



Town of Hopkinton

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HOPKINTON PLANNING BOARD MINUTES NOVEMBER 12, 2013

Vice Chairman Timothy Britain opened the Hopkinton Planning Board meeting of Tuesday, November 12, 2013, beginning at 6:30 PM in the Hopkinton Town Hall. Members present: Ex-Officio George Langwasser, Celeste Hemingson, Jane Bradstreet, Edwin Taylor, Chairman Bruce Ellsworth (arrived late) and Alternates Cettie Connolly and Rich Steele. Member(s) absent: Michael Wilkey.

Due to the absence of Mr. Wilkey and the late arrival of Mr. Ellsworth, Mrs. Connolly and Mr. Steele began the meeting as voting members.

I. Review of the Minutes and Notice of Decision of October 8, 2013.

Mrs. Hemingson, seconded by Mrs. Connolly, moved to approve the Minutes of October 8, 2013 with a correction on page five, paragraph five by changing the word "different" to "difference". Motion carried unanimously (Bradstreet, Connolly, Langwasser, Hemingson, Taylor, Steele and Britain).

Mrs. Hemingson, seconded by Mrs. Connolly, moved to approve the Notice of Decision of October 8, 2013 as presented. Motion carried unanimously (Bradstreet, Connolly, Langwasser, Hemingson, Taylor, Steele and Britain).

II. Conceptual(s). There were no conceptual consultations.

III. Application(s).

#2013-13 Chalk Pond Investments, LLC. Application for a two lot subdivision of property owned by Christian Hartshorn of Chalk Pond Investments, LLC, located off Pleasant Pond Road in the Towns of Hopkinton and Warner. The property consists of 97.4 acres with 1.0 acres and road frontage in Hopkinton and 96.4 acres in Warner. The proposal is to create a 2.75 acre parcel with .69 acres located in Hopkinton and 2.06 acres in Warner, and to construct 330 feet of Town road to be used as frontage for the remaining 94.16 acres in Warner. The property located in Hopkinton contains an existing residence and is in the R-3 district, shown on Tax Map 206 as Lot 21. The property located in Warner is land-only and is in the R-2 and OR-1 districts, shown on Tax Map 3 as Lot 22. Note: This is a continuation of the Planning Board's October 8, 2013 hearing.

Jen McCourt addressed the Board questioning whether the Board had an opportunity to consult with their Counsel concerning the two conceptual plans that she had presented at the October 8th meeting. She recalled the Board wanting to consult with Counsel prior to providing input as to which of the three road designs the Board would prefer. In response, Vice Chairman Britain advised that the Board is prepared this evening to move forward in reviewing the application that was originally submitted to the Board.

Adopted with Correction 12/10/2013

Again, McCourt reiterated her client's interest in constructing a shorter road in an effort to address prior concerns of the Board and neighbors. She again stated that during conceptual review she had presented two additional road designs; however, the Board wanted to speak with Counsel to determine if the road frontage in Hopkinton had to have 200 or 300 feet of frontage. At this time, Vice Chairman Britain stated that the Board now has a better understanding of RSA 674:33 and is prepared to move forward with the original application.

Mrs. Hemingson suggested the Applicant has the ability to withdraw the plan and present an application for one of the alternative plans or could have the Board move forward this evening in reviewing the original application. In response, Ms. McCourt stated that her Client wants approval of a two lot subdivision. In the past, she has heard concerns of the Board and neighbors with respect to the larger lot and Hopkinton's ability to have control over further development of the property. In response, Vice Chairman Britain reiterated the fact that the Board has a better understanding of the RSA and is prepared to take action with respect to the original application before the Board.

Mrs. Bradstreet questioned whether the Applicant could submit an amended design of the road. Vice Chairman Britain responded by saying that at this point in time he was unsure whether the Applicant could "swap out" plans.

After consulting with her client, Ms. McCourt agreed to have the Board move forward in reviewing the existing application. Ms. McCourt gave a brief overview of what had transpired to date, including the Town of Warner's review of the application and revisions to the plan to include NH DES construction approval, Warner's buildable area for Parcel Map 2, Lot 22.1, town approval blocks, and spot elevations southeast of the existing house.

Vice Chairman Britain immediately opened and closed the public hearing portion of the meeting as there were no members of the audience wishing to offer public testimony.

Mrs. Bradstreet suggested that the Planning Board is at a point of review in which the road design should be submitted for engineer review. Mrs. Hemingson questioned whether the Board should proceed in discussing what would be needed (bonding, etc.) should the application be approved. In response, Vice Chairman Britain suggested that the Board should wait for engineer review to determine if the road as designed conforms to the Regulations.

Motion made by Mrs. Bradstreet, seconded by Mr. Taylor to continue application #2013-13 to the Planning Board's December 10, 2013 meeting so to allow engineering review of the plans. Motion carried unanimously (Bradstreet, Connolly, Langwasser, Hemingson, Taylor, Steele and Britain).

At this time, Ms. McCourt inquired about the status of the Hopkinton Planning Board holding a joint meeting with the Warner Planning Board. In response, Vice Chairman Britain stated that the Board is much clearer in understanding the application and therefore does not feel a need to hold a joint meeting.

#2013-14 New Cingular Wireless PCS, LLC ("AT&T"). Attorney Adam Kurth of Anderson & Kreiger addressed the Planning Board indicating that his group was awaiting the arrival of additional information and therefore offered to let representatives of H.R. Clough, Inc. to go ahead in having their application reviewed. The Board agreed.

#2013-15 H.R. Clough, Inc. Alan Davis addressed the Board on behalf of H.R. Clough for Site Plan Review to add a propane storage facility at property owned by Alan R. Davis Revocable Trust, located at 76 Pine Street in the VB-1 district, shown on Tax Map 101 as Lot 30.

Mr. Davis began by noting that his family started the oil business 74 years ago and several years ago included propane as an additional service. At this time, Mr. Davis introduced surveyor Tim Bernier and safety design engineer Jody Ameden for presentation of the proposed facility.

Mr. Bernier provided an updated existing conditions plan that also included the proposed 47' x 25' containment boxes for the propane storage tanks. Additionally, a new access drive around the facility will be constructed. To access the facility one will need to open a chain link fence that will be located at both ends of the new access drive. Mr. Bernier then noted that the plan incorrectly shows the location of the fence and that the plans will be revised to reflect the location as represented by Mr. Davis.

Mr. Davis noted that the proposal had been reviewed by the Fire and Police Chiefs. Neither Chief expressed concerns with fuel storage, safety or traffic as a result of the proposal. Copies of letters from the Fire and Police Chief were included as part of the record.

Ms. Ameden addressed the Board presenting photographs of tanks that are similar to those proposed at H.R. Clough. In particular, a photograph of propane tanks at Milford Propane and Ayer & Goss were referenced. Furthermore, Ms. Ameden noted that there will be two 47' x 10' diameter tanks having a total capacity of 30,000 gallons each. Each tank can only be filled at 85 percent capacity. Ms. Ameden then presented and reviewed manual and automatic safety devices that must be installed at the site in order to meet National and State standards for propane storage.

Ms. Bradstreet inquired about the color of the tanks. Mr. Davis indicated that they will be white and will look similar to the tanks at Ayer and Goss in Henniker.

Vice Chairman Britain questioned whether the only trucks using the facility will be those owned by H.R. Clough. Mr. Davis replied yes, and then explained further about the site design for off-loading and on-loading propane. Currently, H.R. Clough drives to Claremont and Henniker for propane.

Motion made by Mrs. Connolly, seconded by Mrs. Bradstreet, to accept application #2013-15 as complete and for consideration. Motion carried unanimously (Bradstreet, Connolly, Langwasser, Hemingson, Taylor, Steele and Britain).

Vice Chairman Britain immediately opened and closed the public hearing portion of the meeting as there were no members of the audience wishing to offer public testimony.

Mrs. Bradstreet inquired as to whether sufficient screening will remain between the Town property and that of H.R. Clough. Mr. Davis replied yes, noting that the trees that presently exist will remain.

Motion made by Mrs. Hemingson, seconded by Mrs. Connolly, to approve application #2013-15 as presented with the condition that the Applicant provide a revised site plan showing the correct location of the fence. Motion carried unanimously (Bradstreet, Connolly, Langwasser, Hemingson, Taylor, Steele and Britain).

#2013-14 New Cingular Wireless PCS, LLC (“AT&T”). Attorney Adam Kurth of Anderson & Kreiger addressed the Planning Board on behalf of New Cingular Wireless PCS, LLC (AT & T) for a Conditional Use Permit and Site Plan Review to erect a one hundred foot (100') monopine telecommunications tower and associated equipment facility on property owned by Frank and Lois

Mrozek, located at 88 Little Frost Road in the R-4 district, shown on Tax Map 237 as Lot 45. Review of the application is a continuation of the October 8th public hearing in which the Planning Board accepted the application as complete and requested the following additional information:

1. Clarification of coverage of along I-89;
2. Radio Frequency maps for coverage at 78 feet and 90 feet;
3. Confirmation of the tower height, including the tree cap;
4. Map at a larger scale showing the coverage area existing and proposed at 78 feet and 100 feet;
5. Height of First Congregational Church from grade to steeple, and
6. Balloon test (view shed analysis and photo simulation).

The tower and facility will be located within a fenced compound of approximately 50' x 50' on approximately 55 acres that has extensive tree cover. The compound will be able to accommodate two other carriers. AT & T proposes to install twelve (12) panel antennas each at a centerline of ninety six (96) feet on the proposed monopine tower. The proposed installation will comply with all applicable safety codes, including radio frequency emissions.

Attorney Kurth provided the Board with a hand-out which included the following:

1. Visibility study which included photographs of the balloon test and photo-simulations of the proposed monopine;
2. Coverage Plots (enlarged) showing AT & T's existing coverage in Hopkinton and coverage for proposed;
3. Coverage Plot showing coverage for a 90' monopine, and
4. Coverage Plot showing coverage for a 78' monopine.

Site Acquisition Agent Peter Marchant of KJK Wireless addressed the Planning Board reviewing the view shed analysis and photo simulations of the balloon test that had taken place on Saturday, November 2, 2013, from 8:30 AM to 1:30 PM. It was noted that notice of the test was provided to abutters and published in the Concord Monitor.

Mr. Marchant believed that the balloon was "virtually unrecognizable" due to the topography and trees on the Mrozek property. At this point, the Board reviewed the individual photographs and compared the coverage plots for the various heights of the monopine.

Attorney Kurth reiterated the differences in the color key for the coverage plots provided, noting that the color green is in-building service, blue in-vehicle service, yellow outdoor and red meaning marginal or no service. AT&T's goal is to obtain in-vehicle coverage or better as many people are opting to use cell phones, rather than land lines. The target coverage is I-89, exits 5 and 6, and Route 202/9 towards the south. Attorney Kurth explained the difference in coverage in those two areas for a 100' and 90' monopine, noting that there is less coverage along I-89 south. In compliance with AT&T's FCC license, AT&T is trying to provide as much coverage as possible to its customers. Therefore, due to the terrain in some areas along I-89 a height of 100' is believed to be necessary. The lower the height of the monopine will limit the availability for collocation.

In reviewing the coverage plots for 100' and 90', Vice Chairman Britain believed that the difference in coverage between the two heights is insignificant. In response, Attorney Kurth disagreed, stating that there are significant gaps between the two heights and furthermore a lower height would, again, limit the availability of collocation.

Mrs. Hemingson responded that the largest difference in coverage is where the flood control property is located which is the least populated area of Hopkinton. She suggested that AT&T would be meeting its goal by focusing on the on road coverage, rather in areas of Town in which there is no roads or little to no population as a result of the Flood Control Project. In response, Attorney Kurth noted that AT&T also hopes to provide service to seasonal and lake visitors. Again, Mrs. Hemingson noted that there is little or no homes in the area in which there is a difference in coverage between 100' and 90'.

At this time, Vice Chairman opened public testimony.

Beth Taylor of Putney Hill Road expressed concern with the photographs of the balloon test, questioning whether the photos were taken from Putney Hill Road or in the back yard of the homes. She assumed that they were taken from the road because otherwise the balloon would have been seen in behind the homes. In response, Mr. Marchant stated that the photograph was taken from Putney Hill Road as they did not have permission to enter onto private property.

Ms. Taylor questioned who had overseen the balloon test to guarantee that the actual height of the balloon was as represented and not lower. In response, Mr. Marchant explained how the tethered line for the balloon is measured out to the distance required and from that point the balloon is attached and flown. A person then drives the roads radioing back and forth with the person at the balloon to be sure that the balloon is completely vertical before taking the photograph. Attorney Kurth also responded by explaining that the people that conducted the balloon test have done hundreds if not thousands of tests.

Vice Chairman Britain asked Ms. Taylor if she had any information or photographs of how the balloon would be seen from other areas of Town or that would differ from the photographs provided by the Applicant. Ms. Taylor replied no, explaining that it is not up to the residents to make sure that there is cell service coverage everywhere in Hopkinton. She asked the Planning Board to not grant the Variance and instead abide by the rules that were adopted by the residents.

Mr. Taylor questioned whether the tether line was 100' to the bottom of the balloon. Mr. Marchant replied yes, stating that the balloon is an additional six feet or so higher than the 100' mark.

Mrs. Bradstreet questioned the percentage difference in coverage from 100' and 90'. In response, RF Specialist Ernesto Chua, Jr. stated that an analysis could be done, but the information is not currently available.

At this time, Vice Chairman Britain asked Attorney Kurth to present reasons why the Planning Board should grant the waivers requested as part of AT&T's application.

Pursuant to Section 3.10.8, AT&T requested waivers from the following provisions of the Zoning Ordinance:

"3.10.6 (b) Height Limitations

1. General: This provision requires that proposed wireless facilities not exceed ninety (90) feet in height. AT&T requests a waiver from this provision as AT&T is proposing a one hundred foot (100) high monopine tower for its facility.
2. PWSFs in Wooded Areas: This provision requires that a proposed wireless facility not project higher than twenty (20) feet above the average tree canopy height. AT&T requests a waiver from this provision as AT&T is proposing a one hundred (100') high monopine tower, and the average tree height within fifty feet of the proposed tower (of trees to remain after

construction) is approximately fifty-eight (58) feet as noted on Sheet C-2 of the enclosed [submitted] facility plans.”

3.10.6(d) Easements of Leased Areas

This provision requires that if a proposed wireless facility will be located on an easement or a leased area, said easement or leased area shall have a minimum area equal to an area with a radius of 125% of the tower's height plus additional area for accessory structures and access, if required. If and to the extent necessary, AT&T requests a waiver from this provision as AT&T has leased a 100' x 100' area for its proposed monopole tower and facility compound where the closest property line is 184 feet away (Interstate I-89) on an approximately 55.2 acre, heavily wooded parcel.”

Attorney Kurth was clear to indicate that the words, “if required” were due to the fact that the provision of the Ordinance was unclear; noting that the facility will comply with the fall zone of 125%. In response, Mrs. Hemingson noted that the Ordinance is clear to require a “radius” that would calculate out to 250 feet; while the proposal is for a 100 feet which is substantially less than required.

For the record, AT&T's response to the criterion for a Variance as outlined in Section XV of the Zoning Ordinance is as follows:

1. No decrease in the value of surrounding properties would be suffered

“AT&T proposes a 100' faux tree style tower that will be remotely sited on a large heavily wooded parcel. The choice of the subject property was selected so as to take advantage not only of the extensive tree cover but also of the topography. The tower will have no lights on it. The proposed use is a passive use, and does not generate noise, smoke, fumes or any significant vehicle traffic. For all of these reasons, there will not be any decrease of surrounding property values. Indeed, the proposed Facility will provide enhanced, state-of-the-art wireless services to residents and businesses in Warner [Hopkinton], thereby contributing to the local economy and the preservation of property values.”

It is anticipated that the facility will require one vehicle trip per month and is capable of being monitored remotely.

At this time, Chairman Bruce Ellsworth joined the Board. Mr. Steele became a non-voting member.

2. Granting the variance would not be contrary to the public interest

“In *Chester Rod & Gun Club, Inc. v. Town of Chester*, 152 N.H. 577 (N.H. 2005), the New Hampshire Supreme Court stated that, ‘The first step in analyzing whether a variance would be contrary to the public interest or injurious to the rights of others is to examine the applicable zoning ordinance.’ *Id.* at 581. The Court noted, ‘As the provisions of the ordinance represent a declaration of public interest, any variance would in some measure be contrary thereto.’ *Id.* (quoting *Heffernan v. Zoning Board of Review*, 50 R.I. 26 (R.I. 1929)). ‘Thus, to be contrary to the public interest or injurious to the rights of others, the variance must “unduly, and in a marked degree” conflict with the ordinance such that it violates the ordinance’s “basic zoning objectives”.’ *Id.* (quoting *Coderre v. Zoning Board of Review of City of Pawtucket*, 105 R.I. 266, 273 (R.I. 1969)).

The requested waivers will not conflict with the basic objectives of Hopkinton's Wireless Ordinance. Rather, as demonstrated in the ‘spirit and intent of the Ordinance’ criteria the grant of

the requested waivers is consistent with the purposes of the Hopkinton Wireless Ordinance. The requested waivers will promote the public interest by bringing advanced, improved wireless telecommunications to the citizens, residents, businesses, visitors and travelers in under-served areas of the Town of Hopkinton. The Facility will enhance communications for voice, data and in-building applications. In addition, the Facility will promote public safety in the event of fire, flood, panic and other dangers. The Facility will enable users of AT&T's network to communicate immediately with police, fire, EMT, and other public officials in the event of a fire, accident, or other medical emergency or natural disaster. The multi-carrier Facility will also serve the public interest by promoting co-location and helping to minimize the number of new towers in Hopkinton.

As the New Hampshire Supreme Court has noted, 'A tower at this site would also serve the public interest in that it would alleviate a significant gap in coverage and would be used to provide service for at least two other wireless telecommunications companies to limit the need for any further towers.' *Daniels*, 953 A.2d at 414. The primary purpose of AT&T's application is the same as the proponent in *Daniels*, i.e., to address significant coverage issues and thereby to serve the public interest in this area."

3. By granting the variance, substantial justice would be done⁶

"Substantial justice would be done by granting the requested variances. As demonstrated by the RF Report included with this application, the significant coverage problems cannot be addressed by any other feasible means, and use of the subject site is necessary for the Facility. The proposed Facility will improve the provision of wireless communications services in areas of the Town of Hopkinton that currently have significant coverage problems. See *Daniels*, 953 A.2d at 414 ('A tower at this site would also serve the public interest in that it would alleviate a significant gap in coverage and would be used to provide service for at least two other wireless telecommunications companies to limit the need for any further towers. In addition, Omnipoint showed that substantial justice would be done in granting the variances because it was the only reasonable way to remedy an existing gap in coverage.')

4. The spirit and intent of the Ordinance will not be broken by granting the Variance

"The spirit of the Wireless Ordinance will be not be broken if the Board grants the requested waivers because AT&T's proposed Facility conforms to the eight (8) purposes of the Wireless Ordinance at Section 3.10.2 as follows:

- (a) *Preserve the authority of the Town of Hopkinton to regulate and to provide for reasonable opportunity for the siting of personal wireless service facilities, by enhancing the ability of providers of personal wireless services to provide such services to the community quickly, effectively, and efficiently.*

The authority of the Planning Board is preserved by the requirement that AT&T obtain a conditional use permit and site plan approval from the Board for its proposed Facility. AT&T is the premier wireless company in the United States, with more than 107 million subscribers who use the nation's fastest 4G network. AT&T is dedicated to providing customers with wireless technology designed to enrich their lives. AT&T continually raises its performance to meet and exceed customer expectations. AT&T desires to work with the Hopkinton Planning Board so that AT&T can obtain approvals to construct and operate its proposed Facility to provide effective and efficient services to the community.

- (b) *Reduce adverse impacts such personal wireless service facilities may create, including, but not limited to: impacts on aesthetics, environmental sensitive areas, conservation lands,*

historically significant locations, ridge lines, scenic areas and vistas, flight corridors, health and safety by injurious accidents to person and property, and prosperity through protection of property values.

- (c) Provide for co-location and minimal impact siting options through an assessment of technology, current locational options, future available locations, innovative siting techniques, and siting possibilities beyond the political jurisdiction of the Town.*
- (d) Permit the construction of new personal wireless service facilities only where all other reasonable opportunities have been exhausted, and to encourage the construction of new PWSFs in a way that minimizes the adverse visual impact of such facilities.*

With respect to (b), (c) and (d) above, the proposed Facility will provide enhanced, state-of-the-art wireless services to residents and businesses in Hopkinton, thereby contributing to the local economy and the preservation of property values.

The proposed Facility is designed to minimize visual impacts from surrounding areas, ridgelines and scenic areas and vistas. The Facility will be significantly set back from all property lines on a heavily wooded approximately 55.2 acre property, and the faux tree style tower will further allow the Facility to blend in with existing natural vegetation on the property.

A portion of the proposed access drive for AT&T's Facility will be located proximate to existing wetland areas on the property and AT&T proposes to replace an existing bridge located over an existing wetland area on the property, as shown on Sheet C-3 of the plans. However, AT&T's wetland scientist has determined that no state DES permit for the bridge replacement is necessary provided there is no impact to the existing stream, stream banks or other wetland areas, and AT&T is proposing significant erosion control measures along various portions of the proposed access drive to prevent any impacts to other wetlands areas. AT&T will also apply for a special exception from the Zoning Board of Adjustment for the proposed access drive for the Facility proximate to wetland areas, if and to the extent necessary, all rights reserved. The proposed 100' monopine tower will not impact flight corridors.

The Facility will not be located in a Historic District of the Town of Hopkinton. Under federal law, AT&T is requesting the New Hampshire State Historic Preservation Office (SHPO) to evaluate whether the Facility will cause any significant adverse effect to historic resources. If necessary, AT&T will provide a copy of the SHPO determination to the Town prior to constructing the Facility.

The Facility will promote the health and safety of persons and property in the Town of Hopkinton by providing instantaneous wireless communications with police, fire, EMT and other emergency services. The Facility will not endanger health and safety because: it will be enclosed by a six foot (6') high chain link security fence with three (3) strands of barbed wire for security; it will be designed and built in accordance with all applicable building and safety codes; and it will be operated in compliance with all applicable Federal Communications Commission (FCC) regulations concerning radio frequency emissions.

As demonstrated by the enclosed Radio Frequency Report and the coverage maps attached thereto, the proposed Facility is necessary to address a significant coverage gap in the Town of Hopkinton that cannot be addressed by AT&T's existing facilities in the Town of Hopkinton and AT&T's existing facilities in the surrounding areas.

- (e) *Require cooperation and co-location, to the highest extent possible, between competitors in order to reduce cumulative negative impacts upon the Town of Hopkinton.*

The proposed Facility is designed to allow for collocation by two additional wireless carriers. AT&T has master agreements with all carriers, and is willing to supply available co-location for reasonable fees and costs to other wireless telecommunications providers. AT&T will submit a collocation agreement to the Board as required under Section 3.10.7(e) of the Wireless Ordinance prior to the Board's vote on AT&T's application.

- (f) *Provide constant maintenance and safety inspections for any and all personal wireless service facilities.*

AT&T provides continual monitoring of its facilities through its network operations center, including regular site maintenance visits.

- (g) *Provide for the removal of abandoned personal wireless service facilities that are no longer inspected for safety concerns and code compliance. Provide a mechanism for the Town to remove these abandoned facilities to protect the citizens from imminent harm and danger.*

AT&T will remove the Facility in the event that it determines the Facility is no longer needed for its network.

- (h) *Provide for the removal of personal wireless service facilities that are technologically outdated.*

As demonstrated by the RF Report and coverage plots included with this application, the proposed Facility is necessary to address coverage gaps in AT&T's network in the area where the proposed Facility will be located. AT&T will remove the Facility in the event that it determines the Facility is no longer needed for its network."

5. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. For purposes of this subparagraph, "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:
- (i) No fair and substantial relationship exists between the general public purposes of the Ordinance provision and the specific application of that provision to the property.
 - (ii) The proposed use is a reasonable one.

"AT&T has an immediate and compelling need for a location for its proposed Facility in this area of Hopkinton because (a) AT&T has significant coverage problems in the area of the proposed Facility and (b) AT&T cannot address these problems from an existing facility sited within other areas of the Town of Hopkinton or in abutting towns. The purpose of the proposed Facility is to address these coverage problems. Without a Facility at the subject property, AT&T will suffer an unnecessary hardship from a literal enforcement of the ordinance. The property is 'special' due to its size, topography and location proximate to the area requiring service. The extensive tree cover and vegetation which will significantly mitigate the visibility of the proposed Facility also distinguish the property from other properties in the area.

With respect to telecommunication towers and facilities, the general purpose of the maximum tower height, height above the ridge line and the minimum easement or leased area requirements of the Wireless Ordinance is to minimize potential visual impacts of such facilities. Uniquely, however, the subject property is significantly larger than most properties in the surrounding area,

has significantly more existing tree cover and natural vegetation than other properties in the surrounding area, and is located in an area immediately adjacent to a heavily traveled interstate highway. This unique set of facts demonstrates that the proposed Facility is appropriate to the area and the site. AT&T has demonstrated that the proposed Facility conforms to the purposes of the Wireless Ordinance as detailed more fully in the 'spirit and intent of the Ordinance' criteria. Therefore, applying the Ordinance to prohibit this use on this unique parcel will bear "no fair and substantial relationship between the general purposes of the ordinance provisions and the specific application of [those] provisions to the property.

The proposed Facility is a reasonable use of the property, given AT&T's immediate and compelling need to address coverage problems in this area of Hopkinton. The size of the property and the natural buffer and screening provided by the surrounding tree cover and existing vegetation also make this an ideal location for the proposed Facility.

In the 2008 *Daniels* decision, the New Hampshire Supreme Court restated the hardship standards for use and area variances in *Simplex Technologies v. Newington*, 145 N.H. 727 (2001) and *Boccia v. Portsmouth*, 151 N.H. 85 (2004), respectively and introduced a new perspective on the interplay between the standards and the TCA. *Daniels* at 411-412. The Court held that:

[W]e believe that a broader, more inclusive view of hardship is required under these circumstances. When an application to build a wireless telecommunications tower is designed to fill a significant gap in coverage, the suitability of a specific parcel of land for that purpose should be considered for purposes of determining hardship. The fact that a proposed location is centrally located within the gap, has the correct topography, or is of an adequate size to effectively eliminate the gap in coverage, are factors that may make it unique under the umbrella of the TCA. Similarly, that there are no feasible alternatives to the proposed site may also make it unique. Thus, although a parcel of land may be similar to the surrounding properties in terms of its general characteristics, it may still be 'unique' for purposes of hardship when considered in light of the TCA.

AT&T's site in Hopkinton is strikingly similar to the Omnipoint property in Londonderry. The subject site is uniquely and ideally situated within AT&T's target coverage area, and AT&T has amply demonstrated through the RF report and coverage maps that there are no feasible alternatives that would address those coverage gaps, which will be further demonstrated through testimony at the public hearing.

As the *Daniels* Court stated, 'With respect to the 'uniqueness' factor, the evidence before the ZBA demonstrated the necessity of a tower, at the height ultimately approved, on the proposed parcel, in order to fill what could be considered a significant gap in coverage.' *Id.* at 412 - 413. AT&T's proposed tower at a height of 100' at the subject site is necessary for similar reasons."

Attorney Kurth reiterated the point that the radio frequency maps show that there will be less coverage to the north (202/9) and along I-89 south towards exit 5 if the tower were constructed at a height of 90 feet.

Vice Chairman Britain questioned the basis for the request for waiver in the height restriction as the radio frequency mapping does not show a significant gap in coverage between 74 feet and that of 96 feet in height. In response, Attorney Kurth stated that a significant portion along I-89 will only have

outdoor coverage available if the tower were at 74 feet. If the tower were at 100 feet it is anticipated that all areas will be filled in with outdoor and indoor coverage available.

Vice Chairman Britain questioned the actual distance of highway that would be impacted if the tower were 74 feet in height. In response, Mrs. Hemingson estimated approximately one-third of a mile.

At this time, Attorney Kurth reiterated his client's position with respect to the hardship criteria for a Variance; indicating that AT&T cannot address coverage gaps from existing towers within the Town.

Vice Chairman Britain asked Attorney Kurth to explain what distinguishes the Mrozek site from other location in Town. In response, Attorney Kurth stated that the desired location and height will significantly address a gap in coverage. The proposed location, adjacent to I-89, and height will address the needed coverage while limiting visual impact as the property has extensive vegetation. Attorney Kurth, again, referred to the Daniels case in which the Court held a broader view of hardship when applying it to the construction of a telecommunications tower that was intended to fill "a significant gap in coverage". (See explanation for item #5 of the Variance criteria for additional information.)

Vice Chairman Britain asked Attorney Kurth to explain why the Planning Board should waive the requirement of an easement or a leased area of a minimum area equal to an area with a radius of 125% of the tower's height plus additional area for accessory structures and access. In response, Attorney Kurth explained how the Mrozek property is not your typical property in that it is very large, heavily vegetated and the proposed location of the facility isn't in close proximity to property lines. In response, Mr. Taylor suggested that there is nothing to guarantee that the trees that surround the facility will not be removed in the future.

At this time, Vice Chairman Britain read into the record an email received from Beth Taylor and Robert Byers of Dolly and Putney Hill Roads and an email from Binney Wells of Hatfield Road, expressing concerns with the proposed facility. Additionally, Mrs. Hemingson read into the record an email received from Peter and Constance Powers of Hatfield Road, who were also opposed to the application. (See attached copies.) Mrs. Robertson clarified comments made in Ms. Taylor and Mr. Byers' in email in which they had suggested that the Planning Board had previously granted waivers for similar facilities. Mrs. Robertson believed that Ms. Taylor and Mr. Byers' email was in response to an email she had sent to resident Susan Covert concerning the Applicant's request for waivers. Mrs. Robertson wanted to make it clear that while she had informed Ms. Covert that it was not unusual for waivers to be requested, she had never indicated that the Planning Board had every granted such waivers.

Attorney Kurth readdressed the Planning Board, stating that the lower height will not effectively address AT&T's gap in coverage more specifically the area along I-89 and Rte. 202/9. When considering the hardship he suggested that the Board needs to consider a balance between the requirements of the Ordinance, needs of AT&T to meet their required coverage area, and the requirement for collocation.

RF Specialist Ernesto Chua, Jr. readdressed the Board, explaining how he evaluated the differences in the height of the proposed tower when trying to cover AT&T's targeted areas. Specifically, Mr. Chua had taken into consideration the elevation of the property and the tree coverage. Chairman Ellsworth then questioned whether or not one could get coverage using a cell phone that had one-bar. In response, Mr. Chua stated that a call having only one-bar would not be reliable. In other words, the call would most likely be "dropped". Typically, one-bar is sufficient for voice usage, but most likely would not be sufficient for data usage.

Chairman Ellsworth suggested that there was not sufficient evidence to support the necessity for the waivers. Again, Attorney Kurth disagreed, suggesting that the evidence submitted, including the additional radio frequency maps, affirmed the need for the waivers. He believed that it was clear that there would be a significant gap in coverage for a tower that is less than the 100 feet requested.

At this time, Mr. Britain polled members concerning each waiver requested.

1. Height Limitations (3.10.6(b)): Provision requires that a proposed facility not exceed 90 feet in height. AT&T requests a waiver from this provision as AT&T is proposing a 100 foot monopine tower for its facility.

Motion made by Mrs. Hemingson, seconded by Mr. Ellsworth, to deny the waiver as requested. Motion carried unanimously (Bradstreet, Connolly, Langwasser, Hemingson, Taylor and Ellsworth). Reason: The Planning Board was not convinced that the difference in coverage is significant enough that it should outweigh concerns for the Zoning Ordinance. Furthermore, the Applicant was unsuccessful at satisfying the Variance criteria specifically, “spirit of the ordinance” and “hardship”.

2. Height Limitations (3.10.6(b)): Provision requires that a proposed facility not project higher than 20 feet above the average tree canopy height. AT&T is proposing a 100 foot monopine and the average tree height within 50 feet of the proposed tower is approximately 58 feet.

Mrs. Bradstreet suggested that when viewing the balloon test the monopine will be less visible than the actual balloon. She noted that the additional height will provide the opportunity for collocation.

Chairman Ellsworth asked Mr. Marchant to explain why this site may be more attractive for those wishing to collocate. Mr. Marchant responded that he could not guarantee that there will be additional carriers as he is not familiar with the network of other companies; however, he believed the lower the tower would mean that other carriers would not consider the site.

Motion made by Mrs. Bradstreet, seconded by Mrs. Connolly, to approve the waiver as requested. With seven members voting, three (Bradstreet, Connolly and Langwasser) voted in favor and four (Hemingson, Taylor, Ellsworth and Britain) voted in opposition. Motion failed. Reason: The majority of the Planning Board did not believe that there is a significant difference in coverage from 78 feet to 90 feet that would justify deviating from the requirements of the Zoning Ordinance. Furthermore, the Applicant was unsuccessful at satisfying the Variance criteria specifically, “spirit of the ordinance” and “hardship”.

3. Easements of Leased Areas (3.10.6(d)): Provision requires easement or leased area have a minimum area equal to an area with a radius of 125% of the tower’s height plus additional area for accessory structures and access. AT&T has a 100’ x 100’ leased area for its proposed 100 foot monopine tower and compound.

Motion made by Mr. Ellsworth, seconded by Mrs. Hemingson, to deny the waiver as requested. Motion carried unanimously (Bradstreet, Connolly, Langwasser, Hemingson, Taylor and Ellsworth). Reason: The Planning Board was not convinced that the additional area was not available as the parcel in question is over 55 acres. The leased area is not only intended as a fall-zone, but is also intended to protect the trees in the area from being removed at some point in the future. Furthermore, the Applicant was unsuccessful at satisfying the Variance criteria specifically, “spirit of the ordinance” and “hardship”.

At this time, Attorney Kurth was provided an opportunity to consult with his client to determine whether they wished to proceed with their application for a 100 foot tower or would like to withdraw the application due to the fact that the waivers requested were denied. Following brief consultation, Attorney Kurth requested that the Planning Board continue their application so to allow AT&T an opportunity to evaluate what has transpired or to present an amended application.

Mr. Britain inquired as to whether AT&T was willing to waive the 65 day time period for the Planning Board to act on the application. Attorney Kurth agreed, indicating that the extension is granted to the December 10, 2013 meeting.

Motion made by Mrs. Bradstreet, seconded by Mr. Ellsworth, to continue application #2013-14 to the December 10, 2013 meeting, so to allow the Applicant an opportunity to review their proposal or to present an amended application. Motion carried unanimously (Bradstreet, Connelly, Langwasser, Hemingson, Taylor, Ellsworth and Britain).

IV. Other Business.

Zoning Amendments (2014). Planning Board briefly reviewed two provisions in the Zoning Ordinance for amendments.

1. **3.10 Personal Wireless Service Facilities.** For your review, copy of new legislation concerning Personal Wireless Service Facilities (PWSF's), effective September 22, 2013. In particular, the Law now exempts collocation on or modifications to an existing structure (tower) from review by the Planning Board unless the collocation or modifications cause a "substantial change" to the structure. A determination of the extent of change will be made through a process involving the Town issuing a building permit.

The Board asked Mrs. Robertson to make necessary changes so to comply with new legislation and is to schedule a public hearing for Tuesday, December 10, 2013.

2. **3.6.H.1 Accessory buildings, such as private garage, playhouse, woodshed, greenhouse, tool shed, private swimming pool, or similar structures or additions thereto, normally associated with a residence or residential use, subject to provisions of Section IV.** At a meeting of July 1, 2013, the Select Board decided that "no building permit is required for tree houses as tree houses are a risk and as such no building permit is required; however, if a homeowner wants to build on their property it would be at his/her own risk. Further, the Planning Board is requested to review the Zoning Ordinance and make any required changes to assure that permits are not required for tree houses."

The Board briefly discussed the various types of "tree houses" and "playhouses" that have been constructed in Town and whether permits are necessary. It was noted that while the Ordinance does not list "tree houses" or define the word, "playhouse", Webster's Dictionary defines a "tree house" as a "playhouse". Members of the Board suggested other amendments to address the issue while leaving Table of Uses 3.6.H.1 as written. Following discussion, members of the Board unanimously agreed to defer this matter indefinitely.

Subdivision Regulations (2014). Planning Board received proposed draft revisions to the Subdivision Regulations. While amendments to the Subdivision Regulations do not require Town Meeting approval, the Board unanimously agreed to defer the matter until sometime after March 2014.

Capital Improvements Plan Revisions (2014). Planning Board briefly reviewed the revisions to the Capital Improvements Plan, agreeing that there is no need to meet with Town Departments. Mrs. Robertson is to schedule a public hearing for December 10, 2013.

V. Adjournment. With no other business to come before the Board, Vice Chairman Britain declared the meeting adjourned at 10:14 PM. The next regular scheduled meeting of the Planning Board is Tuesday, December 10, 2013, at 6:30 PM in the Town Hall.

Karen L. Robertson
Planning Director

In accordance with RSA 677:15, any person(s) aggrieved by any decision of the Planning Board concerning application(s) may present to the Superior Court a petition, duly verified, setting forth that such a decision is illegal or unreasonable in whole or part and specifying the grounds upon which the same is claimed to be illegal or unreasonable. Such petition shall be presented to the court within thirty (30) days after the Board's final decision regarding the application in question has been filed and becomes available for public inspection in the Planning Office.