference between the school and the VFW Hall is that the school has a pseudo municipal ownership and the VFW Hall is privately owned.

The VFW Hall is the technical better site.

Mr. Charriper:

Aren't there other factors, positive and negative factors, pursuant to Sica, SMR and Lakewood, that would maybe balance out or affect those technological concerns that you're talking about? Did they come into play?

Mr. O'Neill:

It's outside of our search ring. Why pursue it?

Mr. Charipper:

Do you feel that the technological criteria that you're mentioning is more important than the concerns of the citizens?

Mr. O'Neill:

I do, because these sites, as the courts have dictated are technical questions. As one court said, this is not the same as locating a milk dairy.

There are technical requirements that need to be considered, and the technical requirements are to the particulars of the Omnipoint network.

Mr. Charipper:

That's not my question. My question is do you think the technological concerns that you're indicating are more important as a positive criteria versus the negative criteria of the concerned citizens? Is that your feeling?

Mr. O'Neill:

You've heard no legitimate testimony about any substantive negative effects from this pole. Complaining about I don't want to hear the noise of the flag, but they hear it now. I don't want to see the light on the flag, but they see it now. I don't want to see this thing out my window because it's going to block my view of the giant water tank that is sitting outside my window, or it's going to distract a driver who is going to be looking at a howitzer and saying what's that sitting next to a howitzer. So yes, the technical requirements of the network is what this Board has to require that we carry and it's what you have to consider.

Mr. Charipper:

Thank you

Ms. Spindel:

Can you respond to the audience member who was saying that there is other technology out?

Mr. O'Neill:

I can touch upon some of it. The technology is state of the art. The repeaters that are inside the tunnels, the series of small antennas inside the tunnels, are inappropriate for in building use because those repeaters rely on things that cannot be repeated in the open. The technology cannot be employed in a situation where you have people who may be driving, who may be in their homes, who may be on the street, who are either going to be static or driving at 35 miles an hour or driving at ten miles an hour. As the technology advances, the sites become lower, the power become shorter, smaller and the antennas become smaller. What we are proposing here would not have been possible a few years ago because of antenna size and other things, but we can propose it now because of improvements in the technology. That's why we come in with the camouflage technology.

We have the equipment inside the building. It can now be contained inside a small equipment room, whereas in the past, it used to be in something the size of a double wide trailer. This is the best technology available, low power antennas that are smaller than they used to be with smaller radios than they used to be that can be placed inside these poles.

Mr. Karas:

If your technology is so advanced, why isn't it that any of the other carriers who are located on the three CA sites in Fair Lawn are not applying for additional towers or an additional tower in this particular neighborhood?

Mr. O'Neill:

Well, as Mr. Penesso and Mr. Eisenstein pointed out, different carriers are utilizing different frequencies and those frequencies are operating at different band widths.

Mr. Karas:

That's my question. If this were approved by this Board, your application, doesn't that set a precedent for other carriers to come in and request the same relief?

Mr. O'Neill:

It sets no precedent that isn't there from the courts already about the necessity to cover gaps.

Chairman Levy:

Let me also add that each applicant stands on its own merits. Something that may happen today is not necessarily an approval for something else tomorrow.

Mr. Diner:

Mr. O'Neill, I'm reviewing two letters that were sent to the schools. I'll quote them. "Location at the Thomas Jefferson Middle School would meet our coverage objective in this area." Dated March, 2005. The next letter says, "The Thomas Jefferson Middle School and the middle school appear to meet T-Mobile's requirements for wireless communication facilities. Either one of these schools would be acceptable candidates." Both letters indicate that the two Board of Education sites would meet your criteria. Yet tonight you're saying that technologically these two locations should not have been pursued.

Mr. O'Neill:

I'm not saying that. Both our expert and the Board's expert have agreed about the appropriateness of those sites. Those letters were sent out, as Mr. Penesso testified to solicit the signing of a lease. The technical testimony based upon measured data in the area confirms that this is the better site. The VFW is the better site.

Mr. Charipper:

The better site but not the only site?

Mr. O'Neill:

I just went through that. It's not the only site. The water tank is a better site, but it is not available.

Mr. Charipper:

But to clarify your answer to Mr. Diner's question, you're saying that it is a feasible site. It may not be the better site.

Mr. O'Neill:

That's not what I said at all. I said that it's too far out of the search ring. There was a solicitation made to the school to see if they were interested in a lease because it's a non commercial site. This is what Mr. Penesso already testified to.

Mr. Newman:

Approximately how long specifically has Omnipoint been operating this technology in this area?

Mr. O'Neill:

Approximately ten years.

Mr. Newman:

The Telecommunications Act, when was it written?

Mr. O'Neill:

In 1996

Mr. Newman:

In 1996, the criteria for the Telecommunications Act, was it specifically written to address in building coverage?

Mr. O'Neill:

As a matter of fact, it was. The way the Telecommunications Act is written, Omnipoint has to service a certain number of its customers attempting to access its network. The entire build-out plan needs to be based on percentages of people trying to access the network, potential customers, population areas and their utilization. All of the carriers in all of their licenses are required to cover different increasing percentages of people to make the sites available to them.

The federal courts and the state courts have all interpreted that as all of the networks need to be focused upon utilization of the customers, not just areas. The Federal government wants the carriers to cover the population centers first.

Mr. Newman:

What I'm hearing is that although the people who wrote the Telecommunications Act might not have really been thinking about cellular phones taking over the home telephone. In general the telecommunications industry might have been okay ten years ago that everybody had good coverage in their car, but now we want them to be able to talk in their basement, in their house, in their backyard because it's competition and business now. The standard is changing and it may not indeed be what was intended back then.

Mr. O'Neill:

I have to take issue with that Mr. Newman. The original intention of the Telecommunications Act was to encourage this type of competition to encourage different phone carriers, different technologies like the one we're talking about here

competing directly with the older technology. It was actually anticipated that we would reach this point.

Mr. Newman:

The competition isn't exactly what I was referring to. I'm referring to the difference in usage. Ten years ago people didn't use their cell phones as their home phones. What I heard from you is that we're going to start seeing residential applications popping up all over the place. I don't think the technology is ready for residential neighborhoods because it is still much too large.

You made a comparison of the existing flagpole and the proposed tower as if they were interchangeable. You stated it was just another flagpole, but it's not just another flagpole. It's monumental, it's gigantic. It's the neighborhood blight that's the issue, and unfortunately the technology has not yet caught up with what certain individuals might want the use to be. I think that's the situation we find ourselves in here, how do we evaluate the positive and the negative criteria in the application.

Mr. O'Neill:

When I was comparing the proposed flagpole to the existing flagpole, I was comparing the elements of the flagpole. The lighting on the flag, the noise of the flag. Obviously this is a camouflage pole. It's tapered to about 26 inches in diameter at the top. The existing flagpole is not 26 inches in diameter at the top. The negative is going to be the increased visibility. But as far as some of the other negatives that have been brought up, I'm just pointing out to the Board that you have those already.

Mr. Newman:

We don't have a 62 foot 26 inch diameter monopole on that site or any other residential sites in town.

Mr. O'Neil:

It is not a residential site. Mr. Crank did point out to you a 140 foot flagpole in a residential neighborhood in Rockaway.

Chairman Levy:

Is there anyone else with questions? Counselor?

Mr. Soukas:

Mr. Chairman I would just like to remind the Board that this is a use variance application primarily. You are charged with balancing the positive and the negative criteria.

Negative criteria requires proof that the variance can be granted without substantial detriment to the public good and that the variance will not substantially impair the intent and purpose of the Zone plan and the Zoning ordinance.

As counsel for the applicant mentioned, you're required to perform a weighing analysis set forth in the Sica case.

For the

Board's information, that is a four prong analysis. You should first identify the public interest at stake, you must secondly identify the detriments inherent in the proposed use,

third, can the detriment effect be reduced by imposing reasonable conditions on the use and finally, balance the positive and the negative criteria.

You've heard all of the testimony that there is to give in this matter, and that, I would suggest to the Board, is the analysis that you should undertake at this time.

Chairman Levy:

I'll entertain a motion to approve the application as presented to the Board. Hearing none. I'll entertain a motion to deny the application as presented to the Board.

Mr. Newman:

I'll make a motion to deny application # 2006-010 Ominipoint Communication Incorporated, 33-02 Morlot Avenue, Block 2410, Lot 49-56, Zone R-1-2 The proposed antenna flagpole requires a use variance as per Section 125-57D(d)(1) use variance.

Mr. Charipper:

I'll second it.

Chairman Levy:

There is a motion to deny the application as presented. A yes vote is a denial and will defeat the application. A no vote to the motion will approve the application. Mr. Meer roll call, please.

Mr. Meer:

Mr. Karas?

Mr. Kara:

There are a number of issues that have been raised or presented in this application, so of which start with radiation. Insofar as radiation is concerned, radiation is all around us from telephone poles to microwave. I want to cover all bases

Chairman Levy:

Let me point out to the Board that it has been said through the years through court cases and Federal Government that---

Mr. Karas:

I understand that, but the members of the public have voiced some concerns about that

Chairman Levy:

Understood, but that's not a reason to either accept or deny this application. It has been held up in courts' case law.

Mr. Karas:

I'm getting to that, Mr. Chairman

There has been testimony from both applicant's witnesses and our own expert

Dr. Eisentein that the radiation presented by this carrier was 250 times less than the maximum under the Telecommunications Act, the Federal Communications Act. That's not an issue for this Board to consider.

One of the other issues raised by members of public was property values, and the case of SMR versus the Fair Lawn Board of Adjustment, 152 New Jersey 309 which was decided in 1998 clearly states that members of the public, including a real estate broker or agent are not qualified to testify as to the diminution of the values of real estate.

Consequently, that's not an issue before this Board.

One of the other issues raised was seamless reception. I understood seamless reception, it meant that 95 percent of the calls are received by members of the public and that anything less the applicant is bound to go ahead and apply so that there is seamless reception. One of the things that troubled me in the applicant's presentation was their radio frequency experts were not able to give us a percentage of the reception that is currently being received. The only thing they could say was that it was less than 95 percent.

Now, that means that there is reception in the area, it's just that it's not perfect, and by perfect, I mean seamless or at 95 percent. So some calls in a home or maybe some calls in an automobile may be interrupted or dropped.

But again, it does not mean that there is no reception. I feel that has some bearing upon the application.

One of the additional issues that was raised was the height of the flagpole. I want to refer to a report of our previous planner dated September 21, 2006. On the second page, he indicates that the applicant should confirm the height of the existing flagpole. Now, there has been testimony by I think it was primarily Mr. Kronk, don't hold me to the name, who, from the photograph that was taken showing the present flagpole and the balloon test, said that he thought that the flagpole was 40 feet.

From that photograph, it appears to me that the distance that it was taken from the current flagpole superimposing the balloon on it gives an inaccurate reading or estimate of the height of the present flagpole. In my view, it was merely a guess, not an informed estimate.

Contrary to that, we had testimony from some members of the public. One gentleman said he was five foot ten, stood next to the flagpole, a photograph was taken, estimated his height, rounded it off to six feet. And said that based upon that, the present height of the flagpole was around 24 feet. We had another witness who had taken photographs and gave an informed estimate, in my view, that the height of the pole was less than 30 feet. In my view, the height of the pole was 24 feet. And it troubled me that no witness of the applicant went back through all of these months that this matter has been presented to this Board to go ahead and run a balloon test against the present flagpole or to go ahead and use the sun as a means of finding the true height of the flagpole. What I mean by that, and you can find it in any basic physics or algebra book, is you take on a sunny day a stick of known height. You measure it, you measure the shadow, you measure the shadow of the flagpole, and you have a simple equation that gives you the actual height of the flagpole. Why no one did that or raised a balloon to the height of the flagpole to a more accurate reading, particularly in view of the fact that was embodied in the September, 2006 letter of our previous planner, I don't know. In any event, I feel that the height of the flagpole was misrepresented.

Further, I believe that the present flagpole is eight inches in diameter, and the diameter of the monopole that's being proposed is 24 inches, which is three times in diameter. When you sit them next to one another, it is a substantial structure, a very substantial structure. That has a visual impact on the surrounding properties and the neighborhood. There has been testimony by our present planner Ms. Bergailo who indicated that yes, we have a water tower that creates a deficiency in the visual impact in the neighborhood, but notwithstanding, to add another structure which adds to that deficiency is something that could be taken into consideration insofar as the impact on the neighborhood in general. Now, as far as the positive and negative criteria is concerned, it is true that the SMR case has indicated that while an application such as this is not a beneficial use, it is a use that, to use their words, serves the general welfare and satisfies the positive criteria if the use is particularly suited for the proposed site. In my view, because of the visual impact, the negative visual impact that this monopole has on the neighborhood in general, I feel that this application cannot be granted without a substantial detriment to the public good and that the variance will substantially impair the intent and purpose of the Zone Plan and the Zoning Ordinance. Accordingly, my vote is yes in favor to the denial.

Mr. Meer:
Mr. Newman

Mr. Newman:

Before I vote, I would like to review the bases for my vote, the facts that led me to my conclusions and the legal analysis that this Board is required to apply. Forgive me if this is a bit lengthy.

In speaking of the positive criteria, we need to ask can the applicant demonstrate that the proposed site is particularly suited for the use. It has been established that this is not an inherently beneficial use. The applicant has not demonstrated a reasonable and good faith effort to find a less intrusive site. There has been no expert testimony that proves conclusively that no available alternative site exists. No attempt has been made to obtain written evidence of the Board of Education's lack of interest in possibly using their site. The mere absence of a response does not even confirm the receipt of the correspondence by the appropriate party, let alone a confirmation of their disinterest.

Additionally, the Zoning board's RF expert testified that a site further to the east, such as the Board of Education site, would actually provide better coverage for the gap that the proposed site. No testimony was offered regarding any reasonable explanation of locating the monopole along the Route 208 corridor. The Zoning Board's RF expert also opined that locating a monopole in this area would provide adequate coverage of the gap with only a negligible gap remaining to the north.

When looking at the negative criteria, we need to ask has the applicant demonstrated that the variances can be granted without substantial detriment to the public good and that the variances will not substantially impair the intent and purpose of the Zoning Plan and the Zoning Ordinance. We have to apply the four-prong Sica analysis. The first prong is identification of the public interest at stake. There is a public interest of providing coverage for a particular cellular carrier in the area. It has not, however, been convincingly demonstrated that service is not available in this area: only that some gaps for in building coverage exists. No testimony was provided that the existing coverage is

not sound. In fact, coverage is substantially above the level of mediocre service as mandated by the FFC.

The second prong is identification of the detriments inherent in the proposed use. The variances being sought are wholly inappropriate and are inconsistent with the intent and purpose of the Zone Plan and the Zoning Ordinance.

This parcel is a residential piece of property located in a residential zone and is not permitted for commercial uses. It already has one non-permitted use and a principal structure located on the site, the VFW. The granting of this variance would present a layered negative impact of two non-permitted uses and would be inconsistent with Ordinance 125-36 which states that in one and two family zones, except as may be allowed in planned developments, there shall not be more than one principal structure on each lot. This neighborhood was recently singled out by the municipality as inappropriate for the proposed use which made the water tower unavailable. Erection of a monopole on this site would be inconsistent with the Master Plan.

There has been no expert testimony that proves conclusively that no available and suitable alternative sites exist that would meet the needs of the applicant and present less of a negative impact to the area. The applicant should not be relieved of the burden of a much more extensive and valid search for a location that would not have a detrimental effect on the Zone Plan.

There has been substantial public opposition due to the negative impact of the proposed structure in this neighborhood and virtually no public support of this application.

The planner of the objectors opined that this structure would be widely visible and by far the tallest structure in the area, excluding the water tower. In addition, the Zoning Board planner testified that the addition of a monopole on this site combined with the existing water tower would be a proliferation of the non-conforming structures in the area resulting in a layered blight of the neighborhood.

In addition to the mass of this structure, the planner for the objectors opined that the further negative impact would be realized by the flapping and clanging noise created by such structure could be hazardous because no appropriate fall zone exists.

Insufficient evidence was offered by the applicant regarding the extent of the visual impact of the structure and the true nature of its mass. No expert testimony was offered by the applicant regarding the potential effect that the structure could have on the real estate values in the area despite the persistent public concern regarding this issue.

The granting of this variance in a residential zone would conflict with 125-29, specifically No. 5, which states that the objective of this subsection is to regulate commercial antennas for esthetic reasons. Commercial antennas may cause safety hazards if not positioned or secured properly. Commercial antennas may be esthetically undesirable because they tend to be larger in size and/or more numerous. This concerns the threat of regulating the number, location and placement of commercial antennas so as to minimize the visual disturbance associated with their use. The conditions set forth in this subsection are intended to address these land use structural safety and esthetic concerns.

The third prong of Sica is the reduction of the detrimental effects by imposing reasonable conditions on the use. The applicant did agree to partially mitigate the negative impact of the proposed structure by proposing an indoor location for the equipment shed.

Unfortunately, the massive structure of the monopole could not be mitigated.

The negative visual impact and the obtrusive presence of such a structure in a residential neighborhood is impossible to mitigate or screen. The topography of the area, as well as the low height of the adjacent houses, makes it impossible to effectively screen the 62 foot tall, 26 inch diameter monopole.

The last prong of the Sica test is the balance of the positive and the negative criteria. This is not an inherently beneficial use, and the applicant has not presented what is, in turn, an enhanced quality of proof. There are no clear and specific findings by the Board that the variances sought are not inconsistent with the intent and purpose of the Master Plan and the Zoning Ordinance. Further more the applicant has not been able to reconcile the proposed use variance with the Zoning Ordinance. On balance, I find that the applicant has not satisfied by law in order to approve this application and that the granting of this use variance would cause a substantial detriment to the public good. I, therefore, vote yes in support of denying this application.

Mr. Meer:
Ms Spindel

Ms. Spindel:

I can't be as eloquent as the other Board members here, but I will say that being that the Board is charged with weighing the negative and positive criteria for an application by Ominipoint to grant the installation of a monopole with a flag to house cable and antenna on a property that is non conforming and non residential know a the VFW building in a residential zone, and having considered the applicant's public testimony, I find the following:

Adding a second burden of a non conforming use of 62 foot monopole with a 12 by 18 flag doesn't benefit the neighborhood. The possible noise from the flag flapping against the pole could be problematic., especially to those properties adjacent to the VFW building. I believe the size of the pole to be way out of scale to the property. I also believe that the monopole would be the second most visible structure in the neighborhood and can think of nothing that could buffer or reduce the visual impact of that pole. The fact that Ominipoint doesn't have seamless coverage doesn't constitute total failure of the system. Dropped calls by some, not all, Ominipoint users isn't worth the inconvenience that this would have on the neighborhood. For this reason, I vote yes to deny the application.

Mr. Meer:
Mr. Sacchinelli

Mr. Sacchinelli:

I'll make this short. I vote yes to deny because I feel this will be a negative visual impact to the neighborhood. I also feel that it's going to create an unsafe condition in a residential neighborhood.

Mr. Meer:
Mr. Charipper

Mr. Charipper:

I'm going to vote yes to deny also, but I want to state my reasons. First of all, I want to commend counsel for the ominous take of presenting this case, I want to thank the public for their comments and helping the Board make the decisions here tonight, and I want to thank the planner and other experts of the Board and the experts of the applicant for their comments and what they had to say.

With regard to the Sica test, obviously the public interest is providing – filing the gap coverage in regard to the cell phone coverage. The detrimental effects have been outlined by the Board and by the testimony and comments of the public and their experts and our experts and other experts. I find that there is detrimental negative criteria in terms of how the cell tower or flagpole is going to affect the neighborhood the character of the neighborhood, traffic, safety issues and it will substantially impair the intent and purpose of the Zone Plan and Zoning Ordinances which has been outlined.

There have been efforts made to reduce the detrimental effects by the applicant, but I don't think they go far enough.

In regard to the positive criteria, I don't feel that this proposed facility is particularly suited for the proposed site. There are alternate sites. Respectfully, I disagree with counsel. I don't think there have been reasonable and good faith efforts made to find a less intrusive site. I don't think that a follow up was done in terms of the Board of Education site. Other efforts could have been made by the applicant. It was testified that this is technologically the best site. I disagree in terms of what has been said.

Dr. Eisenstein testified that a site further to the east would be better. I don't feel that the applicant made a good faith effort and didn't listen to the concerns of the public as far as the detrimental effects. I think more communication should have been done, more efforts could have been done on all sides.

In regards to the negative criteria and the balancing, on balance I feel there is more of a substantial detriment to the public good in regard to this particular application that outweighs the positive effects or the positive criteria in this matter.

Therefore, as I indicated earlier, I vote yes deny this application.

Mr. Meer:

I'm voting yes in support of denying this application for the following reasons:

Many of my feelings have been stated already by other Board members. I will zero in on looking at the balancing between the positive and the negative criteria. I do not feel that the positive have outweighed the negative to grant a variance. My biggest issue is I think that certainly more effort could have been made to find a suitable site, Perhaps along Route 2081, that might have mitigated the tremendous impact that this would have on the residents of the neighborhood

I also feel that if we are to grant a variance, it would have to be such a positive change to make the neighborhood better, and this is not consistent with proper zoning and planning. Therefore, I'm voting yes in support of the denial of this application.

Mr. Meer:

Mr. Levy

Mr. Levy:

It has been eloquently put by Mr. Newman all the reasons set forth on the Sica balancing test, the positive and the negative criteria. I'll only add my statements to that because he has broken it down so well and I would agree with the items he put forth.

As far as the public interest at stake, there is a public interest as far as telecommunications provided in this area. I'm in agreement with Mr. Newman that there was discussion about other sites and alternative sites being looked at that , there was a letter that was submitted to the Board of Education, but that the Board of Education didn't respond to that. Is it the applicant's right to infer then or understand that they were not interested. It was asked during testimony that they seek further discussions with the Board of education, and that was not done. Other sites were discussed as far as 208, but any further communications with DOT or other people involved with that was not provided as well.

As far as the location for this pole, my recollection is that Mr. Einstein had stated that this site works for the location of the monopole, Did he say that this was the best site? I don't believe and I don't recall that that's what was said in his testimony

As far as the gap in the area, there was no proof provided by the applicant as to dropped calls and there was no statement from the applicant that there was wholly inadequate service. No proof as to the dropped calls or the lack of calls received or transmitted was offered to the Board, only that there was a lack of coverage in the area. Does this translate into inadequate service? As Mr. Newman said, the service is within the means to provide the connections

There is a visual aspect place on this monopole. It does play a part within this. The applicant's own proofs and pictures shows that it is seen from a distance and it will have an impact upon the view shed throughout the area. Yes, there are areas of trees on the streets that do mitigate it, but there is still an impact on the visual view shed and the esthetics aspect within the neighborhood

This is a residential setting. As our planner pointed out, there is an overabundance of variances and structures and non conforming throughout the site, including the water tower, including the VFW Hall itself. This would be an intrusion place upon that and would add to the burden of the non conformities. I could go on, but I would be repeating what Mr. Newman stated in his statement. My feeling, as far as the negative criteria, is that this is an inappropriate and inconsistent use within the Zone Plan and the Ordinance a set forth. With that, my vote is yes

Mr. Meer:

The motion to deny has been passed unanimously

Mr. O'Neill:

I thank the Board for their time and everyone have a nice evening.

Adjourn

Mr. Salerno made a motion to adjourn this meeting and Mr. Newman seconded the motion.

TIME: 10:05 P.M.

VOTE: All Present - AYE.

Respectfully submitted,

Cathy Bozza
Zoning Board Clerk