Verbatim Minutes

Call to Order: Meeting called to order by Jeremy Dube at 6:30 p.m.

Appointment of Alternates: Bonnie Dunbar and James Bureau

Planning Board Members Present: Jeremy Dube-Chairman, Tom Hoopes, Jeanne Crouse, James Bureau, Bonnie Dunbar, and Cris Blackstone as Selectmen's Representative

Planning Board Members Absent: Cindy Balcius, Bruce Holmes, and Wally Keniston

Zoning Board Members Present: Timothy Kinnon-Vice Chairman, Timothy Morgan, Stephen Hurst, and David Schaeffner

Zoning board Members Absent: Marcella Perry and Paul Monzione

Others Present: Attorney James Sessler, Monica Jerkins-Planning Assistant, Jennifer Fortin-Recording Secretary Pro Temp and others as mentioned below

Approval of Agenda: **Motion** by T. Hoopes to approve the agenda, second by C. Blackstone. Motion passed with all in favor

Applications for Public Hearing

Case # P06-41 **Map 14, Lot 21** **Site Plan Review**
Industrial Communications & Electronics **486 East Side Dr. (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
Continued from the November 2, 2006 Hearing.

Case # P06-42 **Map 19, Lot 8-2** **Site Plan Review**
Industrial Communications & Electronics **1439 Wolfeboro Highway (NH 28)**
Co-applicant: RCC Atlantic, Inc. d/b/a Unicel
Owner of Record: Roberts Knoll Campground, LLC
Continued from the November 2, 2006 hearing.

Case#ZO5-34 **Map14 Lot 21** **Area Variance**
Industrial Communications & Electronics **486 East Side Dr. (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 the November 2, 2006 hearing.

Verbatim Minutes

Case#ZO5-32 Map19 Lot 8-2 Area Variance
Industrial Communications & Electronics 1439 Wolfeboro Highway (NH 28)
Co-applicant: RCC Atlantic, Inc. d/b/a Unicel
Owner of Record: Roberts Knoll Campground, LLC
Continued from the November 2, 2006 hearing.

J. Crouse recused herself for the following case.

Motion by T. Hoopes for case P06-41 to table the application at the developers request pending action by the ZBA, seconded by B. Dunbar. Motion passed with all in favor.

J. Crouse resumed her place on the Planning Board.

Motion by T. Hoopes for case P06-42 to table the application at the developers request pending action by the ZBA, seconded by J. Crouse. Motion passed with all in favor.

Motion by T. Hoopes to adjourn the Planning Board part of the meeting at 6:34pm, seconded by J. Crouse. Motion passed with all in favor.

T. Kinnon – Re-convene the meeting for the Zoning Board of Adjustments for the Town of Alton at 6:53pm Members – Tim Morgan, myself – Tim Kinnon, Steve Hurst, Dave Schaffner. Marcella Perry has recused herself for this meeting and I will be acting as chairman.

Appointment of Alternates: Dave Scheaffner

Approval of Agenda: Motion made by T. Morgan to approve the agenda as written, seconded by T. Kinnon. Motion passed with all in favor.

Brief Statement of Appeal Process:
The purpose of this hearing is to allow anyone concerned with an appeal to the Board of Adjustments to present evidence for or against the appeal. This evidence may be in the form of an opinion rather than established fact; however, it should support the grounds that the Board must consider when making a determination.

The purpose of this hearing is not to gauge 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 of an appeal for a variance, the Board must determine facts bearing upon the five criteria as set forth in the State 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 – It is my intention that at some point this evening each person that wants to speak will have an opportunity to speak. I will ask that each person please bear in mind that members of this board have been

sitting through the joint meetings. If you would like to summarize what you have said in the past, you are more than welcome to. If you would like to add more evidence, you are more than welcome to do that also. I would just ask that we do not go over the same evidence continually. With that, I would also like to mention to the applicant's that we have four members sitting here tonight and not five, we do have sufficient members here to have a meeting, but of course as you probably know the vote must be three in favor if it to be approved. Obviously your odds are better with a five-member panel, so it is your decision whether you would like to continue tonight or go for another meeting.

Don Cote – We will continue this evening.

Case#ZO5-32 Map19 Lot 8-2 Area Variance
Industrial Communications & Electronics 1439 Wolfeboro Highway (NH 28)
Co-applicant: RCC Atlantic, Inc. d/b/a Unicel
Owner of Record: Roberts Knoll Campground, LLC
Continued from the November 2, 2006 hearing.

Earl Duval – To my left is Attorney Tom Voltero from my office, to my right is Don Cote and Kevin Delaney from ICE. In consideration of your comments with regards to been sitting here for a year and have heard and presented a lot of information, I to want to make certain that I am not being too repetitive and not saying the same thing that we have had an opportunity to say again and again before. I would start by saying that, as you know we have submitted a significant amount of paper, a significant amount of evidence and reports from ourselves, from our experts, and reports from the town's experts. I would like to and I know we have done this and sort of taken the cases together and speaking in general to both of the area variances.

T. Kinnon – If I could stop you for just one second. I would like to do each case specifically. We found that for procedural reasons it is much safer for us, we have had problems in the past with cases that have come to us with multiple cases and they have gotten intermingled, so we find it much easier. It does make it a slight bit lengthier but we feel it is much more efficient.

E. Duval – I will apologize in advance for crossing from East Side Drive to Wolfeboro Highway. If I do, stop me. I believe it was East Side Drive that was the first one.

T. Kinnon –No, it is Wolfeboro Highway, Robert's Knoll Campground. Z05-32

E. Duval – As you know the application before you is for an area variance. The applicant seeks to construct a proposed 120' monopole. As we all know, the ordinance limits the height of the facility to 10' above the average tree canopy. I believe that we have heard that the average tree canopy at the Wolfeboro Highway site is 59'. We have submitted a significant amount of what I would refer to as scientific evidence, which I believe has been independently confirmed by Mark Hutchins, the town's own Radio Frequency Engineer, that demonstrates or proves that the monopole at 10' above the average tree canopy will not provide reliable wireless service. It is because of that we are seeking the area variance. I am not sure if you have had the opportunity, but we had submitted back at the November 2nd hearing a very detailed memorandum with regards to New Hampshire variance law and what I had done was I went through the five parts of the variance test for each of the sites in one memorandum and if you would like I could go through each of those or I can open this up for discussion or questions from you to either me or any of us.

T. Kinnon – That is up to you. If you want to go through them all, I am not going to stop anyone from speaking, but if you feel like you would like to go through them that is perfectly fine.

E. Duval – I believe that we have submitted significant evidence that demonstrates that we meet or satisfy each of the five parts of the criteria as set forth in the memorandum and I think that there is enough information before this board to make a decision that is favorable to grant the variance. I think that there is sufficient evidence that would with stand state court challenge or even a federal court challenge and that the information that we have provided, our experts, and the town's expert would satisfy any challenge to a granting of the variance. Based on the fact that I sort of half-heartedly wanted to say Happy Anniversary since we have sat here for about a year and I think I started of talking about a variance for this site, that time ago. I think it would be best and perhaps most efficient if there were specific questions for the board for each of the parts for us to talk about. I think part of what we would like to make sure that we discuss is that the ordinance as written with regards to 10' above the average tree canopy is what we refer to as being fatally flawed. It does not work and I think I have written it and re-written it to attempt to demonstrate that it does not work, again that is something we can discuss. I think in the name of efficiency for all it makes more sense.

T. Kinnon – Would any board member like to start with a question?

T. Morgan- To address Mr. Duval what you were just talking about the fatally flawed aspect of 10' above average tree canopy. What height above average tree canopy would not be fatally flawed?

E. Duval – The response to that, my answer, and the town's own expert is that we need to be above the top of the trees and if I look back

D. Cote – I think to answer that Mark Hutchins, your own expert witness stated that the microwave needs to be between 90'-95' in order for that path to work. That is a line of sight path, so trees or no trees at least in the immediate area, that height is a minimum height for that particular aspect of the application.

E. Duval – I think in Mr. Hutchins testimony he said "the rule of thumb is that wireless equipment needed to be 145'-20' above the tallest trees" and I think the tallest trees according to the Forester's report at Robert's Knoll Campground was 106'. He stated "the trees are a little bit higher at the Robert's Knoll Campground site, there are a couple there that are106'. We do not find often we have pine trees that are often close to that height or they are slated to grown that much over not a long period of time, so we need to be, and as I mentioned before, pine needles, I am really nervous about pine needles and about the coverage they would have sort of going up the hill and over into the cover the bay area" was part of his testimony. I think he also had stated "if we have a center line like that again, we are going to have a tower close to the 120'".

T. Morgan – Do you happen to know if those tall trees are within the 150' radius of the tower you are proposing?

K. Delaney – They are in the Forester's study. The 106' trees are within that radius.

T. Morgan – They would probably be taken down is that correct?

K. Delaney – I am sorry, they are outside the compound.

T. Kinnon – I didn't personally find a lot of questions with the Robert's Knoll site. I know the main objective of the zoning ordinance is to get coverage with a network of smaller towers but to also get coverage from towers that is unseen and from the balloon test I believe there was only one house that it was visible from. The Robert's Knoll site, I believe this is the lease site. Will you be removing a significant number of trees within the 150' fall zone of the antenna?

D. Cote – No, the compound itself does not cover the large area. We will only clear the trees within that lease space, which is 100'x100'. When that measurement was done by the forester he took into account the fact that area was going to be cleared and the trees he had measured are outside of that compound area, he is not measuring inside the compound.

T. Kinnon – Specific to the Robert's Knoll site, how many other sites did you try to obtain in that area? Let me rephrase that question a little bit better. Specific to the coverage that that site is going to provide, how many other sites did you approach land owners for?

K. Delaney – There is a specific number I just want to get that, I don't have it in front of me.

E. Duval – Mr. Chairman, I would like to go back to the question with regards to the tree growth. It is section 603 - 77.1F in the ordinance, which is the camoflauge for ground mounted facilities. It says "all ground mounted personal wireless service facilities shall be surrounded by a buffer of dense tree growth that extends continuously for a minimum distance of 150' from the mount" I just think that it a further answer to the question.

T. Kinnon – That is what the ordinance says, I was trying to ascertain if there were plans to remove trees to increase the signal output or to not deter the signal. I know the zoning ordinance wants you to do that but at the same time I am sure there are going to be some trees that you want to remove to enhance the signal capability of the antenna.

D. Cote – Generally we only remove the trees within that compound area and it has to do with development of the compound not to try to increase the signal strength, it would require us to go significantly outside of the area which we have lease interest in, which would create in itself its own problems. To the specific number we are going to get that, it has been a while since we have gone through that part of the process. We literally look at every piece of property in the area. Once we determine from our computer models the area we are interested in, we literally look at every parcel that is within that search area as a potential. It is not to say that there cannot possibly be any other site. When we are not able to find any other site that met the zoning ordinance that met the criteria for the actual coverage that was available. Certainly there are parcels out there that would meet that, but they are simply not available. The owners are not interested in entering into a contract with us so we are unable to come to terms in that type of agreement. I will tell you we did offer to purchase another piece of property and that owner was not satisfied with what the actual value was under her experts so we never really brought that negotiation to any type of meeting full end. We don't go into it with a pre-determined predjudice. This particular parcel was uniquely better suited even though all parcels are allowed to have towers, as you know, this site is being used for a recreational/commercial purpose. It is some what remote and as you stated the bottom line is what the interest is , it is not visible from any area in town for all practical purposes. We all looked, I saw it from the active gravel pit beside it and that was the only place I saw it from. If you saw it from an individual residential building, I did not see that, but that is certainly possible.

K. Delaney – The number that we had researched in the area of the Robert's Knoll Campground because of the size of the properties and the height, and the terrain there was three.

T. Kinnon- At the time that the original application was withdrawn, actually after the original application was withdrawn and the new application was submitted for the new zoning ordinance, were any other sites approached at that point?

K. Delaney – We approached in the initial search the Alice True property and at the time she thought she might be willing to sell but it was off in the future. We re-approached her after we withdrew that application and we negotiated with her to see if she was still interested.

T. Kinnon – So there was only one that you revisited?

K. Delaney – Correct.

T. Kinnon – We have no other questions at this point in time. I would like to open it up to public input unless you have something else you would like to say prior to that. At this point I would like to open the meeting up to public input and we will start with anyone that may be in favor of this particular tower. We are talking bout the tower on Wolfeboro Highway at Robert's Knoll Campground and I would ask that you be specific to this one site at this point. We will get into the other site later. Is there anyone who would like to speak in favor of this application?

Marcella Perry – I would like to speak as a citizen and not as a board member. When the ordinance was written the Planning board spent a lot of time writing this and trying to get this on the March ballot so that we could have more opportunities all over town and not just the three areas that were allowed under the old ordinance. However, I know they spent a lot of time and research in looking at this ordinance, but I would like to know what the criteria or the technical support or the scientific data that they collected to use to determine this 10' height above the tree line. I think it is important, is it reasonable? I know it is part of the zoning ordinance, but is it reasonable using scientific data or what did they use, and I know they are not here to answer that question but I think it is something that has to be asked.

T. Kinnon – I do recall Mr. Hoopes said he got that from another Zoning Ordinance that he had read and I don't believe there was any scientific data to back that up. But that is the only thing that I have heard that was made part of the record.

Hobart Livingston – I would like anyone in this room to tell me how many telephones poles are on their street. You talk about eyesores and visual conflict, you talk about modern technology, cell phones are here, mine just worked. I would like it to work at my house. Let's go guys.

Sylvia Leggett – I am one of the owners of Robert's Knoll Campground, the proposed location for the cell tower. Just speaking as a resident of Alton and also a person who has a tourist related business in town, and hopefully our town is tourist friendly and I think one way we can be is to provide cell phone service to the people who are traveling to out community and through our community and I think the most visual impact for this tower takes place right within my facility and I spent a lot of time driving around too when the balloons were floating out there and I really do feel that this location has minimal visual impact on the town and would provide a great service for residence and for tourists coming to the Lakes Region.

T. Kinnon – Is there anyone else that would like to speak in favor of this application. Seeing none is there anyone that would like to speak in opposition to this application?

Charles Westin – I have several questions and comments. One comment is that the ordinance, I was on the committee that recommended it to the Planning Board and it was based on the Amherst ordinance which has gone through legal court cases and they have been upheld and I think Amherst has the same 10' height with an option for another 10' if it is shown adequately, which is a maximum of 20' and I believe that has been proven through the courts. Another thing I am concerned with is I believe the applicant said they have authorization from FAA not to have a strobe light on the tower should it be granted at the 110' height. If that is so I think it belongs to be in the hands of the board before they make a decision. Secondly, I would also like to know that if they have that, do they also have one saying that the insurance company will not require them to have a strobe light, because there is one tower that has a strobe light in town and I understand it was done by the insurance company and not by the FAA. Again, I am not certain of those facts, but that is the information that I am aware of.

T. Kinnon – First, there is a letter from the FAA that they do not require any type of hazardous beacon on this tower and thank you because you reminded me about a question I had for them about and that was with the insurance company. We will allow the applicant to rebut that.

C. Westin – That is one thing the people in the town and surrounding residence, I am certain would be very concerned with and apparently the towers work in other towns and don't seem to have a problem with the 10' above the high feet. If there are only three trees of concern and they are on the property the resident has because they are 106', maybe since they are leasing the property they would consider cutting down those trees to come within the average of the 55' or 65' of height they are talking about. They mentioned that the average canopy was 55', then that means the tower would be 65' at 10' above it and if those several tall trees that are on the property were cut down than there shouldn't be a problem.

David Slade – I just want to make one quick point and that is specifically in regard to the notion that the ordinance is technically flawed because of the 10' limit. The comment in particular is that as Mr. Duval said earlier, he has written and re-written on the subject, what he didn't mention was in the past what he has written on that he actually wrote in favor of 10' being sufficient. He submitted a memorandum on January 29th in which he was trying to attack the 10' limit and in several places in that memorandum in fact acknowledged that 10' was sufficient and the problem was then you couldn't have vertical co-location, which is what his client wanted to have. The other thing I thought I should draw to the board attention is that one of the other town's that does have the 10' limit is right next door and it is Wolfeboro and as I have submitted for the record, one of the co-applicant's here, RCC, it's self applied with I believe and affiliate of ICE but I am not sure about that. A year ago I think Mr. Cote said once a year ago or so he had applied in Wolfeboro and been ultimately denied for a tall tower and then RCC anyways was rejected on that tall tower. Then just a month or so ago they came back under Wolfeboro's ordinance that has a10' limit and applied for a new tower by itself and was ammeanble to applying to the 10' limit. In fact I have a letter from an attorney friend of mine in Wolfeboro, George Walker, and I have also sent to you the minutes of this meeting in which he says "the minutes reflects RCC asked for a 92' tower but their spokesman indicated that they would be satisfied with an 80' tower if the ZBA would not approve a higher one. The 82' tower would be the 10' above the measured average tree canopy, the limit under Wolfeboro's ordinance if a special exception was granted.. The ZBA denied the higher tower but granted a special exception to construct a tower 10' above the tree canopy". RCC is now in fact constructing that tower at Camp Birch Mont. Why if it is technically impossible to do something within 10' above the average tree

canopy, one of these co-applicant's doing just that. I have a lot of suggestions as to why that might be the case but I will hold that for the other application.

Russ Wilson – All of the evidence that they point to that the 10' above the average tree canopy will not work is theoretical. In actuality we have a case where a tower is being erected 10' above the average tree canopy and in real life it is going to work. Their evidence is theoretical and our evidence is factual.

T. Kinnon – Is there anyone else that would like to speak in opposition, seeing none I will close public input at this point and ask the applicant to rebut.

D. Cote – To the FAA issue, we have blanket insurance that covers hundreds of towers not individually. It is a liability policy. This board as an order of conditions, if they are concerned about that, and it has never been an issue, we have never been requested to do anything by the insurance company related to the safety other than the standard OSHA safety. You can have a condition as typical to say that it will not be lit unless required by governmental authority such as the FAA. That would eliminate any insurance company issue.

E. Duval – I would like Ken Kozyra from KJK Wireless to speak with regards to the Amherst case.

Ken Kozyra – Mr. Chairman and members of the board, I am the principal of KJK Wireless. My company performs consulting services for many of the major carriers throughout the New England area. This evening I am here for the second case to represent US Cellular but I also work closely with the folks at Industrial Communications and in fact my 10 years in the business I have done several hundred of these towers in front boards like yourself, including the Town of Amherst, where I have been involved in four different facilities. This ordinance is not the Amherst Ordinance, it has nothing with that ordinance. That ordinance allows facilities to be erected 20' over the average tree canopy and calculated completely different than this ordinance and gives the Planning Board the ability to waive that and to give the applicant 40' over that average tree canopy. This ordinance is more a kin to an ordinance that is in existence to the City of Franklin, New Hampshire. Recently USCOC (US Cellular) has twice litigated against the City of Franklin and twice the federal court has ruled that that ordinance and the actions of the Planning Board and Zoning Board there did not stand in our application. I don't want you to be misled that this is an ordinance that has withheld any kind of federal scrutiny. Each ordinance is individual and to represent that it would is a misnomer. I can't tell you that it would or wouldn't, but in all of the ordinances that I have reviewed, this ordinance is fatally flawed, not just from the stand point of the 10' limit, every single site is different whether it be a site in Wolfeboro, Alton, Amherst, and Franklin. What would work on a hill top in Wolfeboro may not work on a hill top in Alton just because the topography, the existing cell towers in the area, the existing road ways, every single site is considered differently. So don assume just because one thing works in Alton that it works in Wolfeboro or vise versa. US Cellular is on 170' tower in Wolfeboro and we have been since 1993. That is our only existing facility there. We are also on Prospect Mountain here. In our situation 120' tower at the second application works for us. This current facility that is in front of you is not something that works for our technology at this time but it maybe in the future. I wanted to make it clear to you folks that anyone representing that this ordinance is modeled after Amherst or that it doesn't have difficulty with the way that it is written is not explaining it to you correctly. As I have mentioned, I have read hundreds if not thousands of these and each of them have its pros and cons.

E. Duval – I would further like to clarify reference to the memo written in January. In fact it is stated 10', but 10' above the trees, not 10' above the average tree canopy. I would remind the board that the towns own expert Mark Hutchins has stated that we need 120' or confirmed and stated.

T. Kinnon – Any other questions from the board.

T. Kinnon – At one point in time there was a discussion on camoflauge. Would you still be willing to camoflauge this particular one?

D. Cote – I think we discussed a model pine, if the board feels that it is preferred we would ascend to that.

T. Kinnon – At this point I will close public input ant begin deliberations.

T. Kinnon – Do you want to have a discussion before we go through the different points.

T. Morgan – It is not within the purview of this board to decide whether the ordinance is fatally flawed or not fatally flawed. It is an ordinance that was passed by ¾ of the voters of this town a year ago and it is the law of our town until somebody other than us decides that it is fatally flawed. I don't think we can proceed on that basis and therefore we have an ordinance that imposes upon us a 10' above average tree canopy and we would have to grant a variance from that. I think the Planning Board in crafting that ordinance was trying to balance between the standard of living in this town and that the towns people have expressed in the most recent master Plan and also in the survey that was conducted of the town a year or so ago. The balance there is one between the rural nature of our community and the view sheds which are important to all of us and the cellular service that people have spoken about this evening in which the Chief of the Fire Department talked in favor of it a few hearings ago. I think in this instance we are asked to decide between those two competing values that is the view shed issue and the rural nature of the town and the application by a cell phone provider for service to the community.

T. Kinnon – I agree I think the zoning ordinance is trying to balance the need for personal wireless communication facilities and to maintain the view sheds of this town. My personal opinion of this particular case is that this monopole achieves that goal even at the height requested. It does not in my opinion substantially affect the view sheds. It impacts it very minimally and I think with a camoflauge monopole it would be even less intrusive. I think that this particular site and particular location does work even at the height requested.

D. Schaeffner – I think that if it is camoflauged correctly, driving around being at the balloon test it became more aware of things sticking out of the view shed. There are some roge trees out there that are way over the canopy and if it looked like a pine tree this site is well suited for a tower.

S. Hurst – I agree with Tim we have to take a look at what the ordinance is and what the town people desire. There is not a whole lot of room for us outside of that issue.

Public Interest:

T. Morgan – I find that the variance will not be contrary to the public interest. The public interest in this particular instance at the Wolfeboro Highway site is to provide cellular coverage over a gap along Route 28 and I think this helps in that regard and so fulfills the public need for cellular service.

T. Kinnon- I agree the variance will not be contrary to the public interest in this particular case because it does maintain the spirit of the ordinance, which is to have personal wireless communication facilities with minimal view shed impact.

S. Hurst – I also agree it will not be contrary to the public interest. The view shed is minimal or interfered with especially if we put a tree style tower up.

D. Schaeffner – I agree.

Spirit of the Ordinance:
T. Kinnon – The request is in harmony with the spirit of the Zoning Ordinance, the intent of the Master Plan and with the convenience, health, safety and character of the district within which it is proposed. Again, the tower where it is located has a very minimal impact on the view shed and it is definitely for the convenience, health and safety of the town to have better personal wireless communication and I do not feel it will detract from the charactered district.

S. Hurst – I also agree.

D. Schaeffner – I agree with that.

T. Morgan – I agree that is important to the convenience, health and safety of the people of Alton and I think the Fore Chief brought that to our attention.

Substantial Justice:
S. Hurst – By granting the variance, substantial justice will be done. All of the hearing we have been to on this, there has been a lot of safety issues brought up. A cell tower will definitely approve on a lot of things that the fire department wants to do.

D. Schaeffner – I agree.

T. Morgan – I also agree. I think that we find it is in the public interest and that it is a matter of convenience, health and safety of the citizens that substantial justice is done.

T. Kinnon – I agree.

Value of Surrounding Properties:
D. Schaeffner - The request will not diminish the value of the surrounding properties. I feel that of someone is willing to lease 100'x100' area in their own personal property, be it commercial it actually is a commercial/residential area, if it is a trailer park or recreational area, I don't think you could really diminish the value of a gravel pit which I think neighbors add or the view shed from the gravel pit. I don't think this would de-value any properties around the area.

T. Morgan – I agree.

T. Kinnon – I agree. We haven't heard any evidence that the surrounding values would be diminished in this particular case.

S. Hurst – I agree also.

Hardship – Boccia:
T. Morgan – I think this as an area variance is subject to the hardship criteria of the Boccia case and an area variance is clearly needed to accomplish what the applicant has applied for here. It is a variance of the height clearly and a variance is needed from the ordinance and although the evidence is not convincing in this instance, I think it is probably not feasible to find another way to accomplish what the applicant has in this particular instance.

T. Kinnon- I agree.

S. Hurst – I agree also.

D. Schaeffner – I agree.

T. Kinnon – Based on the above analysis, special conditions do exist such that the literal enforcement of the Zoning Ordinance results in unnecessary hardship.

Motion made by D. Schaeffner to approve Case #Z05-32, seconded by S. Hurst. Motion passed with all in favor.

T. Kinnon – I would like to take a 10 minute recess at this point.

T. Kinnon – I would like to call the meeting back to order. I would like to begin with making an amendment to the motion we made for Case #Z05-32. We had discussed during the hearing process about camoflauge and no strobe and we just needed to add that to the motion.

D. Schaeffner moved to amend the motion for Case #Z05-32 as stated by Tim to add the camoflauge stipulation and no flasher unless required by a federal government agency, seconded by S. Hurst. Motion passed with all in favor.

Case#ZO5-34 Map14 Lot 21 Area Variance
Industrial Communications & Electronics 486 East Side Dr. (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 the November 2, 2006 hearing.

E. Duval – I think what we would like to do is to start of with this application as you know is an application for an area variance for 120' monopole located on East Side Drive. I think it is best for us to start off with K. Delaney giving us a history with regards to the site investigation efforts that went into this facility.

K. Delaney – We did propagation coverage maps to see where the gap of coverage was in the area. We identified the existing towers, which was the Prospect Mountain site and at the time it wasn't there but now there is the Old Wolfeboro Road tower. We ran propagation studies and saw that there was a sufficient gap in coverage along 28, 28A and areas of Route 11. We identified a search ring area where a site would be needed to fill in this gap of coverage and we contacted 9 different raw land property owners. Several of them were interested, but because of the coverage and the terrain of the area there sites did not work and if you would like I could go through each one individually like I have in the past on an individual site for site basis. If you have any specific questions on any of the sites I would be happy to go through it with you but I know you have heard it before so I won't go through each one individually. Of the 9 sites the one property on East Side Drive, the property that we have the application before you, that provided the coverage that was needed. We also researched existing structures in the area, which included the Town Hall, the two churches in town here, the Catholic Church on Route 28 as well as the East Alton Meeting House. We sent letters to the property owners to see if they had any interest. If they did had interest the coverage still would not have worked from those areas but we had no interest from any of those existing structures so we moved on from there. That was a total of 14 sites we investigated in the area.

D. Cote – We have been at this on for a long time so I need to search back into my memory of all of the things we have presented to the board over the last year. As Kevin stated, we looked at all alternative sites that would meet the objective to cover the gap area and what was available. There are other sites that are similar in nature, however they were not available, the trailer park adjacent abutting the property we were not able to come to any type of term with the owner, he has other future plans. Mr. Slade who is behind us and we have heard from him in the past, we approach his mother when she owned the property and she was turning the property over to her son and there was no interest in making that available. It should be pointed out though that all of the properties along this area that had potential would be very similar as to the view and the coverage, unlike some areas that are not visible from any particular area. The objective area we are trying to cover, Route 28, 28A, & 11, is situated in a topographical area that literally you will see it from one side or the other. We should have pointed out in the very beginning of this that we actually looked at the other side of Alton Bay, as well. It would simply be a matter of you would look from the east side and see the tower or in this case you look from the west side and you see the tower. There is simply no place we can put that tower that is not on a ridge line or actually it is not on a ridge line, I shouldn't say that, isn't on a sloping area that some body is going to be able to see that. We did however buy 28-acres of property, which is substantial. We didn't go out and find the smallest piece of parcel we could find. By doing so, we're assuring that a very substantial amount of property is not going to be cut down, is not going to be developed into a subdivision and is going to allow a substantial buffer for that view shed. I think that is significant. We are willing to do that and we are willing to invest a substantial amount of money because we are aware this board has its concerns and the towns people has its concerns. The height, there was a comment made earlier "if we cut the trees back you can drop the height", that's true, you could, but the portion of the tower that is visible is still going to be visible. It is simple going to be visible here or visible a little lower. The distance above the trees is still necessary. If you cut all of the trees down the distance above the trees is till necessary. Beyond that point and the one that shouldn't be lost, Kevin and I talked about trying to think of a way that we could explain it to you is that even if the trees on our property were cut back, the adjacent properties, those trees are still there, this signal that has to travel through those. One of the problems with radio frequency signaling and there are others that could probably explain it better than I, is that it has to penetrate through that dense barrier. If it is coming down on an angle it has a better chance to reach the ground, reach the recipient that wants to make the call. If it has to penetrate on a horizontal plan through literally miles of dense woods it isn't going to get there. I know when we were doing the balloon test, I brought with us a very expensive two way radios that are made to talk between each other with no tower, and they wouldn't work from

site to site and I would hope they would. The density of the growth in this area is such that a radio that is supposed to be able to travel for 5-miles, couldn't make it the short distance. The density of trees is of concern. Mark Hutchins clearly represented that. He gave an objective review. Quite honestly when the town hires an expert they usually do. I sit here a little concerned and I am not to sure of what the response is going to be. I think his response was fair and honest. It is not always what the residents of the town wish to hear. However, it is factual and to his credit he stood and gave a factual report. 120' is not a tall tower, it truly isn't. We see them, now that we are in front of this board I am sure the board has looked around and started to notice towers. Most of them are 180'-190' even 500'-600' there are a lot of tall towers around. We don't go forward attempting to get a height simply for the opportunity to have a vertical real estate that is no value and that isn't necessary. It is an expense that is substantial to us on our part to build towers. So, when we ask the board we try to make a balance between what we need and what the boards charge is to try and minimize the impact. Mark Hutchins stated that 120', may not be enough and it may not be and that will be a challenge for another day. Before you is an application for two carriers that also need a microwave link, which is a 30' spread. If it is a mono-pine that goes up to 36' and that has to be at least starting 10' above the canopy. I realize the concerns and we have all heard them from the town. However, there is a need that we have to balance through this. I ask the board to consider the facts and understand that despite the emotions of the application, the facts stand for themselves.

E. Duval – I would perhaps like to speak more specifically with regards to what Mark Hutchins said with regards to the East Side Drive site and perhaps just to the issue of height. I thought we would start of just as a reminder to us and to you as to the significant amount of efforts we have made at locating the different sites and the efforts that went into them and why with regards to our obligation or the carriers obligation to close a significant gap in coverage. A lot of effort went into co-location. As you know and I need not remind us the ordinance permits us to locate any place except for two, Mount Major and 50' I believe from the shoreline. The issue before us is the variance for the height and the application is for 120' and as we know the ordinance says 10' above the average tree canopy. I think the average tree canopy at the East Side Drive was 61'.

T. Kinnon – I will try not to interrupt you, but I have something from you for East Side Drive and it shows your average tree canopy on this shows 80'.

D. Cote – I believe we measured that in a manner that we thought was accurate. The Forester than came back and using a different criteria came out with a slightly less height. We were more concerned about the trees.

E. Duval – The Town Forester measured the average tree canopy per the requirements in the ordinance, which was different than what we would have measured and I think even the report specifically states that East Side Drive, again, the average Tree canopy is 61' but 12 out of the 24 trees that were measured by the Town Forester were taller than the 61' with the tallest being 87'. I think that if we look back to Mark Hutchins testimony on September 12th, where he said for the most part the general rule is that we need to be above the trees by 15' to 20' as a minimum. He concluded at that hearing that the tower in order to work that the monopole needed to be approximately 120'. He went through what I thought was a pretty detailed analysis in his report and testimony as far as the justification for that. Again, at first he discussed the tree height, again the rule of thumb is wireless equipment needed to be 15' to 20' above the tallest trees. He stated RCC's microwave dish at 95'. Mr. Hutchins stated that the centerline of the microwave dish should be mounted between 90'-95', which would allow it to properly clear the high trees in the area and account for future tree growth. I quote from him "I guess the main point is we are quite close on what we think the microwave should be, somewhere about 90'-95'". He then talked about 10'-12' vertical spacing between the equipment and confirmed that there needs to be at least

10' of vertical space between the equipment and up to 12' in spacing if it would be a camouflaged facility like a mono-pine. He stated that US Cellular antenna ray at 105'. He said probably even the microwave we should have at least 10' to the next centerline, which would put us at 105' and that would be for US Cellular and RCC antenna ray at 115'. The very top for RCC would be 115', and again I quote Mr. Hutchins. He also said the tower height would need to be 120' and noting that the tower itself would need to be 4'-5' higher than the center line of the RCC antenna line. He says now the antennas they are going to be somewhere in the 3'-6' maybe even the 8' range so probably 4'-5' above that for overall height of the tower since RCC center line would be 115' the tower would be 120'. I think that again referring back to the memorandum that we submitted back at the last hearing, I think we did a very detailed and very factual analysis, both with the facts as we have tried to grasp from the last year of reports and studies and from t he report that was put together by the towns own expert and that we satisfy each and everyone of those requirements. I think it is important to know based upon Mr. Hutchins testimony in his report, it is important for us to remember, recognize that we need to be above the tallest tree and that is why we are here. We need to be above that tallest tree. I think that we have demonstrated again and again through the propagation maps and the site investigation as to why that is and why that is has been confirmed by the town's own expert. I guess I would say lastly in regards to the aesthetics, based upon that no matter where it is, the tower is located, it will need to be above the trees and it will be seen no matter where it is.

K. Kozyra – I could go on for hours, but in the interest of time, I want to make it clear that US Cellular was the first carrier to ever come to Alton in 1998. We located antennas up on the Prospect Mountain Facility and we have been back multiple times to modify that and to upgrade the equipment. It is extremely important to us as our customer base grows in the Lakes Region that we have reliable service not only for the people who live in a town like Alton but also for the people who may work here or travel through here. Our mandate corporately is to provide what we call in-building coverage to all of our customers and that would give them the opportunity to use their cell phone whether it be for a telephone call, whether it be a blackberry device to check their e-mail, or to go on the internet, anywhere they need to be, and that includes in their residence, place of work, whether they be on the road major highway, or small cul-de-sac. We have a significant gap in coverage from the area north of the downtown area where we sit all the way up and almost to the Wolfeboro border. The only facility that can solve that gap for us is the facility proposed tonight. If the existing National Grid tower had been able to solve that I would not be here this evening, we would have already located our antennas on that existing tower. If the previous tower had been able to fill that coverage gap, we would have been a co-applicant on that as well and not a co-applicant here. The facts of the matter are as Mr. Duval states, someone somewhere will be able to see this facility. We cannot make them invisible. No ordinance under federal law can require that they be invisible. I understand you folks have a difficult job in front of you. I would not want to be sitting where you are. I like to be thankful that I am sitting on this side and just need to present the evidence I don't have to make the decision. I think it is important for you folks to realize that not only do you have to do what is best for the folks who live in Alton and the people who come to Alton to visit, but you also have to understand you have to go by your ordinance, the state statutes and the federal law that oversees everything that we do in the telecommunications industry. I don't expect you folks to be experts at that and that's why we do what we do. It is important for you to know when we have a significant gap in coverage we have to be allowed to fill that gap. In this instance the only way to fill that gap is with a 120' tower that is proposed by Industrial Communications. When US Cellular instructed me to come look for a facility in Alton in late 2005, prior to working with the Industrial Communications people, I actually worked on the other side of the bay as well as some of the topography is higher and we believe we could provide better coverage to the people of Alton from the opposite side. I was unable to locate a facility and rather coming into you folks and proposing my own facility on the right side of the bay after reviewing both the draft ordinance and the existing ordinance, I saw that the

municipality overwhelmingly encourage co-location. So rather than proposing my own facility of 150', 120'. Or 110' in height, I spoke to the folks at Industrial Communications and we entered into a lease agreement for a space on this proposed tower envisioning that the municipality would be in favor of instead of us erecting our own tower somewhere in the community. I think we all win when we maximize the use of these existing facilities while the five of us on this side of the table may consider them beautiful, not everyone does, and I accept everyone else having an opinion, but I think it is important for you folks to know that we have to provide our level of coverage to our customers. We are federally mandated by the FCC to do that and this is the only feasible way in Alton for US Cellular to close that coverage gap. If there were any alternatives we would have proposed them.

E. Duval – I would like to say or just add a little bit in regards to the telecommunications act and I know as part of our memorandum that I continually reference tonight, we did include in that a section with regards to analysis under the TCA and also in one point in time, many months ago, we had provided a significant memorandum outlining the telecommunications act and the local cases. I would like to remind this board that even if this board finds that we have not met our burden under the New Hampshire variance law that a variance should be granted to avoid a prohibition of services. I think that we have as Mr. Kozyra has said we have submitted a significant amount of evidence over the past year with regards to the site investigation efforts and the time and effort that has gone into locating these sites and the purpose of these sites in regards to the unique ability to close those significant gaps.

T. Kinnon – Would any board member like to

T. Morgan – I don't have any questions Mr. Chairman.

S. Hurst – From what I can gather the height of this tower that you are requiring on this property is being requested because you want to put two companies on it, is that my understanding, you need the additional height to accommodate two cell tower companies?

D. Cote – That is correct, you have two applicant's before you that need that space.

S. Hurst – Towers side by side wouldn't be feasible?

D. Cote – We looked at that from a technical standpoint. There are numerous technical issues with towers adjacent to each other. One is that the signals bounce into each other and interfere with the coverage the tower itself as well as the antennas physically block the other signals so it is not practical to do that.

E. Duval – I believe that we submitted an affidavit and a study from Jacob Warner if RCC addressing specifically that issue and it is somewhere in one of these binders and we can find it and reference it for you.

S. Hurst – I am relatively new to the board and I haven't had the pleasure of meeting with you for a year, so I am trying to educate myself here. The other question I have is, I have another cell phone, a brand that you guys are not representing, you may have heard of them, Verizon, but I have no service at my house, so what you are telling me by federal law they are required to make sure I can use my phone at my house?

K. Kozyra – They are, but the reality of it is that each of the providers, RCC, US Cellular and our competitors, each have their budgetary standards they have to meet and they also have a ranking of where various needs lie

and not all of them focus on the same areas at the same time. We frequently run into our competitors in other communities, but there are many communities especially in northern New Hampshire where RCC and US Cellular are "the only game in town" because the national carriers like Verizon, T-Mobil, Sprint, and Cingular have decided they would rather focus on the more heavily traveled highways like Interstate 93 or on the larger cities like Concord, Manchester, and Nashua. The focus of US Cellular, I can't speak for RCC, is to provide our coverage to areas. We are a regional carrier. We do not have licenses in the larger states like Massachusettes and Connecticut, only Maine, New Hampshire, and Vermont, in New England and our focus is to provide our coverage in the areas that many of our larger competitors do not. We also have facilities in Manchester, Concord, and Nashua, but we have facilities as far north as Lancaster, New Hampshire and in many rural communities surrounding where you are today that our competitors do not.

S. Hurst – How many cell phone companies are there, roughly do you know?

K. Kozyra – There are currently six active major providers within the State of New Hampshire, those being US Cellular, RCC, Verizon, Sprint which just merged with Nextel, T-Mobil, and with Cingular. The federal government in its infinite wisdom just auctioned off major portions of an additional spectrum, which will mean in the next several years there will be several more competitors coming into this market because there are other regional carriers that operate in other parts of the country that currently don't operate here and the broad spectrum want to come this way. You also have other types of wireless providers, some that provide wireless internet, others that provide wireless video services you may have seen some of the carriers advertise that you can download shows or watch clips of television. There are many carriers that have licenses specifically just to do that and my company represents several of those type of companies in other markets. It is just a matter of time before they come to other areas. Will they come to Alton next year, I can't answer that question, but many of our competitors are in markets where you have other than just the cell phone carriers you have three/four other types of companies locating on towers of this type. It is one of those things, build it and they will come. Many of the carriers prefer not to build their own facilities and if they come to a community like Alton and find that there are existing towers to locate on, they would choose a town like Alton over another town where they may have to zone and construct a new tower. For several reasons the major on e being the time to market. If they can co-locate on an existing tower they can get to market almost immediately. The second one being cost, as you know Zoning components can last a year, two years, some towers I have done have lasted five years. The cost of building a new tower runs in hundreds of thousands of dollars. Many carriers don't take that cost lightly, so they would prefer to locate on an existing tower where all they have to do is lease a small amount of space and spend significantly less than that to put their equipment on the tower. I think if you look at this in the long run, I think approving this facility will just foster further competition and more choice for the citizens of Alton and the folks who travel into your community. I hope that answered your question.

S. Hurst – yes, it douse to a certain degree. I mean, excuse me I am new and I am trying to educate myself so I can make a good decision here. Your US Cellular tower if you're the only show in town and I am making a call from my phone, does that go through your tower or is it a roaming type situation?

K. Kozyra – In many rural communities we have agreements with Verizon where they don't have facilities to roam on our network and vise-versa for example, if you are a US Cellular customer and you are traveling to Boston, once you leave New Hampshire you would roam on the Verizon network. We don't have licenses down there but we have agreements with Verizon that our customers can work on their equipment, similar to many of the rural communities up north where Verizon has not built facilities, they roam on out network. In an

area like this where they have existing licenses, typically there would not be any roaming agreement in place because they will eventually building this area out.

S, Hurst – On a roaming situation, does that satisfy the federal law as far as coverage?

K. Kozyra – No, not particularly. It is a stop-gap effort that was done by the carriers to be able to keep their customers happy until they could afford to build out their own network. What happens is when US Cellular customers roam on a Verizon network you get a thing in your bill that says no roaming, no long distance, US Cellular is still paying for that roaming so it behooves the carrier to build out their own network because of they are paying another carrier thousands of dollars every month for you to roam on their competitors network, they are not making money. They are servicing you and making you happy and keeping you a customer until they can afford to build out that area. It doesn't satisfy the federal mandate nor does it satisfy the internal bean counters to see how much money they are paying out to their competitors.

S. Hurst – Is that pretty much spelled out by the federal law that it does not satisfy.

K. Kozyra – It is not spelled out verbatim in the telecommunications act of 1996. It has been obviously portioned to several cases that have become before the federal courts and they have ruled in those instances that roaming does not satisfy that part of the TCA.

D. Cote – (tape switch) This particular one envisioned providing better service, new technology and concepts that were not yet even dreamed of. Certainly if you look back that has occurred. If they took away the competition we would be back to the dial-up phone. They maybe some for that, but the advancements and advantages to the customer and to the safety of our people is certainly unquestioned. As said, each carrier has the right by virtue of purchasing those licenses for millions of dollars and some case billions, to build out its own network. It is not cost effective to use somebody else's network it is no different than any other business, you have to pay that price. Eventually it will be here and I think, from our experience in the business as a facilitator of co-location, if you will, when they see the opportunity is there they will come. When they see a problem they will wait to see if we will solve it for them, and I guess in a lot of ways that is what we do. One carrier does not satisfy all. They all have the right to put their system in place.

S. Hurst – That answers where I was going with this. Basically is why could n't we have one cell company on this tower in accommodating everybody.

D. Cote – I'm sure US Cellular would live it because their roaming charges would be phenomenal, I think it is around $1.00/ minute to $1.50/minute. What that basically does is eliminate competition. It creates monopolies and that is what they try to avoid in the federal act.

K. Kozyra – What transpired in 1996 originally there were only two cellular licenses in each geographical area and in 1996 the federal government when they auctioned off additional spectrum to the folks like Sprint and Cingular so that they could compete with the Verizon's and US Cellular's of the world in areas that with only two carriers there was not as much competition and they envisioned as Mr. Cote mentioned a lot of competition to drive the prices down. If any of you have had a cell phone for many years you will remember that the bills were quite enormous in the beginning where you had to pay several dollars a minute to talk on the phone. Now you buy a bucket of minutes for $50.00 and you can talk for what seems like a lifetime. It has worked and it has brought the prices down and in markets where all of the license carriers are competing the prices go down even

further, so competition is a good thing and the federal government in this instance was actually correct in what they implemented.

T. Kinnon- I would like to address again this diagram that you submitted some time ago. It shows a 120' tower and it show 5 arrays on it. The first array is right at the tree line at 80', if you use the average canopy of 59' that would put it well above the 59', so you are showing 5 arrays on this antenna, so you are anticipating four future companies?

D. Cote – We have learned the hard way in a few instances were we try to anticipate what the future demand will be and we under estimated. So what we have been doing for the last 10 years that I have been involved with the company is we try to put together a structure that is going to accommodate structurally at least maybe physically we can't find a location but structurally will accommodate any needs that may come forward. You can see in certain areas where you will see, driving up here today I saw three towers within ¼ mile of each other because someone built one just enough for US Cellular. The carriers used to love to do this, carriers don't like competition, that is their business so let's build a tower that is just enough for me to use, so when the competition comes along they have to go down the street and fight their own battles. The danger for the town is that you would be subjected to potentially six tower applications right in the same immediate area because they have to cover the same location. You could have six spread out but not side by side. I think from any stand-point that is not desirable. We build it strong enough to accommodate at least structurally anything that anticipate may come down the line.

S. Hurst –this particular tower, how many companies can you accommodate down the road?

D. Cote – I believe as stated it is capable of handling six major carriers and typically it is over built enough so if public safety needed to use it (minor carriers) they would still go on the tower. From aesthetic point of view you can't tell the difference, it is a matter of how heavy we build the foundation, it is a matter of how thick the steel is, but the height doesn't change.

T. Kinnon – What if you were to reduce that down to three carriers? You are still allowing competition in but you are actually reducing the height really significantly for a tower does have an impact on the view shed.

K. Kozyra – US Cellular builds their own towers as well and I get this question quite a bit and we may propose a tower that is structurally able to hold six carriers in the long run, technologically it cannot actually facilitate that many as what you have probably determined looking at, 120' tower looking down the bottom guy is at 60'. That is not going to work. I will give you an example. In New Hampton I looking, a company called BSA out of Florida owns a fake tree on the top of a hill by Interstate 93, I believe they built it 90' and they built it for 6 carriers. It is a beefy tower, well currently the only available height is 50' on that tower, it is in the trees. I had an alternative of Industrial Communications across the highway on 180' self supporting tower and I was able to place US Cellular on the top of that 180' tower because there was no one else on it and it had structural capacity to hold multiple carriers. The SBA tower had the ability to hold more carriers but they would all be in the trees and would not be able to propagate a signal, so they over built the tower but the reality of it is the trees, Mother Nature, didn't allow them to place anyone else on it so they have four carriers on a 90' tower but that is all they could do without taking it down and building a taller one.

T. Kinnon – But you said they have four carriers on a 90' tower.

K. Kozyra – Yes they are on a significant elevation, it is almost like a mountain top where the trees had dropped away from the side of the tower so as you can envision a 90' tower, the tree line was in between 50'-60' so the lowest carrier was at 60' and just poking over the top. I would bet that within 3-5 years he will move across the street to the Industrial Communications tower because everything is in front of his antenna's. I didn't see the cost effectiveness of that so I recommended US Cellular go across the street and they did. It is a trade off that you do. Typically I design a tower for much more than what US Cellular would need anticipating they will need additional equipment in the future and our competitors will come along and want to go on it. Do we always have the ability once we locate several on there to put everything I had envisioned on it? No and that is just what I see today in 2006, I can't tell what the technology is going require in 2010 and what is transpired is that as more and more people use their phones, we are putting more and more antennas on towers so that the traditional carrier, for example, Verizon has leased from us space for 15 antennas on their rad center and put in 18 runs of co-axe and a monopole like this it fills it up pretty quick so it makes it that the next guy down maybe can only put 3 antennas, and maybe his technology requires him to put 6, so he can't use that space either. There are many, many subtle nuances that I could go into in situations where towers have been built to structurally hold equipment but the reality is that they just can't.

T. Kinnon – you don't see the technology going in the other direction now?

K. Kozyra – No, unfortunately what happens and this is something we have done in many of the cities and I am sure the other carriers do as well. Rather than just building coverage sites like this where we have coverage gaps, we are now building capacity sites, which means for example if we had a capacity issue that would be too many people on the network at one time using their phones and each cell site can handle a finite number of phone calls, once it reaches its maximum you as the user can't use your phone anymore so you dial the number expecting to call me and you get a fast busy signal or it would ring and you drop your call. If we had to build a capacity site in Alton, in between this site, if it were approved, and Prospect Mountain, we would probably have to build something half way in between. What we have found in many communities, for example the city of Keene, we started out with one site, we now have four and that is only got a population of 22,000 but we have four sites all within 1 ½ miles of each other because there are so many users on our network that we need additional capacity and the only way for us to do it is to build more towers. In Manchester alone we have on downtown Elm Street we have three sites in the space of two miles for the same reason, so many people are using their phone at once.

E. Duval – I would like to add or emphasize based on what Mr. Kozyra said is just to point out again the study that the applicants performed and the study that the towns engineer, Mark Hutchins performed and that is very site specific and specific to this location on regards to height and requirements as they relate to closing the significant gap in coverage. Also, to further answer your question with regards to multiple facilities, there was a memorandum that I had referenced that had been submitted that we were able to locate in the binder dated October 9th from RCC, Jacob Warner.

S. Hurst – I just figured with 28-acres you might be able to make a couple towers work instead of one.

D. Cote – The 28-acres starts at the road and works it way up the hill. The next one would be significantly lower in height geographically and it wouldn't work.

K. Kozyra – Unless you built a taller tower.

T. Kinnon – If there is nothing else we will open it up to the public at this point. Is there anyone that would like to speak in favor of this tower, please step forward.

Hobart Livingston – The logo on the shirt says Sesna, I sell airplanes and I go all over New England. I can sit in my airplane in many places and I can dial my cell phone and stick it under my head set and talk while listening to the airplane and my telephone until I get down to North Hampton and Rye, New Hampshire where they have a very block-headed bunch of people down there that says "NIMBY" and your cell phone doesn't work from Route 1 all the way to the beach. Up and down 7-8 miles in length, it is absolutely idiotic. These people are proposing a tower that will carry potentially several carriers and prevent the building of more towers and it will work. You can get almost all of the major carriers on this proposed tower rather than have each of them come into town and have to build their own. They have the right to do that and they have the right to hold it up to the town and their feet to the flame and say we are going to do that, and one way or another they can win. You have a company that has done a lot of work and a lot of effort to make this tower as practical and un-obtrusive as is reasonably possible, applying to you for a zoning variance to make it work. I hear comments about lights. The FAA lights are red and they blink and they are dim not strobes, if there was one to be needed in that location down there. Yes, I can see the towers from my airplane, should I be offended by this? How about we go back to our rural nature and rip up all of the telephones poles and shut off all of the lights, what a view we would have, sparkling stars, bright moon, full moon in a few more days. I don't think we want to go back to that stuff, the new technology is our cell phones and transmissions that we can use our blackberries and everything else and it requires these towers and they got to be sufficiently tall to do the job or it is just not worth building them, you get 7 towers instead of one.

T. Kinnon – Have you flown out of Alton Bay?

H. Livingston – I have

T. Kinnon – If you were flying out of Alton Bay heading north and took an immediate right after take off, would this tower be in that path?

H. Livingston – Yes, but I would probably hit something else first, since there a lot of other things to hit. Quite frankly the tower would be the least of my concerns. I also understand 120', 200' is when towers become problematical and the FAA gets into the act.

T. Kinnon – Is there anyone else that would like to speak in favor of the towers.

Alden Norman – I oppose granting this variance.

T. Kinnon – Excuse me sir, this was supposed to be in favor of, but to save you some steps, is there anyone else that would like to speak in favor of. Seeing none, if you would like to speak in opposition to it, please go ahead.

A. Norman – There are two points I would like to make. In earlier testimony in one of the hearings that occurred earlier in the year, the applicant or the consultant to the town represented that this tower on Miramichie Hill and the one on Robert's Knoll would not fulfill the coverage gap in and around Alton and the surrounding area. The fact it was stated clearly, I think by Mr. Hutchins and confirmed by the applicant that two towers conceivably would be required on the west side of the lake. I think the record transcript will prove

that to be the case. Your confronted with a variance that is going to set a precedent visa-vie continue of the construction of cell towers. To do the obvious, the applicants all say the same thing "we must have more towers to fulfill the gap coverage". This is just the start of one perhaps several towers that would ensue to serve this area. It was also stated in one of those hearings that these towers would perhaps only serve 50 callers at one time. I don't know the number of cell phone operators in the town but that is a very limited number. So, more towers are on the horizon and you folks have to be cognizant of setting a precedent. We are talking about a tower that per ordinance 603 can go into a residential zone. We have abutters concerns, Mr. Slade has represented his interest and concerns and I have put a petition to the town citing concerns for abutters. The encroachment of these towers on abutters and their property interests. I am also concerned about encroachment of these towers on the lakeshore, Alton's treasure. I just want to impress on you that you are confronted here with a decision that is going to have significant impact visa-vie the future goings on in the cell tower business coming into Alton to satisfy gaps in coverage. The other point I would like to bring up is that earlier in the meeting, you Mr. Kinnon as the Chairman raised the subject of there were 5 criteria in the state variance law. The attorney for the applicant also acknowledged that New Hampshire variance law but perhaps they have not confirmed to all of the elements of the 5 criteria, so for the benefit of the record and the audience and concerned people what in fact are the five criteria and have they been satisfied visa-vie this application for a variance.

T. Kinnon – At the previous case at the end we went through the checklist, which is the criteria for the variance request. Mr. Cote has submitted memorandum outlining his statements for those particular questions. Again, with this case during deliberations we will address each question or criteria .

A. Norman – Will that occur at this public hearing?

T. Kinnon – Yes it will.

David Slade – I am an abutter to the property in question. I would like to ask the board to the favor of sitting at the table if it is ok because I also have an expert witness.

T. Kinnon – That would be fine you just need to use the microphone.

D. Slade – My expert witness is Gerald Albright and he is a licensed appraiser and he is going to testify on my behalf in relation to the diminished value issue. Before that I would like to make if I could a couple of introductory remarks. The first is that I think there is something missing n the applicants request for variance in that there were after all 5 findings of the Planning Board not just one but five. The first one had to do with the height limitation issue but there were four other and if I am not mistaken, the applicant needs a variance from all five adverse findings of the Planning Board.

T. Kinnon – The findings from the Planning Board were more in advisory nature to the ZBA. The applicant is strictly here for a height variance. If the applicant goes before the Planning Board and the Planning Board denies the application based on a finding then they would need a variance from it or they could do an administrative appeal.

D. Slade – Thank you for that clarification but there is one finding in particular which I believe is a matter of law, really does need a specific variance from and that is the second one that stated that the tower applied for at this location would dominate a view shed. That is a specific provision in the code under the heading location. I can't think of any other way to interpret that particular clause, at this location this is not a permitted use. You

cannot have a tower of this sort applied for here at this location because it would dominate a view shed and therefore it cannot be at that location. I am just making that by way of an introductory remark because I think therefore it is wrong as a matter of law for the applicants to be taking the position is all they need is a height or area variance and I also thin they need a use variance, but that is just by way of introduction. I would like now to get into my presentation and what I would like to do is explain to the board why in my view this applicant does not pass any of the five tests it needs for a variance. I would like to walk through quickly each one of them. Of course they need to pass all five so if I can show that they haven't passed any of the five then they should be denied. Then after that I would like to explain why, in my view, and I am a lawyer myself and very familiar with the telecommunications act, there is nothing in that effective prohibition clause that would override your initial variance decision. Therefore, I would first like to talk about the five tests and because I have my expert here I would like to start first with the requirement that a variation cannot be granted if it would diminish the value of abutting properties. I would like to completely describe our property. It is a 50-acre property that abuts at the top and shares the ridgeline of the applicant's property on Miramichie Hill and then looks northward basically and slopes downward to Miramichie Hill Road, and that happens to be one of the locations where the balloon test was observed from. Here for the board are copies of the view from the whole property, this was taken from the bottom part of the property, but it also the same view you would see from the top. The basic point and Mr. Albright will walk you through this right now is that this tower diminishes the value of our property from both sides. At the topside where I have several prime building site locations from which this tower would be located, the security barrier would be 150' away from my property line. I think a very good point was made earlier, this is 28-acres but it just so happens that they are building the tower at the tippity top right next to our property. If they built it down the hill some that might not be such a big problem but they are doing it right at the top within 150' not only our property but, another abutting property. It is clearly visible and damages the view up there and then you go down to the bottom of the property and as you have all seen where I have an existing structure as you will all have seen from the balloon test, at 120' this is a clearly visible monstrosity from our front porch, whereas if it were 70' you wouldn't see it , it would be below the trees and that is an important point. With that introductory remark I would like to pass it over to Mr. Albright now to talk about how in his expert view this tower would damage the value of our property.

Jerry Albright – I am a Certified Residential Appraiser certified in the State of New Hampshire. I operate my own practice called Hawkeye Appraisals in Moultonborough, which is where I also reside. From time to time I also do work for McLean Associates in Gilford on a sub-contracting basis, there is no employee/employer kind of relationship, it is purely on an assignment, contract basis. I appeared to me when I was introduced to this situation that the first element that needed to be established was that there is value to the view, because if there is no value to the view discussion of diminition of that is not relevant. I did walk the property with Mr. Slade and we did have the ticks to prove it. We walked all up and down, we walked on Mr. Slade's side of the stonewall that runs close to where the tower site will be and that is when I took these photographs. I did some more research and I intuitively based on my experience in the area, I was confident that there would be some value to that view, because it is truly an outstanding one and that was confirmed by my investigation of the Town of Alton assessment data. There is actually a 50% premium rolled into the assessment value for the first acre of Mr. Slade's land, so that is again confirmation from the Town of Alton that there is a value to the view. The other aspects that I would like to address are similar to what I already discussed but they had to do with some exhibits that the applicants have offered that were created by another appraiser called Andrew LeMay. Specifically I am looking at one that came up recently and in this communication Mr. LeMay discussed the fact that it is difficult to find historical sales data to support the fact that there is a diminishing of value of properties that are located close to cell towers and he used an example in Moultonborough, literally right down the road from where I live, I have had an opportunity to visit that site. There was actually two sales of new residences

off of Moultonborough Neck Road ~2 miles south of 25, if you can picture that, both of these new residences newly constructed were across the street from an existing cell tower. I went up there and viewed these two sites twice actually in the last couple of days and my conclusions are that there are no view that could be diminished for these two sites. These two properties are on the west side of Moultonborough Neck Road and at that site the terrain from the roadbed slopes reasonably, sharply down to where these houses are located fairly close to Moultonborough Neck Road, which as you know is a fairly busy thorough fair and borders of evergreens have been planted between the homes and the road to effectively block the view of the road and also coincidentally the view of the cell tower that is across the street. Here is a photograph that was meant to explain that and taken from the shoulder of Moultonborough Neck Road and here is one of the houses, which is actually 792 Moultonborough Neck Road that sold last June. This house is literally across the street from a cell tower. If you could see because of this border, I don't believe from the house you could really see the road or the cell tower that is across because of that border. I don't see a view that could have been adversely impacted by the presence of the cell tower across the street. The cell tower itself which is in the east side of Moultonborough Neck Road, is already well camouflaged by some reasonably mature trees, even in the winter season when the leaves are off it is difficult to pick out in the photograph. The reason I bring that up is to refute the assertion that appraiser LeMay has made that there is no diminished value from a cell tower. I don't believe that the examples that he sited are similar enough to Mr. Slade's property that they offer any relevance at all to that particular property. Another point that was raised in Mr. LeMay's submission was that Mr. Slade should be concerned about the impact of the present value, the value of its property as it is today and being a professional appraiser , I really got excited in a negative way when I read that, because one of the basic tenants of professional appraisal practice is this notion of highest and best use. Highest and best use is that use a piece of land can be used for that will generate the highest value. My opinion is that Mr. Slade's property has a highest and best use of being improved for a residential property that would have a commanding view, actually I think better than this of going north and some to the west and some to the east looking up over the lake and up towards the mountains. I just wanted to bring up that point that the assertion that we should be concentrating on the present use of that land is not appropriate and that it should be thought of as the highest and use of that property, which might mean that the development of a very upscale home with that commanding view of the lake. I don't believe those comments were appropriate in Mr. LeMay's submissions.

D. Slade – I would like to mention that I didn't specify earlier that I have submitted for the record two now three opinions, one from Jeyy Albright and two from Mr. McLain, all of them which support my position that this tower would damage the view of our property and the reason is because this property has a view amenity, which is a special feature of it and none of the evidence that has been submitted on behalf of the applicant goes to that particular thing. None of them are site specific, they all talk about general properties and towers and none of the talk about properties with view amenities. I want to be very clear about this because I think there may be arguments on this point that it is not just a question of how high the tower is, it is a question of whether or not there is any tower there at all. Let me put that point another way, that my property is damaged by this tower because of the tower itself, especially at the top of the hill where it is going to be 150' away, but also due to the height of the tower at the bottom of the property, because if the tower is 120', we will see it and if it is 70' we won't see it. It is important this distinction between a use variance and a height variance I think, to keep that in mind. The last point I would like to make on value is that what I am giving you here is substantial evidence for all purposes including the variance as well as the federal law later and the 11th circuit specifically considering the question of whether or not the type of evidence of this sort is substantial evidence. The 11th circuit again is a court of appeals, next to the Supreme Court it is the highest court you can get on federal issues. We have held that substantial evidence standard is a traditional substantial evidence standard used by courts through agency decisions, the village and this case is Michael Leneigh v. the Village of Wellington and I can

give you that case for the record. The village met the standard and it heard objections from residence and a realtor concerning the cell sites negative impact on real estate values. I have provided not only my own view but the testimony of two expert witnesses on this point and more importantly the court noted that the expert testimony contradicting the adverse value impact concerns was provided by a realtor who based his knowledge on condominium sales in a different county, this does not change our conclusion. The residence were worried about the impact of this tower on the golf course in their community, not a different tower or a different location, different community. We provided very site-specific evidence here about our property and there has been nothing put in the record by the applicant's that relates to this property at all. I would like to move on next to the public interest point, which is the second test that needs to be satisfied by the applicants to obtain a variance. The variance cannot be contrary to the public interest, as you well know. The primary purpose of the wireless ordinance is to protect the view sheds as it has been said many times tonight, of Alton Bay, and there is a very good reason for this, tourism is the trade of this town that is the most important and Alton's scenic beauty is critical to that and its property values are critical to that. The fundamental purpose of this ordinance is to protect that beauty and to protect our view sheds and the Planning Board so found in one of its findings that the this ordinance was enacted and is upheld by the Master Plan, Article 11 of which has that precise purpose in mind, and they further found that this tower would dominate a view shed, and therefore is in direct contradiction to that public interest, so I don't see how logically it is at all possible to satisfy that test. The applicant, if you read through their legal analysis, completely ignores that public interest, they talk about wireless services, they talk about safety, of course those are important issues to the towns people, of course those are also public interest, but the whole point of this ordinance is to provide for cellular services consistent with the dominant public interest of protecting the beauty of the town. These applicants are totally ignoring that issues with this tower. The third test that they have to satisfy is that this tower, if they are not given this variance than they will suffer an unnecessary hardship. Now again, it is important to draw a distinction between a use variance and a area variance because they say it is only the Boccia test that applies. It is not only the Boccia test that applies, it is also the Simplex test, because again there is a particular part of the ordinance that says it is called location, use goes with location. They can't have a tower at this location, they can't use this property, this location for this use if they have 120' tower because it would violate that provision of the ordinance so it can't be there. That is a question of use and location, not just height. In the Simplex test, it is a three-prong test. First I would like to point out that there is a federal court case, the Second Generations Properties case, which has been cited by the applicants many times, which dealt with this very issue, unnecessary hardship because there they were seeking a variance too and they pointed to the third prong of the test to the effect that the zoning restriction as applied interferes with their reasonable use of the property, considering the unique setting of the property in its environment and held, that prong could not be satisfied because the land given its unique setting could reasonably be used for the residential purposes for which it was zoned. Likewise in this case, these applicants can use this property for the residential purpose for which it is zoned and therefore there is no unnecessary hardship on them, in accordance with the Simplex test and this federal case dealing with the cell tower. Likewise, there is a case which ironically the applicants have cited themselves called the LeBrech case, where they cite in their favor in regards to this issue, in that case what they failed to mention was that the reason why they were given the variance was because the applicant was able to show that, well this is what the case said, the concept of unnecessary hardship is a narrow one and such hardship exists only when an ordinance effectively prevents the owner from making any reasonable use of the land. This is a case cited by the applicants. Ample evidence supported the trial courts finding that the unnecessary hardship was not self-inflicted, that is another important point that they if they bring it upon themselves, in accordance to the New Hampshire law under Hill v. Chester, then it is a self-inflicted hardship and they shouldn't be granted the variance. Most importantly it said, both residential lots owned by this applicant were found unusable for residential housing and thus enforcement of the ordinance constituted unnecessary hardship. These applicants

can use the land for the purpose of which it was zoned therefore there is no unnecessary hardship. In turning to the Boccia case and that test for a height test. Two things need to be shown there, that there is a substantial condition, special condition of the property that prevents it from being used in accordance with the ordinance. Somehow these applicants are trying to argue that there is a special condition on this property consisting of tall trees in the State of New Hampshire and this is the first time I have ever heard anyone try to argue that a tree in New Hampshire is a special condition. Their whole argument, they have to show that there are special conditions that prevent them from using the property in accordance with the zoning restriction as a first test and they are trying to argue that the tall trees are somehow a special condition and that this ordinance is fatally flawed. I don't understand the logic of it myself but one thing we can show is that this ordinance is not fatally flawed. I would like to point out a number of reasons why it is not fatally flawed. First of all these applicants themselves have contradicted themselves over and over again on this issue, as we just heard moment ago, Mr. Cote has said that they can have six cell companies on this tower, how is it possible to have six cell companies on this tower in 40' in accordance with the application they have submitted and for it not to be technically possible to have a cell company in the bottom 10'. Their argument is completely inconsistent here. It must be possible for them to have a cell company in the bottom 10' and they are assuming 80' never mind 61', or their application to you is false and misleading, so they are just making things up as they go here. Second, they have submitted testimony from Mr. Duval's letter on January 29th, which again asserts that the bottom 10' will work. They complain about the 10' limit because they say you will only get one cell company per tower, well that means you can have one cell company per tower doesn't it? Logically it must mean that. Third as I had mentioned earlier, RCC itself, one of the co-applicants has applied for and obtained and is now constructing as tower in Wolfeboro under a 10' limitation, it must work. They are just raising this argument because they want 120', so as they have said they can put as many cell companies on it and earn as much rent as possible. There are many, many towns in this state that have an ordinance just like this, the New Hampshire model code is like this, though it refers to 20' instead of 10'. The testimony of Mr. Hutchins, which has been attacked or cited time and time again tonight as standing for the proposition that the applicants must have a 120'. The only thing that Mr. Hutchins says and I am reading from his report is that, a "antenna height clearance as a rule of thumb is 15' above clutter", he never said in his report 15' or 20', by the way just 15'. "On the other hand if we are limited to no more than 10' above the average canopy, he says the antenna would only clear by two feet while slightly less than the text book recommendation, I believe a 75' center line height is reasonable", so he is saying 15' over the 60', he thinks the 75' is reasonable, the then concludes at the end of his report "antenna height should be no more than 75' above ground level, given the 60' average canopy, with microwave dishes centered at 75', then he goes on to say the US Cellular would be at 85' (tape change) We are taking for granted that there will be multiple cell companies on this tower but that is a separate point if the question is one that is technically flawed with 10' he said it is not and then it is just a question of whether or not there should be more than one cell company on the tower. Mr. Kozyra here has several times totally misrepresented the law on this. He is talking about everything from the cell companies point of view, they are licensed to provide coverage, they are not obligated to provide coverage and to get coverage into your home, they are not obligated to do that. They have a license and the right to do it and they should use their reasonable efforts but it is ridicules to think the federal law is obligating them to do that or they are going to lose their license that is not even common sense. They want to do it, they want to have more than one cellular company on the tower but there is nothing in the federal law that says you must give it to them, it just says you cannot effectively prohibit coverage in the interest of consumers, it is not designed to give them rights, there is nothing in the law that says every cell company that has a gap should be able to have a tower where ever they want. They are just misrepresenting the law at that point. One last point on the unnecessary hardship issue, and that is the second prong of the Boccia test is that there're is no other way reasonably feasible to satisfy the problem, basically, and there is a simple way to satisfy the problem here and that is to top or cut down the trees that are above the average canopy. Why

not do that? They are going to clear out 100 sq. ft. of trees anyway, why not just take down a couple more rather than use that 87' tree to piggy back off of. There is nothing in the ordinance that says you can't do that. The only thing in the ordinance, of course there isn't, people can cut down trees on their property right, it doesn't make any sense, there is only one thing in the ordinance and that is the clause 71F, which someone referred to here and that says if you have a lease or easement than the trees can't be cut down within that lease or easement.

T. Kinnon – Could you wait for just 30 seconds. You may continue

D. Slade – What the ordinance says in this regard is that the 150' vegetative buffer area shall be protected by a landscaped easement or be within the area of the carriers lease, this is dealing solely with a situation where there is a lease like on Robert's Knoll, not where they own the property. The easement or lease shall specify that the trees within the buffer shall not e removed or topped unless the trees are dead or lying, etc, etc. This is dealing with a situation where an applicant as on Robert's Knoll Campground has obtained a lease within a certain area and then has to get an easement for the 150' beyond that and it says they cannot top trees there but when they own the property they can top or cut trees, so there is nothing in the ordinance to prevent them from doing that. The point is that even if there were a variance required to do that it would make a lot more sense and be a lot more consistent with the ordinance to cut a couple of trees having cleared 100 sq. ft. any way then to have the tower go up 120' and damage the view shed even more. The whole notion of building the necessity of this tower and referring to Mr. Hutchins testimony as requiring it go up to 120', that whole argument starts on the premise that you start at 87' which you don't need to because you can just lower trees to the average canopy, which would be a lot more consistent with the ordinance, and then he says 15', 10' or 15' what's the difference but the ordinance says 10' as you have all noticed and that brings you up to 70', anything after that is additional carriers and there is nothing any where in the federal law that says you have to do anything, there is nothing that says you have to allow more carriers on this tower, there is nothing wrong with the ordinance in that regard, the second carrier just has to go and find another tower. The next test is consistency with the spirit of the ordinance, the 10', the spirit of this ordinance is to protect the view sheds through alternative means, namely short towers, although more of them and that is the whole purpose of the ordinance. The 10' limit is there for absolutely key tot his ordinance, the 10' limit cannot be ignored and be consistent with the spirit of the ordinance because the spirit of the ordinance is to have short but more towers, so it is completely inconsistent with the spirit of the ordinance to waive that requirement and it is also, especially at this particular sight inconsistent with the spirit of the ordinance because this tower dominates a view shed and is therefore all the more inconsistent with the spirit of the ordinance to allow this tower to be this high because it would definitely impact views and co-location is another alternative means towards protecting the view sheds, it is not a requirement it is just another permitted means, but if there is co-location it has to be consistent with the ordinance. The fifth requirement is that there has to be substantial justice done, I think it is more or less a function of the other test, if as in this case there would be injustice done to the abutters because of the value, the town because it being contrary to public interest, that has to be outweighed by some justice done to the applicants or some injustice done to the applicants and there isn't any because they don't have unnecessary hardship for all of the reasons I just mentioned. I would just like to briefly talk about what I tried to just show you is that the applicant can't pass any one of the five test for this variance but they are going to argue and Mr. Duval has argued that they can't pass the test for the variance, you are still required to give them this tower under federal law and that is simply not true. The federal law in this circuit is spelled out on this point on the question of whether or not by denying this variance you will effectively prohibit wireless service in the town by the two cases of Amherst and Second Generation Properties. The test set out in those cases reads as follows "the burden for the carrier invoking this effective prohibition provision is a heavy one, to show from the

language of circumstances not just this application has bee rejected but that further reasonable efforts are so likely to be fruitless it is a waste of time even to try" that is the standard, all of this talk about your requirement to allow this tower to go up, there is nothing that says you have to give them the towers that they want. The only requirement is that you cannot effectively prohibit wireless services in this town and again the standard is that they have to show from the language or circumstances not just that this application has been rejected but that further reasonable efforts are so likely to be fruitless that it is a waste of time even to try. The Amherst case, I am just going to read you a couple of facts from that case and it is so similar to this case that you won't believe it. "It appears that the applicant has proposed a traditional efficient system that uses standard height towers at optimal locations minimizing both the total number of towers needed for service and the overall cost for service and other carriers that may wish to co-locate", just what this applicant is doing. "It also appears that lower towers could be used and possible re-sighted if co-location were sacrificed and perhaps many more towers were added", exactly what our ordinance is intended to do. The applicant did not present serious alternatives to the town, this applicant has not proposed serious alternatives to the town since this ordinance has been passed, it made calls on a few people in 2004, way before this ordinance, it was my grandmother by the way not my mother who doesn't recall ever having this conversation with them, but they say they spoke with nine people, three of them said they would cooperate or several, I think it was more than three, but they chose this particular site because it is the traditional one, tall tower gives them a lot of coverage, but then the ordinance changed and it requires shorter towers and more towers and they decided to proceed under this ordinance, that was at their election, so they should comply with this ordinance. They have not made not a single effort since that date to find alternative sites in accordance with this ordinance and so found the Planning Board and it said they have made no effort to develop a multi-site network, and they have not made inquery of other raw land owners with a view spelling out the aesthetics. They haven't gone around and said "can we put a 10' tower on your site", which is a lot different from what they were proposing before. They haven't made any serious effort at all since the date of this ordinance to find alternative sites and to build a network in accordance with the ordinance. It then goes on to say "This one proposal strategy may have been a sound business gamble, but it does not prove that the town has an effect band personal wireless communications, and on this record there is no showing of fixed hostility by the board that one can conclude that further applications would be useless, in all events it has not been shown that the board will inevitably reject an alternative application proposal with lower towers, ultimately we are in the rhelm of trade-offs, you have probably heard this before, on the one side of the opportunity for the carrier to save costs, pay more to the town, and reduce the number of towers on the other are more costs, more towers, but possibly less offensive sites in some what shorter towers. The applicant may think even from an aesthetic stand point its solution is best, but subjected to an outer limit such choices are just what congress reserved to the town". The other case is a Second Generation Properties case, which is a more recent case, also the circuit court for the State of New Hampshire, the exact same facts, there is one difference, that case actually involved a vertical real estate development company, like ICE, who wanted a cell tower, who needed to have it at a taller height because they wanted multiple cell owners and renters on the tower, but the court held the landowner who wishes to build a tower on its site is a unique plaintiff. A landowner does not have an incentive to identify possible sites on land it does not own. A landowner differs from a service provider, whose incentive is to choose from among all possible sites. Nevertheless, the court ruled that a landowner tower developer is in no better position than a carrier and has an equally heavy burden in invoking the effective prohibition provision. Again, they found there was no effort made, it must still show that there are no alternative sites which would solve the problem. It found that this applicant had not made that effort and therefore did not pass the test, and it noted in particular nothing in the town's actions thus far shows an unwillingness to acknowledge a problem or to permit the crafting of a solution. The record also suggests a range of possible solutions none yet determined to be infeasible, including the construction of less aesthetically disruptive towers. These are the sorts of choices and trade-offs, which the act

reports to make in the first instance. Let me please describe for you a case, Nextel, actually this is a case that the applicant cited where a town did shown fixed hostility and didn't cooperate in contrast the facts of that case with this one.

T. Kinnon – Would that be different than the case that you just cited?

D. Slade – Yes, I am almost through here.

T. Kinnon – We could literally go on all night with case history, but we need to try to maintain some order.

D. Slade – this is the last point I will make. This really put the whole thing in context. This is the case of Nextel, which they cite as setting up the effective prohibition test and this is a cases where a town did show fixed hostility and demonstrated that all further efforts would be.

Thomas Voltero – Excuse me Mr. Slade, which Nextel case would that be, they have about 40.

D. Slade – Nextel v. Whalend. First it is undisputed that in 1994 the town denied its first authorization to construct a monopole antenna tower. After this first denial Nextel obtained permission from the utility to attaché antennas to it existing tower, I am paraphrasing here, but it is accurate what I am saying, so they did make an effort after the first denial to find an existing tower. Before it could receive approval the town enacted a 12-month moratorium. The 12-month moratorium was disapproved by the attorney general and the town then enacted a 6-month moratorium. The further delayed Nextels attempts to build a tower were appealed and modified its zoning ordinance three times and ultimately so that originally they could have built the tower here and then they couldn't, the exact opposite of what this town has done where it has enacted anew ordinance very quickly allowing cell towers to go every where. Also when Nextel filed the application for a variance the town further delayed Nextel by holding five public hearings just on the variance issue alone. It was eight years that this case went on, there were two denials, a 12-month moratorium, 5 hearings to reach the variance issue alone, and three changes in the ordinance along the way, all of which moved the applicant further away rather than closed to the ability to have a tower. Here this case has been going on for one year, as much as they moan about it, there has been only one change in legislation in a favorable direction in terms of the effective prohibition issue, allowing towers to go up nearly every where. There has been none of the other adverse features that they have been describing at all. I think it is critical because the test is a heavy burden for them to meet and the town has to be showing fixed hostility not the other way around and it has to be a situation that no further effort on their part to find alternative sites, which they haven't done any of, would be fruitless, and to the contrary this town is fully cooperating. They said they would fully cooperate, in fact you just proved you are fully cooperating by passing the other ordinance. Any talk about effective towns behavior rising to a level of effective prohibition by denying this one variance, I am sorry, is just a make believe law on their behalf. I am sorry that I have taken so long, this is very important to me as you can tell it is my family's heritage that we are talking about here that would be altered forever. The problem here is not what the town is doing, the town's ordinance is absolutely fine, it's this applicant's refusal to comply with it, which is the problem.

T. Kinnon –Thank you Mr. Slade, I just want to make sure you have presented everything that you wanted to present. My only concern was to keep going over the same type of material. I want to make sure you have every opportunity to say everything because I know it is important to you and a lot of other people in town and I don't want anybody to feel that they have been cut short.

K. Kozyra – Mr. Chairman not to interrupt you but I want to make it clear that I would like the opportunity to rebut his testimony as he questioned my integrity directly.

T. Kinnon – Yes, everyone gets the chance to rebut.

D. Slade – Will I get a chance to counter-rebut then?

T. Kinnon – I f he says something that is erroneous.

E. Duval – Is it possible that we address a rebut at this time?

T. Kinnon – That was unusually lengthy and normally we don't do that but in this particular case I would allow a rebuttal to Mr. Slade's testimony since the length of it is such and then we will go back to allowing more people to speak. At this point folks it doesn't look like we are going to finish this tonight, at 10:00pm we are going to recess. We tried but everyone needs to be heard and we will go to 10pm and then we will set the next date.

D. Cote – Thank you and we do appreciate your cooperation and your professional demeanor, it is very refreshing. We are all chomping at the bit to respond to what was clearly a lot of information that was not consistent with the facts before the board so we will give that to our attorney to start but I think we will probably go some period of time to respond to that.

E. Duval – I would like to start and although I appreciate what it is Mr. Slade has said, I clearly disagree with this analysis and conclusion with regards to the standards set forth for the variance law and I guess that I would just state that we have not misrepresented the law. We have not misrepresented New Hampshire law nor have we misrepresented the federal law. We have clearly and susyncly set forth the variance standards and the federal law in the first circuit as it applies to these particular cases. I would urge you if there are questions with regards to that law to seek guidance from Town counsel. I would like to first address to and just briefly the Second Generation case. I would remind this board that every case is unique and every case is different. There are distinctions in this case. That requested tower is for 250' more than twice what it is we are seeking. There was a proposed 45-home subdivision near the proposed tower. Second Generation admitted in that case that they could use a shorter tower and there were other site available. We have done an exhaustive search, we have heard from our experts and we have heard from the town's experts. There is no need for me to rehash what it is we heard. That case is absolutely distinguishable. The Town of Amherst case, we submitted to you at some point a comparison between the Town of Amherst and the current applications, I think again they are significantly different. The topography of the town is flat with some hills, average elevation is 259', highest point only 865', number of towers proposed 4, we only have two. We have extremely mountainous and hilly topography, the average elevation is 560' here, highest point Straight Back Mountain of 1900'. The four towers they are proposing 190', the two towers we are proposing 120'. Required approvals, in the Amherst case each of those towers required a special exception and each of them required an area variance, also one of the towers required a use variance and approval from the historic commission. We are here only requesting an area variance. As you look through that analysis and you look through the evidence of alternatives between the two cases, in the Amherst case the carrier did not engage in a thorough investigation of alternative sites but rather decided on a site suggested by the town itself on town owned property. Our particular case we have engaged in an extensive site investigation and we have presented a significant amount of evidence with regards to this process. There as evidence in the Amherst case provided by the residence that were alternatives. We have

demonstrated through substantial evidence, its own data, plus the conclusions again of Mark Hutchins that there are no other existing structures or raw land on which a facility could be located. The carrier did not submit evidence of infeasibilty of alternatives in the Amherst case, we have. In the Amherst case the carrier admitted there were alternatives, there are no alternatives in our case. Clearly distinguishable and I would urge you to review those materials, Mark Hutchins, we have submitted into the record the DVD of the testimony that has been cited by us in our materials is from that very materials and it is clear as to what Mr. Hutchins testified and we represented it clearly and the materials before the board. I believe that the report Mr. Slade was relying upon was the prior report from Mr. Hutchins. I know that Mr. Kozyra would like to raise a couple issues and then it will come back to me.

K. Kozyra – Thank you Mr. Chairman, not being an attorney I am not going to touch on any of those legal issues even though I believe Mr. Slade misstated all of them. To correct another misinterpretation of Mr. Slade, do you actually have a copy of your ordinance with you, if you refer to 7.1F camouflage for ground mounted facilities and that was the section regarding the 150' dense tree buffer. Section 603.7, 7.1F camouflage for ground mounted facilities. It says all, it does not say some, one, maybe, ground mounted personal wireless services facilities shall be surrounded by a buffer of dense tree growth that extends continuously for a minimum distance of 150' from the mount security barrier or designated clear area for access to the equipment, which ever is greatest, and screen views of the facility in all directions. These trees must be existing on the subject property, planted on site, or be within a landscape easement on an adjoining site. The Planning Board shall have the authority to decrease, relocate, or alter the required buffer based on site conditions. The 150' vegetative buffer shall be protected by a landscape easement or be within the area of the carriers lease. What that says specifically is if the area is leased it must be within the lease area, if it is owned it must be within a landscape easement. Specifically the applicant must have that 150' area in an easement and it goes on to say that they cannot top trees under any circumstances unless they are dead, dying, or are a hazard. The other item I wanted to talk about briefly was regarding Mr. Slade's appraiser and I am sure as the applicant has submitted many reports regarding that as I mentioned to you I have extensive experience on this subject and I have in here another four reports that I would like to give to the chair to enter into the record which are four more reports that show there is no diminishing in value of cell towers and it actually incorporate several areas of high end homes on hills with views, I have been doing this for a long time, if there was any place where any board like yourself had ever viewed there was a diminishing of value I couldn't be doing this anymore because that would set the standard for the law. Fortunately for us the boards have ruled there is no diminishing of value and the federal courts have agreed that there is none and I want to make that clear and in the record that there is none and that Mr. Slade's appraiser submitted no data to you, just subjective opinion, he did not perform any type of detailed sales analysis on similar properties in similar locations with similar views. He stated that he walked over to Moultonborough and took a couple of pictures that is not sufficient to out way the testimony submitted by myself and the other applicants here in front of you this evening. I could continue right to 10pm but I can see that Mr. Duval wants to talk some more but those are the two issues that I wanted to hit on most and obviously if Mr. Duval shakes my memory a little more I want to put my two cents in again.

D. Cote – I share the concerns about facts being some what distorted but in particular I want to talk about property values. We submitted, and I will do this at the interest of board members who perhaps weren't here at that time we had an expert testify at a hearing about property values and he submitted a written report to that effect. That is the report that was challenged tonight and I do like to remind the board that they heard nothing about diminished values, not a single example of a diminished value, only challenging particular examples that our expert used. Also in that presentation was three questions were asked of 26 towns in the New Hampshire area. Have you observed or are you aware of any loss in residential property value due to the presence of cell

towers? Yes/no. Have you observed or are you aware of any appeals filed in the last two years claiming property value loss due to the presence of cell towers? Have you observed or are you aware of any property value loss due to the ability to see any part of a cell tower from a residential property regardless of distance? All 26 New Hampshire towns Hudson, Dover, Claremont, Laconia, Sunapee, it is in the record I won't burden you with the 26, replied back in the negative, no they are not aware of any property value loss. As Ken stated, if that were case if you don't think for a moment that every town constination would be waving that flag, it has been looked at, we've had reports done, this is a site-specific town specific report, not a general opinion that relates to Alton, similar in demographics similar terrain is site-specific. We have done that over and over again in every town that has asked us to do that and the answer is always the same, different appraisers but it is always the same. I would also like to point out that there is conflicting uses, I am not sure if the objection is the type of tower, location of the tower or the use of the property. We are here on a height variance, the location is allowed. Towers are allowed on this site, we don't need a variance it is not an issue. Your new ordinance allowed towers in any location of the town. You can talk about the aesthetics but we have talked about it before. We are here for one purpose in front of this board and that is height variance and it is a technical application that we are referring to for a need for that.

E. Duval – Again the issue is height and we have not heard anything as to whether or not the height would diminish property values.

T. Kinnon – Mr. Slade if you would like to rebut over specific evidence and not just an opinion that would be fine.

D. Slade – There are several things I need to respond to because of inaccuracies that were just made. The first on the value is that we are talking and I thought I made it very clear that it would be a diminishment in value and the reason is because this is a property with a view amenity which will be damaged by this tower and there is no question that the town attaches value to the views that will be damaged, and it is a question of height as well as use because if the tower is put at 120' it will be seen as shown by the balloon test from my front porch on the other side of the property whereas if it is in accordance with the 70' limit it will not be. We are talking about a view amenity which is peculiar to this property which is being tax therefore it has value and will be damaged by the increased height of this tower.

T. Kinnon – You presented an argument, the applicants rebutted it and they presented their argument, I don't think this board has given you any indication of how we feel anyone is right or wrong or indifferent. If you want to present your argument that is great, they presented theirs in the rebuttal and then we will hash it out.

J. Albright – I think the thrust of what I wanted to portray tonight was that I didn't feel that the applicant's appraiser has convinced me at least that there is no diminishing of value, the particular cases that I have seen that Mr. LeMay presented, I don't feel were relevant to the particular site we are talking about.

D. Slade – It is their burden to carry. I just would like to say quickly that all of the facts that were cited to distinguish Amherst and Second Generation are not relevant facts, the case, and I have tried to summarize the relevant portions but the case stands for the proposition that there is a very heavy burden to show that a town is effectively prohibiting wireless communications by actual decisions that it is taking and that they have to propose alternative sites no matter how many times they say it they haven't. There is new ordinance and they haven't done anything since that ordinance and the point that we all have to keep in mind here is that this ordinance is different from what they want it to be it mandates more but shorter towers. They are putting up a

traditional tower exactly like happened in these cases which they want all this height for but the town says no, we want more but shorter towers. They have to make an effort and there have been lots of raw landowners out there that have made an indication that they will cooperate. Their problem is that they have to find more sites. The sites are out there, they haven't made the effort, they could put a tower on either side of this hill, they could go use some of their other 28-acres and go down a little bit and then find someone, there are other people on the other side of Route 28 who have said they are interested, they haven't made that effort. What these cases stand for is that they have to make that effort and continue to make it until it is fruitless because of your lack of cooperation and that is clearly we are miles and miles away from that. Mr. Kozyra, he said he is not a lawyer and he keeps expressing his legal opinions but if we go back to this 61F again

T. Kinnon – I would like to keep it to facts and not you know.

D. Sldae – Yes, but it is important what it says these trees must be existing on the subject property, planted on site, or be within a landscape easement on an adjoining site. A landscape easement on an adjoining site or a lease, that may be all applicable to Robert's Knoll but there is no need for a lease or adjoining easement this is talking about if you don't have enough property for the 150' and you need to get an easement from me for example and they don't need that because they own the property. I don't think that Mr. Kozyra knows what an easement is.

K. Kozyra – Mr. Chairman direct assaults on my integrity are not what this board should be hearing.

D. Slade – I apologize

K. Kozyra – Mr. Slade has never ever been experienced an application with an ordinance of this type, I have done several and to tell me or the board that I don't understand what an easement is when I have 10 years experience within this industry, he is blatantly lying to you.

T. Kinnon – Fair enough, Mr. Slade fair enough you have apologized, no personal attacks keep it strictly to facts.

D. Slade – There is federal case law in the effect that roaming is sufficient by the way. The only other thing I would like to say is that Mr. Hutchins testimony has been confusing I think to say the least and I think he has contradicted himself several times. He contradicted himself on the whole existing use issue because he said sometimes that they hadn't tried to find existing properties and other times he did, but I read from you something in his I think last written report and I think what Mr. Duval is quoting is his oral testimony or some CD or something but Mr. Hutchins has said different things and I read from his written report what the sort of argument or thingy laid out about the different heights. The only thing we really need to focus on is how many feet over the tree line does he think is necessary for one cell provider all this other stuff is just trying to build up the height as much as possible so they can piggy back off of the highest tree and get 120'.

T. Voltero – Mr. Chairman I would just like to address to reports, Mr. Slade is actually correct, we were referencing the September 12th testimony of Mark Hutchins which actually he produced after reviewing the information from the Town Forester with respect to the tree heights, so he produced his report sometime in June, he subsequently reviewed the Town Foresters report with respect to the tree heights and his testimony on September 12th reflects that new analysis of the actual tree heights as measured by the Town Forester.

D. Slade – No, he had the Town Foresters June report, which I am reading from. Mr. Hutchins reports have been confusing at least I have been confused by them and there is case law by the way to the effect when your own expert is confusing than you can discount his testimony.

T. Voltero – There is also federal case law involving Mark Hutchins in which the town disregarded the findings of Mr. Hutchins and relied on a previous report which did not reflect new evidence and that town was Dunbarton, New Hampshire and the town actually lost its case because it failed to consider the testimony of MR. Hutchins as amended.

D. Slade – This is very important to focus on because it is a very different case, there is nothing in Mr. Hutchins testimony here, what they are trying to say is that you have to rely on what Mr. Hutchins said in accordance with this confusing convoluted argument that gets you up to 120', but the only relevant thing Mr. Hutchins says on this point is can you fit one cell provider in 10' and he said 15 but he didn't say you had to go up to 120'.

T. Kinnon – that is our job to weed through all the stacks of papers that we have been given on this case and again you presented your argument and them their argument and we need to decide from there and there is still more testimony to come but unfortunately it is not going to be tonight. E are going to recess and continue at this point to another date.

T. Morgan – Mr. Chairman we have a regularly scheduled meeting I think on Thursday December 7th, Mr. Slade has put the fear of God in my heart by talking about a Nextel case that lasted 8 years so perhaps we could consider convening on the 7th of December.

T. Kinnon – Monica I am not asking you to guess but do you believe the case load for that night would be lenghthy.

M. Jerkins – That depends on the board. We have three cases that night and we begin at 7pm.

T. Kinnon – The problem is that any continued case would come after those three cases.

D. Cote – In fairness to them we should do that anyways.

T. Kinnon – in fairness to everybody we can schedule for that night but there is not guarantee that we would get to it.

D. Cote – Do you know what types of cases those are subdivision.

T. Kinnon –We don't get into subdivision.

M. Jerkins – There are I believe and this is off the top of my head and I have a lot going on in there right now, two special exceptions and one variance application.

E. Duval – Is it possible to set a date for a special meeting, one that we know that we could start and finish.

T. Kinnon – We could possibly, what about the following week the 11th through the 15th?

S. Hurst – The 14th is no good for me.

M. Jerkins – The 12th the Planning Board has a work session

T. Kinnon – What about the 13th, Wednesday?

K. Kozyra – I can't make it

T. Kinnon – How about the 11th?

M. Jerkins – The 1st and 3rd, I don't believe they have a meeting that night.

Motion made by S. Hurst to continue Case #Z05-34 until December 11, 2006 at 6:30pm, seconded by T. Morgan. Motion passed with all in favor.

Motion made by T. Morgan to adjourn at 10:04pm, seconded by D. Schaeffner. Motion passed with all in favor.

Respectfully Submitted

Jennifer Fortin
Recording Secretary Pro Temp