

## Clifton Park Zoning Board of Appeals Meeting Minutes

June 1, 2004

Present: Dale Kelley, Michael Dudick, Dale Gleason,  
Gilbert Kortz, Donna Lawton, Jessica McCarthy, Robert Ritter

Also Present: Don Clemens, Building & Development  
Louis Renzi, ZBA Counsel

Mr. Kelley called the meeting to order at 7:00 PM. He informed the Board members of the upcoming Planning and Zoning Summer Schools offered by the Association of Towns and the New York Planning Federation and encouraged interested members to attend one of the sessions.

### NEW BUSINESS

1. An application from Daniel Cole, requesting an area variance from Section 208-98 from the required 100 ft. front yard setback from the centerline of Riverview Road - proposed setback = 69 ft. - variance requested = 31 ft.. The property is located at 824 Riverview Road, Rexford. Permit #80501.

The secretary read the legal notice as it appeared in the Daily Gazette on May 27, 2004.

Gil Van Guilder, surveyor, presented this application. He explained that the Cole's own 3.7 acres of land on the westerly side of Riverview Road between Riverview Road and the Mohawk River. They were before this Board in April 2002 and asked for variances for a reduction in lot size. The lots were subdivided into 1.86 acres and 1.81 acres respectively. He noted that there are significant topographic constraints on the property. They had worked with the Planning Board for several months and came up with an acceptable means of accessing a much lower and flatter area more conducive to meeting all the setback requirements, however the difference in elevation between Riverview Road and this lower area is approximately 40 ft.. The driveway configurations that their engineer came up with were not acceptable for emergency vehicles so they had to move the

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building forward. The engineer did design a septic system for the lower area and it will work very well. The front yard setback for Riverview Road is 100 ft. and that would put the building approximately 20 ft. lower than the road. If a variance is granted for 31 ft. the front of the building would be on the edge of the lawn area. The house would have a walk out basement and there would be access for an above grade garage. They would use the curb cut for the existing residence on the adjoining lot because the site distance is the best in that location for safe entry onto Riverview Road. The percent of grade would be more in the 5% range, which is more negotiable than the originally proposed 10%. This

would enable it to be used year round versus just in the summer time. The applicant's brother will be building on this lot.

Mr. Kelley asked what the setback is on the adjoining property. Mr. Van Guilder responded it is very similar, it is approximately 28 ft. from the right-of-way line and this one would be 31 ft.. This makes a lot of sense for the usability of the lot and not having to deal with the steep slope.

Mr. Van Guilder noted that there is public water available and a septic system has already been designed.

Mr. Clemens recommended granting this variance because of the steep topography. He also noted that there will not be any adverse affect on the neighborhood and if they were ever to widen Riverview Road they would go in the other direction away from the river side.

There was no public comment. Mr. Ritter made a motion to close the public hearing, Mrs. Gleason seconded, approval unanimous.

Mr. Kelley stated that he has walked the property and agrees that it is a difficult lot and has a very steep topography.

Mr. Ritter made a motion to approve this variance as requested. Mrs. Gleason seconded. Ayes: Dudick, Kortz, Gleason, Lawton, McCarthy, Ritter, Kelley. Noes: None.

2. An application from John Coneys, requesting an area variance from Section 208-11 from the required 50 ft. front yard setback in an R-1 zone - proposed setback = 26 ft. - variance requested = 24 ft.. The property is located at 5 Barkwood Lane, Clifton Park. Permit #80502.

The secretary read the legal notice as it appeared in the Daily Gazette on May 27, 2004.

Mr. Coneys presented this application. He explained that he would like to install a 16' x 24' in-ground swimming pool in his  
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backyard but because his property is bounded by Barkwood Lane and Moe Road he has two front yard setback requirements. The house faces Barkwood Lane and has a 30 ft. setback there, a 50 ft. setback is required from the property line on the Moe Road side. He would like to place the pool approximately 35 ft. from the house away from the trees. He also presented letters from his neighbors on the north and south sides stating that they do not have any objections to this request.

Mr. Clemens stated that he has no objections to this request. He also noted that if the pool were moved closer to the house to make the setback from Moe Road it would be

dangerously close to the foundation wall and could cause an engineering problem.

There was no public comment. Mr. Kelley made a motion to close the public hearing, Mr. Ritter seconded, approval unanimous.

Mr. Ritter made a motion to approve this variance as requested.

Mr. Dudick seconded. Ayes: Kortz, McCarthy, Dudick, Kelley, Ritter, Lawton, Gleason. Noes: None.

3. An application from Cumberland Farms, requesting an area variance from Chapter 171 of the Town Code (Sign Law) for a 3rd wall sign of 34 sq. ft. on the east elevation; an area variance for a 4th wall sign of 34 sq. ft. on the south elevation; and an area variance for a 5th wall sign of 7 sq. ft. on the east elevation of the pump island canopy. The property is located at 1032 Route 146, Clifton Park. Permit #80495.

The secretary read the legal notice as it appeared in the Daily Gazette on May 27, 2004.

Mr. Kelley read the Saratoga County Planning Board's comments stating that there is no significant inter-community or county wide impact.

He also read the comments of the Town's Environmental Review Board stating that this site has significant exposure and additional signage does not appear necessary. They also feel the applicant has failed to justify why a variance is necessary.

Mr. Kelley also read the recommendation of the Town's Planning Board to deny this variance request.

Steve Knopcle, Regional Manager for Cumberland Farms, presented this application. He reviewed the request for three additional signs - one canopy sign for Gulf gas which is an important part of their business. He noted that the sign is 16'h x 4'8"w. He explained that coming from the east a Cumberland Farms identification is needed for identification purposes. He stated

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that many customers have expressed that it is not easily discernable as a Cumberland Farms. He also stated that identification is needed from the south side also. He explained that this building is vastly different from the old Cumberland Farms that were easily identified.

Mr. Clemens recommended disapproval of this application. He noted that when they were here previously asking for quite a number of variances including an extra wall sign and a second freestanding sign on Vischer Ferry Road it was approved because there was no sign on the Vischer Ferry Road side. He recommended that if they want a wall sign they should give up the second freestanding sign.

He also noted that there does not seem to be an identification problem because the site is

extremely busy. The current signs seem to be doing an adequate job.

There was no public comment. Mr. Dudick made a motion to close the public hearing, Mr. Ritter seconded, approval unanimous.

Mr. Kelley stated that he feels there is not a need for additional signage at this site. The building is quite visible. He noted the improvements made are quite attractive.

Mr. Dudick noted that the old building probably attracted more attention but business is also attracted to a nicer look and more signage may detract from the site.

Mr. Ritter made a motion to deny this variance request.

Mrs. Gleason seconded. Ayes: Lawton, Gleason, Ritter, Dudick, McCarthy, Kortz, Kelley. Noes: None.

4. An application from Independent Wireless One Leased Realty Corp., requesting an area variance from Section 208-95(2)(C) from the required 500 ft. separation from telecommunications towers and a single family residence in an R-1 zone. The property is located on Castle Pines Road, Clifton Park. Permit #80496.

The secretary read the legal notice as it appeared in the Daily Gazette on May 27, 2004.

Mr. Kelley submitted for the record a letter dated April 6, 2004 from William Waldron expressing his concern over this variance request.

He also read the Saratoga County Planning Board's comments that there is no significant county-wide or inter-community impact.

Mike Cusak, Independent Wireless One (IWO) explained that they are the Sprint PCS affiliate based in Albany, NY. He noted that

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they operate in a five state territory generally described as Upstate New York, New Hampshire, Vermont, Western Massachusetts, and portions of Pennsylvania. He explained that this is an application for approval to construct and operate a personal wireless service facility at the Town of Clifton Park's existing water tank facility in Knolltop. He explained that the project consists basically of four or five components, six panel antennas and one GPS antenna mounted at the top of the water tank at approximately 136 ft. in the air with certain base station equipment and supporting utilities that basically comprise the cell site and make sure everything operates and functions properly.

Mr. Cusak explained that he will touch on three standpoints before taking questions, i.e. aesthetics, the need for the facility, and alternatives that they looked at before coming before this Board.

First, from an aesthetic standpoint except for IWO's antennas and a small portion of coax cable everything they are proposing to install will be located inside the water tank structure. There is enough interior ground space at the base of the tank for them to put their base station equipment, power meters, etc.. The antennas will be connected with coax cables running from the base station equipment to the top of the tower. They will be able to run the coaxial cable up the inside of the water tank to a service pipe located near the top and then it will briefly come out the top and down the side where the antennas will be mounted so from the ground you won't be able to see the coax cable unless you have a viewpoint from far away and you know what you are looking at. From close up it will not be visible. He continued, this is a significant design point as there have been a number of difficulties associated with the existing outdoor wireless equipment of Nextel Partners that's located on the property. They have a 12' x 30' equipment shelter on the lawn area next to the water tank that also has a fairly large generator associated with it. From the standpoint of IWO and from the standpoint of the Clifton Park Water Authority the way this project is designed is to mitigate, if not eliminate, those types of impacts on surrounding neighbors. There will be no permanent generator installed at the facility and as mentioned before the equipment will be located indoors. The equipment is battery driven, the regular power service charges the batteries and the batteries run the equipment. In the event of a power outage the batteries will support the cell site for a limited period of time, basically a half day, typical power outage time frames. In the event of a serious power outage they do have the ability to deploy temporary generators to the site to keep telephone service working, but beyond that it is a whole different operation from what the Town has seen with respect to the other carrier that is there, again all the equipment indoors and what they believe is a very quite and innoxious operation. The antennas will be visible but that is all you will see given the design. He emphasized that this

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was required by the Water Authority before they agreed to go forward with the project. They did originally propose to put their stuff outdoors and fence it off and landscape it, but after reviewing the issues and hearing some of the neighbors it became clear to them and to the Water Authority that they did have to come up with a better way to do it and this proposal is what the engineers came up with.

From the perspective of technical need for this site there is an identified gap in their coverage in the Knolltop area. He referred to a map that is included in the application package behind tab "C" and an enlarged copy posted for the public hearing. He identified the areas that they are trying to improve service in. To the north it is generally bounded by the Ushers Road area, to the south Route 146, Plank Road to the east, and Ballston Lake Road and Longkill Road to the west. This is the general area that is deficient. There are reasons why the service is deficient. One reason is the tremendous explosive growth of Clifton Park. That growth translates to customers using the network and the network does not have infinite supply. There are so many people on the network that you have to add additional cell sites, or capacity planning, and as people expand into new areas geographically, you have to actually provide coverage to those areas, which are two drivers for network design capacity and coverage, and both of those are in play for this

project. In order to remain competitive we have to expand into those areas that we have not been covering that well, that is a fact. There are some parameters why we have had problems in Clifton Park. In 2000 we opened a store in Village Plaza and had to close that store because we could not complete our network quickly enough and in essence people were buying the phones and finding out that the service wasn't where they lived, where they worked, or where they did their recreational activities on the weekend. We wound up closing that store and doing a complete redesign of our network. There was a brief delay in 2001 and 2002 because of the moratorium that the Town had on wireless facilities which was followed by some litigation with Nextel that concerned this very site. We knew we would not get out of it fast enough and we actually had to close our retail facility and go back to the drawing board. In addition we have had a number of instances where people have disqualified us from bidding on business accounts due to the poor service on the west side of Clifton Park. We keep our customer information very, very close. I've seen from time to time where we have been challenged or precluded, from a business stand point, from participating in expanding our business and with number portability now on the table, where a wireless subscriber can take their number and go to a different carrier, we are seeing people leaving us a lot in this area of the Town, so it is important to us to improve the network so it has some staying power with our subscribers.

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Mr. Cusak explained the technical reasons why it is important for them to have additional facilities due to the 1900 mega hertz technology.

He also explained why they are having a problem that may not be seen in the system of the other carriers.

Mr. Cusak also noted that under certain provisions of the Town Code this is an existing structure and has a preference and under certain other provisions of the Town Code a variance is needed because they are within 150 ft. of some of the surrounding dwellings. He also noted that from the standpoint of alternatives, this is the best alternative because there is a lack of additional, usable, tower infrastructure in the Town of Clifton Park right now. If there is an existing tower in the area, they are on it. One of the first things they did is they went through and picked up all the existing structures that were there and this is what they were left with. They have to try to use this facility with approval or they have to go out and build additional new facilities in the Town and due to the stringent zoning requirements, in addition to the heavy residential growth in the area, there is just not a suitable spot that they can find to propose as a new tower facility when they know that using this existing water tower is going to make the objectives, provide the service that they need to provide. They did look at the number of sites it would take to replace this existing site and it would take a minimum of two to a maximum of four sites based on the design work and additional studies that were completed. There were also problems with those sites, they would not completely cover the area that needs to be covered due to the existing terrain. They feel this is the best solution and is the right thing to do. Conversely, if they are unable to construct this facility or do something in this area of

Clifton Park, they will be unable to attract and maintain customers, and they will suffer irreparable harm in the form of loss of subscribers, loss of ability to compete for new subscribers, and loss of good will and reputation damage. There is no way they can sell a PCS or wireless device if it doesn't work in a significant part of the community and here the main roads are pinned down but they are not doing a good job on the secondary roads and residential roads. They would like to be able to fix it and they need the Town's support to fix it.

Mr. Cusak introduced Bob Duclose, civil engineer, and Rick Andress, RF manager, the person responsible for the design, and stated they are willing to answer any questions anyone may have.

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Mr. Kelley explained the function of the Zoning Board of Appeals and reviewed the criteria they must consider for granting any variance.

Mr. Cusak noted that under NYS law they are considered a public utility and as a public utility they are entitled to a necessary variance where they can show that the modification is a public necessity and it is required to render safe and adequate service and that there are compelling reasons, economic or otherwise, that make it more feasible to modify a structure than to use alternative structures in the community. Furthermore, where the intrusion on the community is minimal the showing required by the utility is correspondingly reduced. They are hoping with the evidence submitted, that the facility will be safe, the visibility will be limited to the antennas only, and that the only alternative they have is to come forward and put new tower facilities in the community, that they have met that standard. It is not the traditional variance analysis that is seen from time to time.

Bill Waldron, 49 Castle Pines, reviewed the history of this site and the problems encountered with Nextel. He expressed his concern that the installation will change the character of the neighborhood. He also noted the Town Board's amendment to the Town Code, Chapter 208, Article 14 requiring a setback of 500 ft. for telecommunications towers and noted it is evident that the intentions of the Town Board were to prevent any further expansion of telecommunications towers at 51 Castle Pines. He also noted the objections of the entire neighborhood. He stated the area is not screened and emits constant noise.

Jeff Mason, 59 Castle Pines, confirmed Mr. Waldron's objections to this variance and noted that they have been struggling with this problem for a long time. He noted the inappropriateness of having industrial type outbuildings and wires outside the water tower, and antennas on top in a residential neighborhood. He also read a letter from Neils & Susan Schmidt, 34 Castle Pines, opposing this variance. They cited the Nextel site as not being good neighbors and they feel telecommunications towers do not belong in a residential neighborhood.

Anita Zepperi, 36 Castle Pines, expressed her concern with the safety of her children and the area around the building and the lack of landscaping. She also noted the noise emitted is quite loud.

John Emery, 1 Plantation Crest, concurred with the comments of those before him. He also stated that he feels Sprint stated

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that their needs would outweigh those of the residents that live there.

Christopher Nuss, 32 Castle Pines, stated that he has concern for the safety of the neighborhood children.

Richard Miller, attorney, spoke on behalf of the Knolltop community and stated that he feels Sprint cannot and has not established the required elements for practical difficulties and based on that the ZBA is free to, and is technically required to, if it so finds, deny the application. Also the telecommunications act really has no direct bearing here to the extent that if the Town uses the reasonable degree of discretion vested in it under the police power as found in the zoning ordinance and in doing that finds that the land use regulations of the Town are not advanced or violated by this particular application the Town is free to enforce its zoning, and the telecommunications act, for reasons he won't get into because it would be rather a lengthy digression is not really relevant to that. He continued, this Town has indicated it is prepared to grant approvals to telecommunications facilities, as it did previously with Nextel, when the circumstances, in the view of the Town, warranted it. Given that there has been no discrimination or prohibition of telecommunications facilities by the Town of Clifton Park, such as some aspects of the telecommunications act would not be invoked because of that. Mr. Miller continued, finally under the telecommunications portion of the zoning ordinance there are additional area restrictions contained in Section 208-95B(9) that he referenced to the Counsel for the ZBA. He stated he recommends that the ZBA deny this application.

Fred Halle, Southbury Road, questioned how the areas of low coverage were determined and the number of people that would be affected. He also inquired about safety concerns.

Mr. Andress responded they used driver test vehicle readings and stated there are a lot of factors that go into that.

Mr. Cusak responded that from their position there are no safety concerns because everything is located inside the water tank facility.

Wayne Burge, 13 Castle Pines, stated his opposition to any additional telecommunications equipment in the Knolltop community. He stated that there are other alternatives that are not in residential areas. He pointed out that there are two zoning areas of concern, one is the 500 ft. within a residential area which the Town Board passed specifically to protect the residents from telecommunications equipment being built in a

residential area. He also stated that he believes that Nextel never met the setback requirement. He believes that once an  
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antenna is placed on the water tower it meets the requirement of a telecommunications tower and it does not meet the setback requirement. He expressed his concern with the noise and aesthetics of the site. He expressed his concern that Nextel never met their obligations to the residents. He also noted he is concerned with other expansion in this area.

Mr. Cusak addressed the concerns of the residents. He explained that the situation with Nextel and their past is unfortunate, but it has nothing to do with their technology and how it is deployed. There are steps that the Water Authority have taken, and IWO have taken, to make this facility as innocuous as it can be possibly made. The only thing that will be visible will be the antennas, and they will not be seen all at once, and a small portion of the coax connecting to the back of the antennas so that the service works. They have offered, as part of their lease agreement with the Water Authority, they stated they will participate and pay their pro-rata share as a user of the land, on the improvement of the landscaping for the facilities that are there even though they didn't cause the problem. The Planning Board said they will take a look at that. The Water Authority wanted to know what we would do and we said we would pay a reasonable fair share of improving the conditions.

Mr. Kelley noted that if any variance is granted this Board has the authority to impose any reasonable conditions along with an approval, so in many cases opportunities can be created by granting a variance. If a variance is not granted obviously there is nothing that can be done to try to cure things that may have incurred in the past.

Mr. Cusak commented on setting a precedent by saying that if anyone comes for another variance they will have to meet the burden of proof and they will be subjected to the same scrutiny of the Water Authority, the same scrutiny of this Board, and of the Planning Board. He explained that it is possible for other users to design their facilities in this innocuous manner. He noted that they are willing to compromise with the Town and are only asking for the bare minimum.

Mr. Cusak responded to Mr. Miller's comments regarding the Telecommunications Act (TCA) and the local zoning. He explained that the Town can put whatever it wants in its local zoning ordinance. In the same sense the applicant has the ability to come in and make an application for a variance. minimizes He noted this variance is the least intrusive means of constructing a wireless facility on this water tank. The alternative sites mentioned leave most of the area uncovered and just doesn't work. There really is not any spot that can provide the coverage

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needed. The best alternative is to use the current tall structure that is already in the Town,

it is not a new tower, it is a water tank and they are co-locating on the water tank. He also noted there are no health risks. They submitted a study that establishes that these types of facilities do not impact adversely on property values or marketability of property, and they submitted a visual study showing what the antennas would like to demonstrate that the impact visually is dominus. There is no way to come away 100% with everyone being satisfied. He informed the neighbors that they have cut this down to the bare minimum that they can reduce their facility to to provide the service that they need to provide and a way that minimizes the impact on them personally and on their property. He again emphasized that there is no generator, the equipment is all in doors on the ground, there is no exterior ground equipment, and they will try to fill in what is a significant gap in their service.

He explained that the alternatives do not cover the areas they hoped they would cover. He submitted drawings indicating that the service just doesn't make it using the alternative sites. He also indicated that because of the ridge line of Knolltop it misses most of the search frame.

Mr. Kelley stated that he will leave the public hearing open in case there are other questions. He also noted that the most troublesome part is the past, in the early days of cell phones, when no one knew what the sound issues would be, buffering, etc.. He feels there must be some way to help out the residents with their issues. Sometimes there are more opportunities than negatives. Perhaps there is something that can be done in the granting of a variance that can help to satisfy those living with it and make it better.

Ms. Zepperi stated that they had been lied to. She stated her children are the ones that are suffering. When she moved in there were no cell towers, now there is.

Ms. McCarthy asked if the existing towers could be built higher to over come the elevation of Knolltop without building new ones.

Mr. Cusak stated the distance is the issue.

Mr. Andress stated the problem is the height you would have to add. Most of the existing towers are at the maximum height allowable. In this particular case he does not feel this would work because there is a significant valley, the tower would have to be 600-700 ft. tall.

Mr. Dudick inquired about Sprint PCS operating at 1900 mega hertz where their competitors operate at 800 mega hertz. He asked if that was mandated or by choice.

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Mr. Andress responded it was first mandated by the FCC. He explained that there were two cellular carriers that had been in business for years and when the PCS auctions came up they were in the 1900 mega hertz band, there were no opportunities to purchase in the 800 mega hertz band.

Mr. Dudick stated that he thought Sprint PCS operates on dual systems and if you ever went outside the PCS 1900 mega hertz system the technology would automatically switch you over to the other more traditional technology so you would not lose coverage.

Mr. Andress responded that is true but their rolling partner is Verizon and they have the same problem that we have in this area and also you would drop the call before you would originate on the other system. The call goes away and you would experience a drop of the call and you would have to re-initiate your call as a roaming call.

Mr. Cusak noted that roaming service on Verizon is not service on Sprint. It is something that is there as a back-up for emergencies. It comes to you, as a Sprint customer, at an additional cost and excludes all of the features that you get when you buy into the Sprint product line as opposed to the Verizon, Nextel, or the Cingular product line. There are a number of features that distinguish their service from the others that simply just wouldn't work. He explained examples of the service features. He also noted that it is a back up plan as being the primary service that simply causes their customers to leave them.

Mr. Dudick inquired about satellite cellular service and asked why that is not a viable solution. Mr. Cusak responded it is available in Clifton Park right now but it is not Sprint technology, it is from a different company. It is a significant competitive difference. The problem with them providing satellite coverage as a carrier is that they are not licensed to operate extra-terrestrially. They are a land based licensed technology, and the FCC specifically intends that these technologies compete with each other. He continued that in urban or rolling areas you are not guaranteed that your satellite phone will work. You still need the same line of sight that a satellite television service requires. There are significant limitations in and around tall buildings and in rolling terrain.

Mr. Andress also noted that the phones are also much larger because they operate at higher power. They weight about 10 lbs.

Mr. Dudick noted that they knew these were the issues to be resolved to create the network when they started years ago. He asked does that not make this a self-created hardship?

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Mr. Cusak responded that he is now touching on why IWO was created. What no one anticipated in 1996 when these sites were originally approved, in large part by Clifton Park, Round Lake and other municipalities in the area was the explosive growth and demand that wireless would see. Now there is a situation where it exceeded everyone's projections, Sprint could not fund to build for Upstate New York and had to stop. In 1997 they shut down their operations in Albany and went looking for partners to come in and build tier 2 & 3 markets while they focused on the larger national markets, much the way Verizon spends most of its money in Boston, NYC, and Philadelphia. There has not been

much in the way of new cell sites in the last 3-4 years.

They came into the picture in the year 2000. It was just bad timing when they came here. The damage had been done with the “damage” from the Nextel outdoor equipment and they could not get onto the agenda because of the moratorium, and the Water Authority did not want to lease to them until things settled with the litigation. It is not a self-created hardship, it is something they wanted to address since coming into the market in the year 2000 and taking over this territory.

Mr. Address added that part of the requirements of obtaining a license is to cover a certain amount the pops within your area to satisfy your license within a certain number of years. You start out with a limited budget because each site costs \$300,000-\$500,000 to build. In order to satisfy the FCC you have to cover a certain amount of pops, so you target the pop centers first, like Albany, Schenectady, and Syracuse. So that is why the network starts in the high pop areas and then goes to second or third tier to build.

Mr. Kortz asked if there is a minimum requirement of what percentage of a population you need to cover in a certain area.

Mr. Address responded it is roughly 70-80%.

Mr. Kortz asked if your looking at an area, not just the Knolltop area, what percentage do you currently cover. Mr. Address responded so far they have satisfied every pop area to date and he believes they are close to the next one, but does not know the exact number.

Mr. Kortz asked if without Knolltop will they be in jeopardy of not covering their pops percentage. Mr. Address responded if there's just one Knolltop it's not so bad but if there's 50 Knolltops there is a problem. He also noted that you always pick the easy ones first, but they eventually go away.

There was a question from the audience asking if all the other carriers are capable of installing their equipment within the

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Water tower as well.

Mr. Cusak responded from approximately '92-'93 to the year 2000 he built Verizon Wireless networks here in the Capital District and Vermont and some other areas and there are people inside the industry, not singling Verizon out, but look at Nextel, who have a fairly rigid checklist of what they require as a minimum design standard for a cell site, and they had one of those checklists too when they first came to the Water Authority and asked to lease land and when the Water Authority explained the circumstances some of which they were aware of and some of which they were not, and they had their initial meeting with the Water Authority before the public hearing approving the lease, it was apparent the standard design was not going to fly, and what he is saying is if something

comes down the road and you don't like the design, that's what engineers do. You have to find a way physically to locate the equipment in a manner that satisfies the local concerns. He continued that there is plenty of room left inside the water tank, and he is submitting to us that if someone else comes down the line look at whether they can put their equipment inside. Restrict the ability to have a permanent generator on site as opposed to an emergency generator, consider underground bunkers. There are a lot of different ways of deploying facilities there and there is flexibility and don't be stuck with the Nextel design.

A member of the audience stated that Nextel lied, they were asked those questions and they gave answers that they had no choices. That is part of the issue here, there's past history, basically you have an industry that lied to the Town Board and Planning Board.

Mr. Kortz noted that is unfortunate. He noted his experience with the Zoning Board, which as an appellate board, has legal authority and if conditions are put on the variances they have to be enforced, and the recourse is for the Building Department to enforce them.

A member of the audience asked if Nextel has paid any property taxes on the water tower equipment. The response was they don't think so. Is Sprint going to pay any property taxes? Mr. Cusak responded yes, it is required under their lease, any increase in property taxes that is attributed to their equipment has to be paid by their company. It was asked if their equipment generated any noise. Mr. Cusak responded it is calculated to be that of a refrigerator. He described the equipment that will be used.

Mr. Kortz asked if there is an existing site that is similar where you could go to hear the level of noise. Mr. Andress

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responded, the K. C. Canary site and the Enterprise site at 21st Century Park. Mr. Cusak stated it is low power, low noise, within operational noise levels of a home air conditioning unit.

Mr. Waldron stated he hears compressors, blowers, transformer hum, and the only recourse left to him is to sue the Town Planning Board and Nextel for public nuisance.

Mr. Kortz stated he believes there are two major problems here, one is noise and one is visual based upon the Nextel experience. He would like to have a better handle on the specifics of the noise involved. He asked if there was any way to determine decibel levels, and inquired about the fan's use. Mr. Andress responded it is just to keep the air circulating.

Mr. Waldron stated that the auxiliary generators are 83 decibels, which was obtained from the manufacturer, the facility that Nextel runs puts out 50-52 decibels all the time.

Mr. Kelley asked if that was at his home or at the site.

Mr. Waldron responded it was measured at the property line.

Mr. Kortz asked what the distance is to the closest residence. It was determined to be about 126 ft.. Mr. Clemens noted that there are 14 homes within the 500 ft. radius of the tower with the closest one being between 100-130 ft.

Mr. Cusak responded to the ambient noise levels and stated he can obtain a report from Lucent Technologies on the ambient noise levels and it can be reviewed as a part of any conditions.

Mrs. Gleason asked why monitoring of noise levels would be done in the future if they were not done in the past. Mr. Kortz responded that Nextel came in before there were considerations like this and secondly the Town Board placed the 500 ft. restriction because of these problems and to try to rectify the situation.

Mrs. Gleason asked who would enforce any conditions the Zoning Board put on the variance if granted and why were they not addressed previously.

Mr. Clemens noted that there were no prior conditions to enforce, but the Building Department would be responsible for any future conditions placed on this site.

There were comments from the audience stating that there were promises made to the Planning Board regarding shrubbery and blocking but when the actual site plan was signed it was not included or carried through.

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Mr. Clemens noted his disagreement with that statement. He said it is his understanding from the Planning Department that everything that was on the approved site plan was indeed planted.

Mr. Kelley explained that technically the Nextel problem is not why this applicant is here tonight. He suggested anyone that believes Nextel has not lived up to the site plan should take that issue up with the Planning Board. This Board cannot address those issues. This Board can make conditions on any variance that they approve.

Mr. Waldron asked what it takes to enforce an ordinance. Mr. Kelley responded the law. He then explained the duties and obligations of the ZBA.

Mr. Ritter stated he believes there are two issues, one the actual application and the potential noise that this tower may or may not generate, and the bigger issue, in his opinion, is that this does set a precedent for this tower for this section of the community and he believes the Town Board set the precedent straight when they enacted the town law to add the 500 ft. setback and also when the Water Authority constructed the tower off Miller Road that there is a deed restriction that states they will never entertain a lease

prospect of any cellular equipment on that tower. He stated the reason for the deed restriction is so the town does not have to face any of these issues of the existing water tower in an established neighborhood such as we are facing tonight. He feels the greater issue for the Board to consider is not if the variance will be granted but does this variance if issued, uphold the intentions of why the law was changed, and if the Board feels that this is ok, we will be setting a precedent and have to constantly revisit noise issues. This company may be generous by offering the least intrusive way of erecting a tower but the next carrier may not be as generous. He stated that he feels what the Board has to concentrate on is that they are asking the Board to grant a variance on a law that the Town Board has set because of this very issue and that is why the residents on the other side of town will not have a problem in theory until someone comes in and asks for a variance. He continued, it has been said and viewed that the town, over the course of the cellular industry, has provided fair and reasonable access to the existing telecommunications towers that are there. Whether it is in that particular section of the town, that is what the company has to prove beyond a shadow of a doubt that they have a strong need. He continued, we do not have to necessarily get into the logistics of that need, we have to be comfortable that the Town of Clifton Park has been reasonable and acted in the best interest of what is out there now, and in addition to that, be respectful to the fact that the Town Board has asked, and answered, and addressed this issue and we're asking to change that and what's the precedent that's going to

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cause. He also stated that he believes the reason why everything was changed was primarily from the outcry from what has happened.

Mr. Ritter also asked if anyone was present from the Water Authority and if the lease has been signed and if there are any contingencies.

Mr. Renzi noted that the record should reflect that the code section in issue with regard to 500 ft. is not just water towers it is any cellular transmission.

Mr. Cusak stated the lease was signed January 21, 2004. He noted that they have the right to terminate if they cannot get government approvals. The lease is a valid lease right now.

Mr. Cusak stated that precedent is important but he does not think it is controlling. He feels every case or application has to stand on its own specific facts.

Mr. Dudick asked if an engineer could find some other way to get the transmission done?

Mr. Cusak responded, that is a physics issue of radio frequency propagation which are not negotiable. You can not design around the fact that a radio wave travels through space in a certain way and is subject to break up because of interference with man-made objects, natural objects, or vegetation. There is no way to get around that, but on a simple interior design civil engineering question of putting equipment within a structure there are options as distinguished from the physics issues

that you cannot get around.

Mr. Kelley stated that there has been a lot of material presented this evening and he would like additional time to look at, investigate, and mitigate some of the issues brought before the Board. He suggested adjourning the public hearing.

Mr. Ritter made a motion to adjourn the hearing, Mr. Dudick seconded, approval unanimous.

It was agreed that this application will be back on the agenda for June 15, 2004.

Mrs. Gleason asked for additional information to be provided on the town law pertaining to the 500 ft. setback and also for minutes of Town Board and Water Authority meetings regarding this issue.

Mr. Miller, asked why there was no referral to the ZBA for the Nextel application.

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Mr. Clemens responded that in his opinion it does not qualify as a telecommunications tower.

Mr. Kelley recessed the meeting at 9:20 PM. The meeting reconvened at 9:30 PM.

#### OLD BUSINESS

1. An application from Gordon Nicholson, Environmental Design Partnership, representing Country Club Acres, requesting a Use Variance for Blue Spruce Landscaping to operate a wholesale landscape nursery business in a B-3 zone. The property is located at the south side of Rt. 146A, opposite the intersection of Elnora Road, Clifton Park. Permit #80488.

There was no one present to present this application. It will be on the next agenda for June 15, 2004.

2. An application from Glen Witecki, requesting an area variance from Section 208-11 from the required 100,000 sq. ft. minimum lot size in an R-3 zone - proposed lot size = 39,716 sq. ft. - variance requested = 60,284 sq. ft.. The property is located at 87 Hubbs Road, Ballston Lake. Permit #80491.

Mr. Kelley read a letter from Steve Bulger, Planning Board Chairman, supporting the revised application.

Mr. Witecki reviewed the previous application and noted the revisions that have been made. He explained that he moved the lot eastward closer to water and sewer and reduced the size of the variance request to 55,000 sq. ft.. The new lot will be 45,000 sq. ft. but

there will be an additional 55,000 sq. ft. with a deed restriction that it can never be developed. That land will be retained by the farm owner and will continue to be farmed.

Mr. Clemens stated that he has no objections to this request, it grants relief to the applicant and still in essence is within the spirit of the zoning law and he would recommend approval.

Mr. Renzi stated he is unclear why they are unwilling to sell 100,000 sq. ft. or why the buyer is unwilling to buy 100,000 sq. ft. with clear language in the deed conveyance specifying that the farm is entitled to continue to use the land.

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Mr. Witecki responded that would bring the buyer into the picture and invite, at some future time, some kind of litigation. He noted they are willing to put deed restrictions on the lot that would go on forever and since this piece of land is to be used as farm land it makes sense to control it with the rest of the farm that will be farmed also.

Mr. Renzi stated that there is just as much a chance that there will be a problem down the road either way.

Mr. Witecki stated that the future land owner who buys the remainder interest will be buying it subject to a deed restriction on his or her deed saying they can never build a residential structure on it. It takes the other land owner out of the picture so you don't have any lease requirement. It simplifies the process but it guarantees the town nothing will be built there.

Mr. Clemens noted that in addition to this being a condition of the variance if it gets approved it also is a condition of the subdivision as well.

There was discussion on how this restriction would be monitored by the town. Mr. Witecki explained it would be a deed restriction that would go with the land forever. It will be recorded in the County and have a legal description.

Mr. Ritter made a motion to close the public hearing, Mrs. Gleason seconded, approval unanimous.

Mr. Ritter made a motion to approve this variance as amended with the condition that the Zoning Board counsel review and approve the deed restrictions as discussed. Mrs. Gleason seconded.

Mr. Dudick asked for clarification on the deed restrictions versus leasing the land. Mr. Witecki stated that the deed restrictions are more binding than leasing. If the land is going to be farmed it makes more sense to keep the land with the farm.

Ayes: Gleason, Lawton, Ritter, Kelley, McCarthy, Kortz. Noes: Dudick.

Mr. Ritter made a motion to approve the minutes of May 18, 2004, Mr. Kelley seconded. Ayes: Gleason, Kelley, Lawton, Ritter, Dudick. Noes: None. Abstained: Kortz, McCarthy.

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Mr. Ritter made a motion to adjourn the meeting at 9:50 PM, Mr. Kelley seconded, approval unanimous.

Respectfully Submitted,

Judy Lamb  
Secretary