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Meeting called to order at 6:30 p.m. by Timothy Kinnon, Vice Chairman.

Introduction of Board Members: David Schaeffner-Alternate, Paul Monzione, Timothy Morgan, Stephen Hurst, Timothy Kinnon-Vice Chairman, Monica Jerkins-Assistant Planner and Carolyn Schaeffner-Recording Secretary.

Appointment of Alternates: David Schaeffner for Marcella Perry

Approval of Agenda: **Motion** by T. Morgan to approve the agenda as amended. Second by P. Monzione. No discussion. Vote unanimous.

Mr. Kinnon read the Statement of Appeal Process
The purpose of this hearing is to allow anyone concerned with an Appeal to the Board of Adjustment to present evidence for or against the Appeal. This evidence may be in the form of an opinion rather than an established fact, however, it should support the grounds which the Board must consider when making a determination. The purpose of the hearing is not to gage the sentiment of the public or to hear personal reasons why individuals are for or against an appeal but all facts and opinions based on reasonable assumptions will be considered. In the case an appeal for a variance, the Board must determine facts bearing upon the five criteria as set forth in the State's Statutes. For a special exception the Board must ascertain whether each of the standards set forth in the Zoning Ordinance has been or will be met.

T. Kinnon: At the last meeting we had discussed taking the time to wait for the verbatim minutes to be produced and then to read it and come back with some written opinions concerning the Application for the Appeal. Monica would you read the case in for the record?

M. Jerkins: Yes, just before I do, the Statement of Appeal process is typically geared more towards a regular and this really isn't a regular meeting so I just want to let the public know, that are here that you do not take public input for Motions for Rehearing.

Motion for Rehearing (East Side Drive Cell Tower app)
Case #Z05-34 Map 14, Lot 21 Area Variance
Industrial Communications & Electronics 486 East Side Drive (NH 28A)
Co-applicant: RCC Atlantic, Inc. d/b/a Unicel
And U.S.C.O.C. of New Hampshire RSA #2, Inc., d/b/a U.S. Cellular
Owner of Record: New England Nominee Trust
David J. Fenton, Jr., Trustee
Continued from February 1, 2007 hearing.

T. Kinnon: Before we get into the application and the meeting minutes and all that we have two members that were not present at the last hearing and I think we should discuss whether or not we

want to allow these two members to have time to read the minutes and the application and come back to another time when all five of us can be present or should we move forward?

M. Jerkins: I did email the minutes to everybody, I believe.

T. Kinnon: Okay.

P. Monzione: Right, I am one of the members who was not present at all of the sessions including the presentation by the applicant where the, for the campground site where the variance was granted. Although I will state for the record that I did watch the entire proceeding on tape. I did see that on the cable channel and watched that. As for the hearing presentation that was made with, for the Mirimichi Hill, where the Variance was denied, I did not have a chance to see that on tape but I have received a copy of verbatim minutes, what I trust are verbatim minutes and I have read those in detail, specifically for participation in tonight's hearing. I also attended, I think all but one of the joint meeting sessions with the ZBA and I was present during, I would say, most other, if not all of the other public hearings that were conducted. I think the two specifically that I was not present at are those that I identified. I talked with Town Counsel, Mr. Sessler, about this and since this is in essence, to some extent, a "denobo" process, where we are not accepting public input or are going to work on it within the context of what we have in front of us this evening, I did express a willingness to participate in that. On the other hand, if anyone feels that given my absence at those sessions that I have identified, that that would in anyway pose a problem of if any member of the public or the applicant himself objects, then I would leave it up to the Board and to you as the acting Chairperson to see whether it is appropriate that stay or recuse myself. But that's my background as to the information on this. I am willing to participate as long as no one has any problem with it.

T. Kinnon: My personal feeling is that the more opinions we have on this subject matter, the better we are as being able to make conclusive decision and a decision that can be substantiated. I feel that Mr. Monzione really has done his due diligence in being prepared for tonight. I personally feel that he should sit with us.

T. Morgan: I agree and I think Mr. Monzione's skills will be helpful in drafting an appropriate document so I think it would be good if he sat in on this one.

D. Schaeffner: It would be good to have a fresh opinion being that he did read the minutes and watching the tape also (an additional short sentence was not audible on the tape).

T. Kinnon: How do you feel, Steve?

S. Hurst: Well, I reviewed the minutes and I was present for all of the meetings, so I think I got a grasp on things. The only thing that I don't have is an actual copy of their Appeal which if I can get a copy of it.

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M. Jerkins: I actually have a copy; let me go check on that.

T. Kinnon: I think then, in light of the fact that Stephen Hurst has not had the opportunity to fully read the application; it may be beneficial to discuss the application tonight and then return once again to submit our written opinions. How does the rest of the Board feel about that?

T. Morgan: And we will have then five separate written opinions, what are we planning to do, sort of make an amalgam of those . . .

T. Kinnon: Well, that was one of the other things I wanted to discuss tonight. In a past case what we have done is to take our written opinions and give them to our legal counsel, and then the legal counsel has then compiled them. The legal counsel did not change any of the wording but they simply compiled them between opposing and in favor of positions.

T. Morgan: So legal counsel would end up with five different . . .

T. Kinnon: Five different sets . . .

T. Morgan . . . in regard to the Area Variance, five different sets.

T. Kinnon: Yes, you would.

T. Morgan: Okay. . .

T. Kinnon: . . . and they would separate those by way of people who were in favor of or by those opposed to the rehearing . . .

T. Morgan: . . . to any of the particular items on the worksheet?

T. Kinnon: Yes.

T. Morgan: Okay. So when we do our homework then we will be producing a separate page for each item on the worksheet?

T. Kinnon: Well, the way I had done it myself, was I came up with a response to each of the applicant's responses and I did that to the five criteria on the worksheet. The application, obviously, goes beyond that and I didn't feel it was necessary to address that area of the application as long as I was addressing the five criteria that we base our decision on. And I basically broke it down to one decision per sheet . . .

T. Morgan: Okay.

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T. Kinnon: . . . but it could multiple decisions on one sheet. I think as long, when we turn these over to our legal counsel, or our counsel, that's kind of redundant, they will be able to understand the format that we are presenting.

T. Morgan: Okay.

T. Kinnon: Does anybody else have an opinion on how they would like to move forward?

M. Jerkins: Excuse me, Mr. Chair?

T. Kinnon: Yes.

M. Jerkins: I just wanna clarify; tonight you're going to be going over the Motion and deciding whether or not to grant it?

T. Kinnon: We will.

M. Jerkins: Okay and if you do decide to grant the motion, will that be determined at tonight's meeting? Cause if you do, we have to notice abutters and go through the whole thing to grant the rehearing, if not, then we just issue our written Notice of Decision.

T. Kinnon: I think we should probably make that determination after we deliberate . . .

M. Jerkins: Okay.

T. Kinnon: . . . and discuss, because we do have two members that were not. . .

M. Jerkins: Yup.

T. Kinnon: . . . here and have not had. . .

M. Jerkins: I wanted to clarify the process . . .

T. Kinnon: . . . and have not had as much opportunity as the three that we here last week to see the application so I feel that after deliberating, Mr. Hurst feels that he would like further time, I think that's fair.

M. Jerkins: Okay.

S. Hurst: Excuse me, Tim; was there any discussion at the last meeting on this at all?

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T. Kinnon: No, there was no discussion. The only thing we did was continue it to tonight. Let's take that back, we did discuss how we were going to come back tonight, which was with written opinions.

P. Monzione: The Motion for Rehearing, is what we would decide on this evening whether to grant or deny that motion? If the motion is granted then a rehearing will actually be scheduled with notice and so forth. At which point the applicant will come before us again and submit whatever they want for us to rehear or re-entertain, I guess and then, so that will be the first thing we decide tonight. If we deny that, of course, they won't; if we grant it then we'll set something up. Is that . . .

T. Kinnon: That's, ya. . . .

P. Monzione: . . . okay.

T. Kinnon: . . . and we have had rehearings on only one or two of the questions on the worksheet, so it's not necessary for us to find that the entire worksheet needs to be reheard. We could find that one question was not addressed adequately at the hearings and we could have a rehearing for simply one of the questions and at that point, the applicant would come forward and public input and would be limited to that one question or two or however many. So there are some variables. We don't, we could have a rehearing for the whole case or a rehearing for just a number of the questions that we have on the worksheet. Any other questions or comments? Okay. If nobody minds I wouldn't mind starting and what I would like to do is to discuss each point that we go through on the worksheet to everybody's satisfaction rather than discuss the case as a whole. The first question that the applicant raises or statement I should it is that the ZBA's decision that the Area Variance would be contrary to the public interest is both illegal and unreasonable. The applicant is a part of the record so I think rather than reading the whole statement I will just read some of the points that I came to when reading the applicant's submittal. One of the things that the applicant discussed was that the aspect that the cell tower would provide a level of safetyness for the town with emergency communication. And one of the things that came to my mind that is, well a cell tower at that location would undoubtedly enhance emergency and non-emergency wireless communications there was no evidence presented that the tower must be at a height of 120 feet above the ground or 60 feet above the tree canopy in order to accomplish this. I do feel that a tower that was within the Zoning Ordinance could also provide enhanced emergency services for the town.

P. Monzione: I don't know whether in deciding on whether to grant the Motion for Rehearing whether substantively to respond to each of their arguments in terms of what the record shows or didn't show. You know, that might actually go to the idea of actually rehearing because although maybe they'll submit additional arguments in writing besides this, but in this Motion for Rehearing it seems that the applicant is also substantively arguing the case again, not just why it should be reheard and I thing, you know, if we limited ourselves, for example, does the ZBA need

to take another look at issue number one. You know, according to the applicant the ZBA's decision is illegal and unreasonable and so I guess if we feel that they have a basis for making that claim then we might want to consider, well okay, we will consider rehearing that issue to see if there is a basis for saying why it is illegal and unreasonable and in reading the Motion for Rehearing I didn't see anything in there that demonstrated a basis for saying that it was illegal or unreasonable. I saw, however, a rehash of the argument as to why they should be granted a Variance as opposed to why it's illegal or unreasonable. So as far as I'm concerned, looking at this first issue I didn't see enough in their motion, that they submitted that would cause me to feel there is a basis to having to reconsider that. Again, I mean, you know, if this, if the applicant had decided that they'd like to put a 120 foot tower in the middle of Main Street, you know, next to Town Hall, I think everybody would clearly say well that's far too extreme to be granted a Variance and I think from my review of the records what this Board did was to take that and apply it to the situation that actually existed. In one case the Variance was granted because it appeared they met the criteria and were entitled to it. In this second case that they were asking for it wasn't as extreme as putting this thing in the middle of Main Street but it was being asked to be put in a place that the Board determined greatly affected view sheds and was not in the spirit of the Master Plan and the rural setting and went I favor of what this regulation was voted in by over three quarters of the townspeople to do. In reviewing the record I thought that that was very well reasoned and thought out and I don't see anything in this motion that would provide a basis for the argument that that decision was either illegal or unreasonable in just in terms of whether they should be granted a rehearing on that one point.

T. Morgan: It is also, as Paul says, a rehash of what we heard during a number of hearings and they haven't demonstrated anything here that was a mistake of fact or a mistake of law that this Board made in its deliberations. They haven't said that you misunderstood or you took a fact in error or the law says and you didn't apply that law. They've just told us once again in condensed form what they told us innumerable times in lengthy presentations. And I think my impression of what this Board did is that we considered all of these kinds of issues previously and we came to a conclusion which is reflected in the verbatim minutes and I don't see that they've told us anything here that now that they hadn't told us previously or that we hadn't heard properly. So I don't know if we need to go through and try to rebut their arguments specifically at this point. I think probably when we do a write-up to be submitted to counsel that we need to make our points. I don't think we need to necessarily need to rebut theirs. We need to write what criteria we used to come to these conclusions so that it's clear to whom ever reviews the record but I feel like I've thought about all these things before.

T. Kinnon: Good.

S. Hurst: I am of the same opinion, I mean I don't see anything new here and I think that's criteria for us allowing them be heard there's no evidence on the table in section 1, I certainly don't see that. I think everything that's on there we've taken into consideration.

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T. Kinnon: Okay, Dave?

D. Schaeffner: We sat, the meetings were long enough to me. There was enough evidence presented and I don't think we missed anything.

T. Kinnon: I agree with the Board. I wasn't quite sure how the Board felt it should handle this tonight and I agree. I think it's well thought out. I do feel that when we do submit our written opinions there should be some more detail to it but for the sake of tonight, I think as long as we've gone through the application and we can certainly determine whether or not there is any new evidence in there, I think that would be sufficient. Well, then we can move on to the second question. The ZBA's decision that the Area Variance would not in harmony with the spirit of the Ordinance is both illegal and unreasonable. I have read this a couple of times if not a half a dozen times and I feel that this also is just a rehashing of the same arguments. I felt that we were very just in determining that this request far exceeded what a reasonable variance would be to the Zoning Ordinance.

P. Monzione: I would agree with that. Again, on that setting I keep going back to, although obviously a ridiculous example but just by way of demonstrating the point, if the applicant had come here and said the only way for us to get full coverage with absolutely no gaps at all for the number of providers we want to accommodate on this tower is to put this tower right in the middle of Main Street next to Town Hall, 120 feet tall where everybody would see it and it would be the biggest obstacle in the town, I don't know then if a court, a Federal court, or anyone would determine that we were unreasonable, illegal, or anything else in denying that kind of thing. And again, I recognize that my example is an extreme one but I use it to demonstrate the point. I think that the issue of continuous coverage, etc. is but one side of the coin that this Board considered. The other thing was we considered whether the tower should go, by analogy, in the middle of Main Street here, granted it wasn't Main Street, it was in a place that they demonstrated, you know, location, etc. but this Board, I think, carefully reviewed those criteria and though not as extreme as my example, found that the request did ask this Board to go far beyond the Variance, far beyond the Boccia criteria and so I think reached an appropriate decision with regard to that subject and therefore I would say that I don't see a basis in this motion on grounds of illegality or unreasonableness for rehearing on point number 2.

T. Morgan: There response to point number 2 seems to me to be made up of two parts. One part is sort of a straw man argument that they set up that has to do with saying that Board members commented that they wanted shorter towers and then they tried to formulate a definition of taller and shorter and shot down their argument that we wanted shorter towers. We didn't necessarily make that argument and didn't use it necessarily as part of our reasoning so they've created an argument and then rebutted their own argument in the first part. In the second part they talk about what the TCA requires in terms of closing gaps and wireless coverage but I think that they overstate what the particular law requires in that they say all providers should be allowed to close all gaps and that's not how I believe other cases addressing this issue have turned out. I think

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other cases have said that not all providers need to have coverage everywhere and in hilly terrain like the terrain of Alton. Some gaps are permissible because they are almost physically impossible to eliminate. So I don't see anything here that would particularly convince me to change my mind with regard to my original vote on this section 2.

S. Hurst: I agree with both Paul and Tim. In the comment, I mean, in their heading here that the ZBA's decision that the Area Variance would not be in harmony with the spirit of the Ordinance I think the townspeople decided what they want and we acted accordingly.

D. Schaeffner: To the Bay, down town Main Street is Alton Bay in the summertime to a boat and that's and you are not way out of line in your example in putting a tower in downtown Main Street. You know, it's not in the spirit of the Ordinance at all, so I don't see where they are coming up with that.

T. Kinnon: I couldn't agree more Dave, and that's, you beat me to the punch on that in stating that, you know, one of the things that they stated in their application was that, and they stated this erroneously, that we relied on pictures of the balloon test to make that determination. We all observed these balloons and I even made the statement at the last hearing where I stood on the Mt. Washington dock and could see all three balloons. And I know a large number of people, thousands of people, every year will see this tower in that location. So I agree, I think that when this particular location is, not just from down in the Bay, but the whole Bay, Alton Mountain, miles around, including Wolfeboro, this is as prominent as having it in Main Street.

P. Monzione: I would just like to add, I think for the record to that, you know, for purposes of this Motion for Rehearing, the grounds that are being stated in the motion as to why the applicant should be entitled to a rehearing is that the ZBA's decision that the Area Variance would not be in harmony with the spirit of the Ordinance is illegal and unreasonable and just for the record, I mean, we don't need to come to the conclusion that it was or was not illegal, and by illegal, not to imply something untorte but rather just that it doesn't follow the law, obviously, or unreasonable. I don't think we need to ultimately decide that issue was illegal or unreasonable in ruling on this motion, I think what we need to do and what we've done is to see if there is a basis for that ground in this and as I deal with number 1 and 2 I don't see a basis in the record that the ZBA's decision in either of those cases was illegal or unreasonable and so from my point of view, I don't think they meet this ground and therefore it lacks the basis for their Motion for Rehearing and I think they failed.

T. Kinnon: Is everybody satisfied?

T. Morgan: Yes.

S. Hurst: Yes.

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T. Kinnon: Number 3. The ZBA's decision that substantial justice would not be done by granting the Area Variance is both illegal and unreasonable. You know, and we've talked about this one many times, substantial justice, is difficult to come up with but in my opinion the substantial justice to this to the entire town, any place that will view this particular tower, this particular site, which is not only Alton but it is also Wolfeboro and I believe hundreds of thousands of people that come to this area every year and they come up for a reason. They come to the largest lake in New England, I mean, excuse me, in New Hampshire. They come to an area that is very close within driving distances for large cities such as Boston and Portland. It's an area that people can get to in a reasonable amount of time for a weekend and it's an area where I believe people want to get away from constant cell towers and constant commercial structures and this particular area is very vulnerable to that. Also in this particular question they delve a little bit into utility poles and they try to liken a 120 foot tower to a 30 or 40 foot wooden pole. I simply believe that this argument in absurd. First, a utility pole, seen at a distance will be unseen. You won't be able to see it. This 120 foot tower you could see it for miles and it's not just that it's merely visible it will dominate the view shed. And the other part about the utility pole I think is not a good one is the fact that many subdivisions and planned communities now-a-days go with underground utilities. They simply don't want to see the utility poles so they put the extra money into the infrastructure so that the utilities are not visible. And, as with the first two items I don't believe there was any new evidence introduced and that's what we clearly have to look for.

T. Morgan: They say in their argument to number 3 that the ZBA did not discuss the particular loss involved not did it identify the parties that such loss would affect citing the New Hampshire Handbook for local officials where the test for this prong is any loss to the individual does not outweigh by gaining to the general pubic is an injustice. In reading the verbatim minutes there are several cases where we say the impact on the view shed from a tower of this height outweighs and overshadows the value of the provision of cellular service. This Variance would be contrary to the public interest. In the particular instance, the public interest we are protecting is the view shed of the lakeside residential area and the view sheds for the tourists from Alton Bay and I think that public interest outweighs the public interest for the provision of cellular service. It seems to be it's addressed.

T. Kinnon: I agree.

P. Monzione: I agree as well, I would also point out that in reading the minutes I think that this argument is without basis because, I think, and a lot of these the Board went through the criteria for the decision to be granted or not granting the Variance, a lot of these things overlap so we have to look at what the Board said with regard to each of the criterion that it dealt with and a lot of these overlap and as you read the complete minutes, you see, that I think the Board identified exactly and so forth and so just think that's without basis.

T. Kinnon: I don't want to flip a coin for who goes next.

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S. Hurst: I agree with everybody, no sense in repeating. I agree there is no basis to rehear that, number 3.

D. Schaeffner: I agree. It way outweighs the cell phone service vs. the view and the nature.

T. Kinnon: Okay. Number 4. The ZBA's decision of granting the Area Variance would diminish the value of surrounding properties is both illegal and unreasonable. I think that they tried to do in this argument was to say that their expert submitted scientific data that proved conclusively that it would not diminish the property values. One of the things I looked for was evidence being submitted that could have a reasonable comparison of this site to another site. I do not believe that a reasonable comparison was submitted. I found that in the minutes and by watching the DVD again. I just don't think you can, it's a unique property, it's a unique area and there was nothing new submitted with regard to this question.

P. Monzione: I, unless I misunderstood this when I read it, I thought that the expert by the applicant talked about an inability to gear this market. That some people are willing to buy stuff with cell towers and some times they're not, I think the evidence from the applicant, attempted to demonstrate that you can't opine from an expert perspective as to whether these thing affect value or not but I know Mr. and Mrs. Slade had an expert-appraiser who did opine that and there was evidence in to show that values could be adversely impacted and then I notice also in the motion that they are trying to impose an improper burden and that is that some are trying to demonstrate and adverse impact of value must demonstrate that the 120 foot tower as opposed to a permitted tower would somehow adversely affect that and I don't think that that's right. I think that the Board's job was to deal with the town that was being opposed and I think the objectors who were trying to demonstrate and adverse impact on property are to deal with the tower that was being proposed. It's not on them to say what a smaller tower or a tower that isn't as tall would do so I think that the people who presented evidence dealt with the tower that was being proposed and I think that there is valid evidence in the record for the Board make its finding.

S. Hurst: I agree. Again the case was presented with 120 foot tower and that's basically what we got to look at. I am a licensed real estate broker, I sell real estate and in my opinion a 120 foot tower in that view shed is objectionable to a buyer and I just don't agree with what their expert was saying and I am leaning towards what Mr. Slade's expert said. I do appraisals and I would have to take that into consideration in appraising that property.

T. Morgan: Comments like that by Mr. Hurst are in the record.

D. Schaeffner: I would agree to exactly what Mr. Hurst said. You know, you gotta really take than into consideration. You know, 120 foot tower that, all you had to do, I'll point right back to the balloon test, right there in the middle, I wanna say that surrounding property values, but I mean, anybody around that can see that, not just next door to Mr. Slade but someone possibly across the lake and granted there's a bunch of houses on mountain sides as you come into Alton

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Bay there are growing up and you'll be able to hide those houses, but a tower, you're not gonna be able to hide 120 feet above the tree canopy with some 70 feet. It's still gonna take away from the property values.

T. Kinnon: Number 5. Two part obviously. It says the ZBA's decision that the applicant's would not suffer any unnecessary hardship as a result of the Alton Zoning Ordinance is both illegal and unreasonable in the first part. A Variance is need to enable the proper use of the property given the special conditions of this property which is the only in the East Side Drive area that is available, accessible, and technology feasible to provide reliable wireless coverage in that area. I don't see anything that's new in here as far as evidence concerning the uniqueness of this site. I personally do not feel that this site is, has any special conditions that make it the only site that a cell tower could be placed to provide adequate coverage, not 100% coverage but adequate coverage.

P. Monzione: Ya, I'm not so sure that legal argument made under there, that somehow the ZBA has the burden of identifying any evidence in the written record that contradicted the applicant's evidence is actually the criteria. I don't know that the Board is required to come up with any evidence of its own. And based on the evidence that presented to the Board can, I think, reasonable infer that the applicant has failed to show that an Area Variance is the sole means of enable their purpose and not to come up with evidence showing to the contrary but just to weigh all the evidence presented and determine whether they have met their burden and I think the Board found that the applicant failed to meet the burden to demonstrate that an Area Variance represented the sole means to them to accomplish this goal. So I think that again, their argument is not supported by the record.

D. Schaeffner: I think that, you know, the town hired an expert that said adequate coverage could be done without and 120 foot tower yet a Variance possibly for 10 feet above which might be acceptable but we'd have to hear that at a separate case, but ya, well the fact that they were going for 120 feet when you could have gotten adequate coverage, not 100% coverage possibly with a shorter tower that met the, was more within the spirit of the Ordinance, so I don't think (the end of this sentence is not audible)

S. Hurst: I agree, and I'll refer back to the minutes, one of the questions I asked at one of the meetings was why can't you have a cell tower side by side and their answer to me was it was too much interference. After that meeting I was driving down in Hooksett and low-and-behold on the highway there is two towers side by side, so I re-asked the question how come they can do it, you can't and then they said well, you can but you got to space them. So as far as I'm concerned they lied to me the first time and I feel that, you know, they should have addressed my question the first time around more appropriately in saying ya, we can do it but may cause, you gotta space them differently on the tower or something, but their answers seemed to have changed on that, that particular case and I think that they can get this done within the Ordinance.

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T. Morgan: I would simply have to agree that they did not meet their burden of proof as far as I'm concerned. They did not meet their burden of proof to demonstrate that this was the only feasible way of doing it and I think they were asked on a number of occasions question along those lines, you know, how many other places did you explore, where else did you look and I didn't feel that the answers that we got back were sufficient to address this portion of the requirements.

D. Schaeffner: I seemed that they, well, what they said no this time and they are going to say no again. They only tried it once, I think or may twice, I can't recall.

T. Kinnon: That is in the minutes and one of the things that I came up with was that when they resubmit that application, I believe they looked a little more at existing structures. I don't think they looked at any other raw land sites. The list was the same and the list was very difficult to obtain. It took a couple of meetings before we were able to obtain a list and the list was the same as it was when the application was first submitted under the old Ordinance.

T. Morgan: I think the reason that they looked at existing structures is because the old Ordinance didn't require it and the new one did, so they had to say, well, we've this to address the new Ordinance but they didn't make a whole, hardy attempt at it.

T. Kinnon: I agree. I really do not believe they put any where near adequate amount of due diligence into determine the feasibility. As a matter of fact, they put it more back on to our expert to determine whether or not a different type of system would provide adequate coverage or not. At one point it was sent back to Mr. Hutchins and I believe the town ended up paying for it when the applicant really should have paid for it. The other part of that one is that the benefit sought by the applicant's could not be achieve my some other method feasible, the applicant's to pursue that would require an area variance. I think we have touch on it a little bit. You know, for one thing it's not our job to come up with alternatives. Although I think in order to answer this question we need to be able to think of something else that could be done and I do believe there are other methods with towers that are not as high above the tree canopy. There is a very good example of it down in Hooksett, Mr. Hurst said, as Steve said, about the two towers and their own expert admitted that these towers are only 75 to 100 feet apart. So they could easily be fit on to 28 acres but at a much small height and even in different areas and not only on this particular property but other property too, so I doesn't have to be right here. I think the applicant's main purpose in pushing this piece of property is simply because they already owned it and because of that they really didn't put the effort into find another place to put the tower that would be more acceptable to the town.

P. Monzione: I think it was appropriate for the Board to conclude from the evidence that, at least it seemed to me that they had one site and one height and tower on, an that was their primary objective to get that through and I don't think they performed the due diligence requirement from under the Ordinance to truly explore other sites. I got the sense, and I think this is clearly in the

record, reasonable inference can be drawn from the presentations made and the evidence we were given about contacting other land owners etc. that was not a good thing, full effort made on the part of the applicant to actually pursue alternative that would be within the Ordinance or that perhaps would not require as the date of hearing to be, well . . . as so I think the Board was well within reason and interpreted the application appropriately in finding that the applicant had failed to meet that burden and demonstrate that.

D. Schaeffner: I remember the public say that it didn't seem like they were trying to compromise. They came in with one agenda and that was it and because it seemed they owned it, they owned the property, you know, it just seemed like that was it, the only solution and you know, they did not look or try to find a compromise so to say that we are trying to look for other sites or at least lowering the tower or doing a couple, you know, multiple towers. So it just, you know, on part B I just don't think they did their due diligence.

S. Hurst: I agree with that and especially on the noticing, One of the hearing they had put up a picture of all the people they noticed and one of the people they claimed to have noticed was Mr. Slade and he later on got up and testified that he never received notice and then when I asked them about it, well their question or answer changed they notice his mother and yet they had Mr. Slade's name up on the wall there and it just, I don't know, there are too many inconsistencies I think and I don't think they, you know, provided due diligence to noticing people for approvement.

T. Morgan: I don't have anything to add to this section.

T. Kinnon: Well, that's the criteria that we're to work with on the worksheet. Their application does go further. I mean, I don't, I didn't see anything in reading the application that there was new evidence or even a new argument that could possibly be supported by further evidence being introduced. I think we have done our job.

P. Monzione: The only concern that I have with regard to their Motion for Rehearing, I don't know, and maybe we can check with town counsel on this for more expertise but, this Section 6 of the Motion for Rehearing argues that the Board failed to sufficiently articulate the basis for it's decision at, under the TCA, the written decision contains sufficient explanation for the reasons for denial to allow a review in court to evaluate the evidence in the record. Supporting those decisions is required and I don't know, whether that's true. What's happening in Section 6 of this motion is they are presenting a lot of legal arguments and citations from the Federal Statute, the Telecommunications Act or TCA and what it requires and my suggestion on this part of it here, I'm not an expert, nor am I town counsel to advise the Board in that regard, but my suggestion is maybe we should consult with counsel because if they are making a valid point here and if the basis for the decision needs to be more clearly articulate, although again, in the minutes, you know, I see a lot of clear reasons and basis for the decision but you know, perhaps we might want to just get an opinion from counsel and see if perhaps we could adopt this record tonight as part of

the reasons, you know, to make it even clearer in case they need it but that would be my only hesitation on this.

T. Morgan: I think first that, Paul, that this was drafted prior to the production of these minutes so they have . . .

P. Monzione: . . .I'd say. . . right . . .

T. Morgan: . . . what record exists at all and second, if I understood what Mr. Kinnon was driving at when we started this he wants us all to sort of write out in the worksheet, present it to counsel and then counsel will produce a document that addresses . . .

T. Kinnon: . . . that will take care of that . . .

P. Monzione: . . . okay, that's good.

T. Kinnon: The other thing, I think that we address this, and correct me if I'm wrong Monica, but now when we, when the decision was sent to the applicant wasn't the minutes referenced in that decision that the decision was based on the minutes of the hearing?

M. Jerkins: They were, however, Mr. Morgan is correct when he states that the draft version of the minutes that were available at the time of the Notice of Decision were not the verbatim minutes and therefore when this document was written they only had a very draft copy of the minutes to substantiate and to back up the Notice of Decision. The verbatim minutes takes a little more time. They were completed and now they are part of the record.

T. Kinnon: Right. I had though about . . .

M. Jerkins: and they had been forwarded.

T. Kinnon: Right, I had though about that while reading this. You know it finally dawned on me that these were dated January 10 and we didn't receive the verbatim minutes until February so I actually posed that question to Monica by an email, what minutes were they referencing and she replied to me that they were referencing the draft minutes. Now that to me explains why some of the wording is the way it is in the application but the other thing I thought about too was that the applicant's lawyer, Duvall and Associates, had, I believe, at least three or four associates there at each hearing.

M. Jerkins: That's correct.

T. Kinnon: My opinion would be that Duvall and Associates has their own recording of what transpired in these and they should have some good documentation as to what was said but I think

what we can do to cover ourselves tonight to make sure everything is entered properly is to make a motion, somebody to make a motion to enter the verbatim minutes as part of our decision. I think that would get them in there quicker. And then also, too, like I said, if we return written decisions that counsel can compile then that will answer questions with more verbiage for our decision.

T. Morgan: In that case, I make a **Motion** that the verbatim minutes of the meeting of December 11, 2006 where we considered this case and rendered our decision that those minutes be made a part of the record and that the minutes from this evening's also be made part of the record, from this evening's meeting be a part of the record.

T. Kinnon: I'll second that motion. All in favor?

[Audible "I"'s heard from the Board members]

T. Kinnon: One thing I would, a statement I would like to make also is that the Land Use Office did receive some, did receive a letter and a package from another member, from a member of the community with regards to this application. I have asked Monica not to distribute that until after this meeting because it would be the same as receiving evidence and proceedingly we can't receive evidence for this application outside of the application itself. And I feel that until the written decisions that you want to support tonight are turned in to the office, I don't think that that letter or package should be distributed just in fairness so that there is not perception of being tainted.

M. Jerkins: That's fine, I'll hold on to it.

T. Kinnon: Okay, well I'll make a **Motion** that we deny the request for a rehearing of Case No. Z05-34, East Side Drive, the applicant's are Industrial Communications and Electronics, co-applicants are RCC Electronic, Inc., United States Cellular in New Hampshire and that's it.

T. Morgan: I second the motion.

P. Monzione: How will this motion coordinate or coincide with what we are going to be submitting to town counsel? Did we want to do this before we make a definite decision on this motion or . . .

T. Kinnon: that can be made part of the motion.

P. Monzione: Okay, ya, subject to submissions to sub counsel or . . .

T. Kinnon: subject to the submissions of written decision by the members present tonight and returned by town counsel.

VERBATIM Minutes

T. Morgan: I'll second that motion as restated, then.

T. Kinnon: All in favor?

[Audible "I"'s heard from the Board members]

T. Kinnon: Do we have, that this decision needs to be sent to. . .

M. Jerkins: Yes, it needs to be sent out with 144 hours, 6 days.

S. Hurst: when should the written documentation go back to Monica?

T. Kinnon: Right.

M. Jerkins: and I will forward it to, I understand I'm getting something from each of you?

T. Kinnon: Right.

M. Jerkins: Okay, so as soon as I have everything from all of you I will forward it immediately to town counsel. This decision needs to be compiled and send out within that time frame so the soonest you can get them to me would be appreciated. He will need time to review what you submitted and compile it.

T. Kinnon: Any questions?

D. Schaeffner: Just email them to you?

M. Jerkins: Yup. That's fine, email them, drop them off, however is easiest for you.

T. Kinnon: So we have six days, so preferably within two days.

M. Jerkins: Two, get them to me tomorrow. As soon as you can get them to me just to allow for him to have enough time to look at them as well. He's dealing with a lot of things right now.

S. Hurst: (inaudible comment).

M. Jerkins: I'll try.

T. Morgan: How to weekends work into that on account . . .

VERBATIM Minutes

M. Jerkins: You know, that's an interesting question or not. I'm not sure of the answer. The statute is pretty specific when it says 144 hours. Typically if it's a weekend day or if (inaudible several words) it would actually give you a number of days. Minutes and Notice of Decisions all have to be done within 144 hours so I would assume that means that weekends are part of that time frame.

T. Morgan: Okay.

T. Kinnon: Well, we've made our decision. Can the decision be sent out with the supporting documentation later?

M. Jerkins: Well . . .

T. Kinnon: It might be a question to pose to town counsel.

M. Jerkins: It is, because that's essentially how we handled sending out the first decision. The minutes with supporting documentation were referenced in the Notice of Decision and the minutes, when they were complete both draft and the verbatim were sent to them subsequently.

T. Kinnon: Not to make any sense of urgency away from the Board members, but also I think you should be able to notice the applicant within 144 hours. If there is anything that we need to do, if we need to reconvene this week to help out that, you might just want . . .

M. Jerkins: Well, is there body that thinks they are going to have trouble getting me their written decisions in the next two days? Then I don't think we need to reconvene.

T. Kinnon: Okay.

M. Jerkins: I'll drive them to Jim myself if I have to.

T.Kinnon: Alright. Any other business?

P. Monzione: (inaudible comment to T. Kinnon) on tonight's agenda.

T. Kinnon: That is the correspondence that I was talking about. It's with regard to this application.

P. Monzione: Okay. I didn't know that was his.

T. Kinnon: Yes. Mr. Slade had sent in a letter and that's all that I know of the letter. Anybody like to make a motion to adjourn?

VERBATIM Minutes

P. Monzione: I'll make a **Motion** to adjourn.

T. Morgan: I second.

T. Kinnon: All in favor?

[Audible "I"'s heard from the Board members]

Respectfully submitted,

Carolyn Schaeffner
Recording Secretary