

Town of Clifton Park

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Zoning Board of Appeals



2-21-17

ZONING BOARD OF APPEALS February 7, 2017

Present: Chairman Michael Dudick, Chris Lemire, Jerry Cifor, Lisa McCoy, Randy Gifford, Michael Bloss and Mario Fantini.

Absent: None

Also Present: Tom McCarthy, Esq., Town Attorney
Steve Myers, Director, Building and Zoning
Jaclyn Hakes, AICP, Associate/Director of Planning Services

The Meeting was called to order at 7:07 p.m.

PLEDGE OF ALLEGIANCE
ROLL CALL

OLD BUSINESS

The secretary read the legal notice as it appeared in The Gazette on February 2, 2017:

- 1. Application from Satin Beak LLC for four area variances from: 1) Section 208-33B which allows maximum area of a new building to be 4800 SF. Applicant requests 7227 SF single story building; 2427 SF variance required; 2) Section 208-35D(2) which requires a 25' parking setback. 0' proposed; 25' variance required; 3) Section 208-35D(4) which requires a 10' buffer. 0' proposed; 10' variance required and 4) Section 208-35D(1) which requires a 130' setback from the centerline of NYS Route 146. 120' available, 10' variance required. Property is located at 954 Route 146, Clifton Park, NY 12065. (Permit #81111).**

Joshua Silver, Esq. from the Murray Law Firm presented the application on behalf of Satin Beak LLC. The LLC principal Dr. Sal Galluzzo and Brian Sleasman of ABD Engineers were also present.

He explained that they are back before the Board on a re-design of a proposed new construction and that the project initially proposed and presented was substantially larger. After going back and forth with their engineers, they now feel this is the smallest building they can get away with. He advised that Dr. Galluzzo, a podiatrist in Clifton Park for almost 25 years, has in a sense become a victim of his own success, has outgrown his current space and requires additional space to allow his practice to grow. He explained that Dr. Galluzzo owns 2 lots which consist of 3 existing buildings and an existing foundation, which will be

removed so that the new building can be placed on top of it. He added that the applicant has tenants who have made commitments to locate within the new building, contingent upon its being built, and identified them as a Rheumatologist and a Vascular Medicine practice; two medical practices that don't currently exist in Clifton Park.

Referencing the criteria to be reviewed for issuing an area variance, Mr. Silver stated that there would be no undesirable change to the neighborhood because anyone driving by would not be able to notice anything unique or exceptional about the building or the parking lot situation, as the proposed building is going to be consistent with the buildings already in the office park and that although the parking is on an access drive, the 2 lots function as a single office park and therefore the parking lots will be able to serve both the new building and the existing buildings.

As to whether the benefit sought by the applicant could be achieved by other means, Mr. Silver stated that the applicant needs more space and the opportunity to bring in new medical practices. He described it as unique and a benefit to the Town if they could expand the size of the new building in order to provide the other practices with the space they need to operate.

As to whether the requested variance is substantial, he agreed that it is because they are going from the permitted 4800 SF to 7200 SF which is a 50% increase, but opined that no one in the area would notice it as being a substantial increase because it would be consistent with what is already there.

He added that he did not believe there would be any effect on the environment and that although in a sense, Dr. Galluzzo has created the difficulty through his own hard work, it's not something that can be pinned upon him as a self-created difficulty, as it is the circumstances of his success which has led to the need to expand.

Mr. Cifor pointed out that because he was talking about other tenants coming into the new building, that was inconsistent with the statement made about the applicant's practice having expanded to a point where he needs a newer, bigger building. Mr. Silver replied that if it was just the applicant in the new building, it could be smaller, but that smaller wouldn't really work for him as the landlord.

Mr. Cifor inquired as to whether it was economic interest driving the request and Mr. Silver responded, partly, but also that there is a synergy that would result from bringing in additional medical practices; that it is unique to medicine where the podiatrist gets referrals from the rheumatologist and the vascular medicine practice and all patients benefit from having essentially a medical park in the same location, which would not only be a benefit to the applicant's patients, but to new patients as well.

Upon inquiry from Mr. Gifford, the applicant confirmed that are other doctors within the applicant's current building and when asked whether he could kick them out and remain in the same building. Mr. Silver responded that part of the issue is there are new tenants/practices coming in as well which don't currently exist in Clifton Park.

Dr. Galluzzo stated that he is present occupying approximately 1/3rd of the building at #950 and that the remaining 2/3rd is occupied by Advanced Laser Med Spa. He added that building 2 on the site currently has a psychiatrist, an acupuncture doctor and Lab Corp, who has outgrown their space and that the new building would partly be his own practice in 2500 SF, Lab Corp in 2500 SF, leaving hopefully, another 2400 or 2500 SF for a third tenant to occupy that new building. He added that his old space would be occupied by one of

those 2 new groups that had been mentioned, which would require a remodel, and that he was not sure whether it would be the rheumatology or vascular group taking the space in the new building. He reiterated the tenants were lined up and that if he can't bring them here because of lack of space, he would lose them because they will either go to Latham or Saratoga and stated we need them here in Clifton Park.

Board counsel reminded the applicant that the issue before the Board is only the size of the new proposed building, the parking variance and the setback, which are all between the applicants own properties.

Upon inquiry from Mr. Lemire, Dr. Galluzzo advised that the entire building at 956 is occupied by Little Lambs Cristian Daycare; that of the 4800 SF building he is currently in, his practice occupies 1800 SF; Advanced Laser Spa has 3000 SF and that he is looking to expand to 2500 or 2600 SF by moving into the new building being proposed. He added that the vascular group can take anywhere from 2000 SF and up, but that if his practice and Lab Corp both took 2500 SF, they could only take what is left unless they take his old 1800 SF space. He further advised that the Rheumatologist would need anywhere from 1800 to 2500 SF as well.

The Chairman opened the Public Hearing and asked for questions or comments. There were none. Mr. Cifor made a motion to close the Public Hearing. Mr. Gifford seconded. All voted in favor and the Public Hearing was closed.

Mr. Gifford pointed out that basically the applicant wants to put 3 practices into one new building, but that if he eliminated one, he could exist without increasing the size of the new building, he might just lose a tenant.

Dr. Galluzzo responded it is economically not feasible based on the tax structure in the Town right now, that he couldn't do it, that he'd be strangling himself and committing economic suicide, because with 2 tenants it would not work.

Mr. Silver advised that the other part, aside from the economic inability, is the fact that this is an opportunity for the Town to grow and have a medical park here where patients could come in for rheumatology, vascular medicine work and podiatry. Dr. Galluzzo added that St. Peter's had done that down the block.

Upon inquiry from Mr. McCarthy, Mr. Myers confirmed there are other medical type specialties in the neighborhood and that there is one building across the street that is larger than the allowable 4800S SF, which had been built by DCG back in 2007 at 6300 SF after having been granted a 1500 SF variance.

Mr. Gifford pointed out there are 3 buildings on the site currently surviving, paying their taxes and mortgages and inquired as to why this proposed building has to be increased beyond the allowable size in the zone.

Dr. Galluzzo responded it is not that he has to increase it, but that he sees the opportunity to bring rheumatology and vascular medicine here, which are 2 specialties that we do not have in this Town. He added that now people have to travel to Saratoga, Latham, Glens Falls or Albany and that the Town could have them here in Clifton Park. He stated we have everything else, we have 9000 restaurants and 2 huge supermarkets and there is a need and he is trying to fill that need. Mr. Silver added that such new practices come with new jobs.

Mr. McCarthy again pointed out that the application is not a use variance where the Board has to determine whether these uses are economically needed.

Mr. Myers stated that this would be the largest variance in this zone if granted. He added that there wasn't much trouble with the 1500 SF variance granted in 2007 to DCG, but that this is a request for almost double that at 2400 SF. He further added that the applicant meets all of the other criteria for the zone which allows for 50% coverage of the lot, because even if the new building was built, only 40% of the lot would be covered and agreed that aesthetically, no one would notice the difference.

Mr. Bloss pointed out that the applicant originally had come in with a request for a 2-story building, but has now revised his request for a 1-story building that looks like everything else in the neighborhood.

A discussion ensued as to whether the requested 25' parking variance and 10' buffer were actually variances for parcel 1 and not for parcel 2 where the proposed new building is to be located. Mr. Silver commented that it functions as a single unit and therefore that they approach it as a single unit.

Mr. Myers confirmed the parking spaces are being added for the new proposed building and suggested that the Board could specify which parcel the requested variances applied to. He added that in concept, Planning had agreed to shared parking between the 2 parcels. Mr. Silver advised that they would be happy to agree with any condition the Board would make with respect to those issues and to provide a future parking agreement if needed.

Chairman Dudick stated that although he can be compassionate to a doctor who is looking to expand his practice and has outgrown his space, this doesn't strike him as that scenario. He went on to state that saying he needs 7500 SF to accommodate 2500 SF for himself to expand his practice and to bring in more tenants than the property can accommodate without variances, seems to be an absolute self-created situation. He added there is no requirement that the Town accommodate variances to bring in certain doctors, restaurants or businesses and certainly if there is a doctor or a doctor group that wants to come and practice in our Town, there are empty spaces that have been designed for medical use which could accommodate that. He added that although he doesn't not believe it would have an undesirable change with regard to the neighborhood, it is a substantial request.

Mr. Silver pointed out that it is not fatal if the Board decides that this is in fact, a self-created hardship and that the law provides it is only a factor to be considered, but that the variance may still be approved unlike with a use variance. With respect to the prospective tenants the applicant is looking to bring in, he advised they have an opportunity to bring them in now and suggested if they wanted to be in other spaces in Town, they would already be there. He reiterated that this is an opportunity to bring in new tenants, new practices, and new jobs in what could really be a nice medical park that would serve the community and be a benefit to patients.

Mr. Dudick stated that he does not believe there would be an adverse effect on the neighborhood, but as far as whether the benefit sought could be achieved by any other method, he believes the applicant could grow his practice with the new building and take on a tenant, but that he would be leaving money on the table, meaning that he wouldn't be able to rent 2 new tenants and expand one of his current tenants and therefore he wouldn't be able to make all the money that's possible unless the Board is willing to grant the variances.

Mr. Silver again referenced the synergistic effect that occurs when there are multiple practices in the same office park and advised that only by having the larger building, would they be able to get all of the practices in there and achieve the benefit sought, which is a valuable benefit to the landlord.

Upon inquiry from Mr. Lemire, Mr. Myers advised that if the proposed new building was the allowed 4800 SF, the applicant would not need as much parking, but that the parking could always be land banked by the Planning Board.

Mr. Fantini inquired as to whether a 6300 SF building, which would be consistent with the largest variance granted on Route 146, would meet the applicant's needs.

Mr. Silver responded that 7200 SF is the number that they need in order to move Dr. Galluzzo over, move the Lab Corp over and then have room for the 3rd tenant. Dr. Galluzzo added that if it is smaller by 500 SF, he would not have a 3rd available space that would be feasible for any practice, especially not a rheumatology or vascular group. He explained his first prior is building his own practice and that he believes they are at the bare bones with the 7227 SF requested.

Mr. Bloss made a motion to approve the application. Mr. Cifor seconded the motion.

Mr. Bloss advised that he did not believe there would be an undesirable change produced in the character of the neighborhood because the new building would blend in with the others; that although there are probably some other ways the benefit sought by the applicant could be achieved, he believes the plan the applicant has to bring additional medical practices into this area is a good one; that the requested area variance is certainly substantial at 50%; that the proposed variances would not have an adverse effect on the physical or environmental conditions of the neighborhood and that although the alleged difficulty is certainly self-created, the other factors outweigh it.

Mr. Lemire stated that he agreed there won't be an undesirable change to the neighborhood properties or that there will be adverse environmental effects, but that he does believe the difficulty is self-created; that the request is substantial and that the benefit the applicant hopes to achieve could be achieved by a smaller building than the one presently proposed.

Chairman Dudick advised he was going to call for a vote and that 4 yes votes are required for approval. He inquired as to whether any stipulations with regard to the parking being on a separate lot were needed. Mr. Myers advised he did not believe so because of the shared parking agreement.

The secretary called the Vote:

Ayes: Mr. Cifor and Mr. Bloss

Noes: Mr. Lemire, Mrs. McCoy, Mr. Dudick, Mr. Gifford and Mr. Fantini.

Motion to approve the application did not carry

Mr. McCarthy advised that because the motion to approve did not carry, the Board would now need to vote to deny the application. Mr. Lemire made a motion to deny the application for the reasons he had stated earlier.

Mr. Silver stated that if the motion to deny were to be put forth, the applicant would like an opportunity to have the motion tabled and attempt to re-design, without having to start the process over if that was acceptable to the Board and advised they would like to ask the Board for a motion to table the application.

Chairman Dudick then called for a 5-minute recess at 7:47 p.m. He recommenced the meeting at 8:52 p.m.

Mr. Silver reiterated his request that the Board entertain a motion to table the application to permit his client and the engineers to attempt a re-design of the proposed application and come back before the Board next month.

Upon inquiry from Mr. Dudick as to whether he could make that decision, Board Counsel advised he could take a vote on it.

Mr. Lemire stated he would withdraw his motion to deny the application given the applicant's request to table any further action on this matter.

Mr. Cifor seconded the motion.

The secretary called the Vote:

Ayes: Mr. Lemire, Mr. Cifor, Mrs. McCoy, Mr. Dudick, Mr. Gifford, Mr. Fantini and Mr. Bloss

Noes: None.

Application tabled.

Upon inquiry from the Chairman, Mr. Silver agreed to waive the 62-day rule within which the Board is required to make a decision on the application and further advised he would contact the Building Department once they have determined what meeting they would like to come back for.

- 2. Application from Cellco Partnership d/b/a Verizon Wireless for a use variance from Section 208-10, permitted uses in R-1 zone; from Section 208.95D(3)(h), new towers not allowed in R-1 zones; and from 208-95 E(3)(b), no new towers within 500' of the property line of an existing residential property. Applicant requests approval to construct a new cell tower. Property is located at 329 Moe Road, Clifton Park, NY 12065. (Permit #81091).**

Dave Brennan, Esq. with the law firm of Young Sommer presented the application. Sara Colman, a site acquisition specialist with Aerosmith Development and Rick Andress, a Radio Frequency Engineer with Verizon Wireless were also in attendance.

Mr. Brennan advised he was going to dispense with his normal audio visual show and slides and instead provide a quick overview of the project where it stands and an update on what's happened since their last appearance. He explained the project that has been submitted is a proposed telecommunication facility at 329 Moe Road and that they had started off with a submission back in May for a 100' monopole tower with antennas on the top of it and base station equipment. He explained that in September of last year they submitted a revised set of plans switching it to a 100' monopole with antennas at the 91' centerline height and that from his perspective, currently before this Board is the application for a stealth monopine tree, with an equipment platform with radios, electric equipment and a diesel backup generator at the base of the tree.

He advised that one thing not in front of the Board, which he wanted to add tonight, is to surround the base station equipment with a wood stockade fence on what would be the westerly side facing Moe Road and the southerly side facing some of the trees and neighboring properties, instead of the chain link fence originally proposed, and to stagger and add some evergreen plantings outside of the fence to break up the fence to the extent its visible.

He explained that since they were last before the Board, he had made an appearance in front of the Saratoga County Planning Board in December, at which several of the neighboring residents were present and submitted comments. He stated that as is generally typical, County Planning had come back saying there was a not a Countywide or Inter Community impact of this proposed facility. He added that one of the County Planning Board members, Ed Vopelak who is a professional engineer at CT Male, had raised an issue in front of the Board of a water tank that is located roughly northwest of the site, fairly well removed from the project, and suggested that the applicant should look at that. Mr. Brennon stated that he thinks Mr. Vopelak may also represents the Water Authority and was therefore aware of that particular water tank.

Mr. Brennan went on to state they had submitted a radio frequency report from Mr. Andress analyzing and plotting out a potential co-location on that 60' water tank and that they had run it at 100', which would be a new tower and it still showed the same problem that they've seen with the other locations that the Board or others had asked them to look at. He added they had looked the water tank at the Barney Road Golf Course as well as a hypothetical 180' standard tower at the Town's transfer station and an admittedly slow moving proposal to go on the existing monopole off of Exit 8 that is just over into the Town of Halfmoon. He advised that site will go up eventually, but is still in some sort of litigation. He further added that Professor Johnson from RIT, the Board's consultant, has reviewed all of that information and has concurred with their analysis that none of those other sites fill the gap in coverage.

Mr. Brennan advised that since they were last here, they had an obligation to conduct a new visual resource evaluation. He explained they had done one in March of last year in leaf off conditions, which was presented to the Board and that the Code requires it be done on notice. Therefore, notice was sent to the adjoining property owners within the appropriate radius; was published in the Gazette twice within the required time frames and the balloon went up again for 6 hours on a Saturday. Tectonic Engineering went out and re-did the photo sims. He opined that there is no substantial or significant difference between what we saw last March and what we saw this March, which is that from about 355 degrees around the circle, there is no or very limited views of the balloon and when you put a stealth monopine tree up in that location, it is substantially screened or invisible from the majority of the locations. He added there is a view (photo P1) looking directly into the site from Moe Road that is not fully screened, which is where they are now proposing some base station equipment screening to the Board.

He then handed out a revised sim to the Board, as well as drawing showing engineering details of what the double board constructed fence would look like, as well as the plantings. He explained the fence, which is about 850' back off of Moe Road is fairly well removed and that they believed it was worth improving the chain link fence to a stockade fence and putting trees in front of the fence.

Upon inquiry from Mr. Lemire, Mr. Brennan advised that the lowest branch on the monopine would be about 55' feet from the ground, adding that if it is a concern to the Board that too much trunk is seen, certainly as a condition, they could add branches going down and spread them out to increase the branching on the tree.

He advised they had also submitted with their most recent package, another copy of the survey map prepared by or on behalf of Tectonic Engineering. He explained there had been some discussion about the tree screening around the property and what that survey shows is that on more than 3 sides, there is between 60' and about 90' worth of trees on this existing property, and that because there was some discussion about what if the trees were no longer there in the future, he had wanted to show the Board that there is a very thick mature set of trees existing on the landlord's property that will remain there to screen the tower from view from substantially all of the residential properties.

He advised they had submitted an appraisal report that was done for a standard tower site out in the western part of the State, which indicated that once a standard tower that was visible to existing homes went up, there was no adverse impact on property values. He stated he would submit by extension, that on a stealth monopine tree at 100' surrounded by woods, there would be no impact on property values and that he has not seen anything contradicting that appraisal report which was submitted.

Mr. Brennan went on to state that they are here before the Zoning Board because there is an existing gap in coverage along Moe Road, Grooms Road and the surrounding areas. He stated that Professor Johnson has issued 4 letters on behalf of the community indicating that he agrees Verizon Wireless has demonstrated that there is deficient coverage in this area of the community and that there is a need within this area of the community to serve or fill that gap in coverage. He added that was not only noted in his recent letter, but has been noted elsewhere in his correspondence over the last 8 or 9 months. He reiterated they had submitted Root Metric data in support of that and explained that Root Metrics is a private organization that tests and looks at wireless networks and grades them, identifying where there are deficiencies. He added that drive data tests, which is when they drive in a car with a phone attached to a computer and measure the signal and the performance of the network had also been submitted by Mr. Address to Professor Johnson to satisfy him that we do in fact, need a facility here to serve the surrounding community.

To support the application, Mr. Brennan explained they also had hired an independent company to fly a drone around the property which is something he has never seen done before, but had worked out very well. The drone had recorded everything it saw as well as its height above the ground, which demonstrated that the tree tops around this area are 85', that there is one tree in the vicinity of a 100' and stated Professor Johnson agreed that the antennas need to be just above those trees to function, which is where they came up with the antenna being at a centerline height of 91' and the rest of the 91' to 100' being the ornamental cap on the tree.

Mr. Dudick asked what the expected growth for trees of that height and age would be. Mr. Brennan replied their position is that the trees are at maturity and are not going to grow higher in 10 years. He added they don't do many trees here, but that they are done in the Adirondack Park regularly, and advised they are satisfied they have enough room to transmit and to transmit effectively. He added that if the trees creep up a little bit, they were okay with that, but that if they significantly exceeded, due to the nature of this approval process, anything they would want to do to change the tower would need to come back to the community and this Board for review.

Mr. Brennan stated there is a Taxpayer Relief Act where you can extend or change towers and that the community as the language says, must approve. From his perspective, he advised that does not apply to changes to a stealth facility and that in the FCC rule on that process talking about stealth facilities and not being able to put a 10' pole on the top of a tree. He added there are significant limitations as compared to a standard monopole, which under the current Federal Law, can go up by 10% one time - not 10% multiple

times - but it could in theory, if it was a monopole, go up by 10 additional feet for the next carrier in, if they wanted to put that before the community.

Restated, at the request of Mr. Dudick, Mr. Brennan clarified that although different communities handle it differently, basically it can require approval or review by the community, but there is language in the Federal Law that says there is an as of right 10% increase in the dimensions of the base station, monopole or existing tower to accommodate co-location.

Mr. Brennan went on to state that his position is a stealth facility doesn't get the 10% as of right to grow, but that for a stealth monopole, if the trees grow, they are back in front of the community to review the efficacy of the stealth nature of the facility as compared to a standard monopole which could under this Taxpayer Relief Act provision, go up by 10%.

Mr. McCarthy inquired as to whether Verizon intends to continue to own the wireless facility if it were built here. Mr. Brennan replied that he does not know the answer to that, but that sometimes Verizon does sell a typical facility off to other tower owners, leases space and then the tower owners use it and have other carriers go on it. He advised that the reason he can't answer the question exactly is because he doesn't know that the economics of a stealth tree, with the upfront cost being more than double if not 2 ½ times a regular tower, this close to the tree line, which he would suspect they can get one additional set of antennas below – whether a company would be interested in buying that from Verizon if you can't get 3 or maybe 4 carriers on it. Therefore, it's a bit of a different economic analysis where the cost of building the facility in conjunction with the rental stream that would be available and he believes that would make it unattractive to a tower company to add to their portfolio.

Mr. McCarthy asked whether stealth technology precludes additional carriers by the nature of engineering.

Mr. Brennan responded that he thinks there is an inherent tension between deploying stealth technology and making it look like a tree, look like it's in the right spot and not stick up 50' above the tree line. He referenced an awful one off 88 towards Oneonta that's up on a hill, which looks like a toilet brush, that is 120' tree on the top of a hill with nothing around it. He explained that the tension becomes, if you want to do a stealth facility, you need to keep it close to the trees to make it blend as this one does. He explained that after their September submission, the Board had requested they re-do the sims for a 2 and 3 carrier tree, which they had done. He explained that when you start adding the carriers, you start getting to be 30' and 40' above the tree line, which in this case, because of the very heavy tree growth in Clifton Park in general, its probably still not visible, but it's still visible from at least a couple of locations where it sits way too high above the existing tree. He added the Board could issue approval for 100', which is what is being requested, they could overbuild and extend up if someone else actually needed it and so the tension becomes, they could built what they needed and leave capacity in there if someone actually came in. He mentioned a proposal at the Fire House by a different carrier some years ago and indicated what you do is build a monopole tower to what is needed, keep it at the tree level, and build it to be extendable, but that's the tension is – then you have to be monopole rather than a tree. The problem with the tree is I've never heard of someone essentially unbranching the whole thing, putting 10' or 20' on it and then basically buying or reattaching all of the branches to make sure that it looks like a tree.

Mr. Brennan advised that had also submitted in September, a determination of no hazard to air navigation from the FAA, as well as a determination that no light or orange and white striped paint job was needed and that because of its height, it does not need any obstruction markers.

He advised they had also submitted information from the State Historic Preservation Office, explaining that because they have a Federal license, they also have to comply with the Federal Environmental Review process. Here we have SEQRA, but at the Federal level, they have a similar statute called NEPA and because they have a Federal license, the FCC requires an environmental review and part of that is a consultation process with the Historic Preservation Officer. He reiterated they had submitted correspondence from SHIPPO, the State Historic Preservation Officer, concurring that there is no direct or indirect effect on historic or other sensitive properties within the community. In response to a question that was raised about potential for archeological resources on the property, prior to that coming up and as part of their NEPA SHIPPO review, they had an archaeologist go out and perform shovel tests, catalog and take a look at it, who had concluded there was nothing that was found.

Mr. Brennan also referenced the extended discussions in front of the Board at various times about health effects, and stated he didn't want to dwell on that too much, but did point out that in Professor Johnson's letter in December he had concurred with Verizon that there is no suggestion there is any health effect from this facility. He went on to state that a study that had come out that had any discussion of that, was about handsets which are much stronger wattage than the tower. He added that the tower itself transmits at about between a millionth and a billionth of a watt; the negative 95 dbm signal strength that they are trying to deploy when you convert that watts, is something like point 9 zeros and that 316 watts is what they are transmitting at. He added that Professor Johnson had gone on record saying that agreed with their analysis as to RF safety.

Mr. Brennan stated that although he doesn't like to get into this often, it was worth mentioning and hopefully counsel will back him up on, but there is also at the Federal level, a preclusion from local communities basing decisions on the affects or perceived effects of radio frequency emissions.

Mr. McCarthy inquired as to whether the applicant was below the threshold and Mr. Brennan replied absolutely, adding that in Professor Johnson's most recent letter from January 31, 2017, he had again concurred with the need for the facility; had taken a look at the tree screening and had indicated the trees would continue to provide buffering should the adjoining property owners remove any of their trees.

Mr. Brennan then mentioned, as was being discussed with the prior applicant, the 5 part standard for an area variance and the 4 part standard for a use variance. He reiterated that in this application they are requesting both. They are requesting a use variance and that if you look at the Code, it says the Town has a hierarchy of where it wants telecommunications facilities. He stated that the first of the hierarchy in the Code on Page 2 or 3 where telecom is referenced, is on an existing tower or tall structure. He stated that Ms. Colman went through and he would expect the Board agrees at this point, there are no existing towers and there are no existing tall structures anywhere in this area that they can go on. He added that those that are around, they are already on and are so far removed, that they don't fill this coverage gap.

Mr. McCarthy opined that the water tower would constitute a tall structure. Mr. Brennan replied that it would, but that at 60' tall, it is below the tree line around it, that they had taken a look at that and it is so far removed, it again does not cover and wouldn't solve anyone's concerns.

Mr. Brennan stated that the next item in the Code talks about alternative tower structures and advised that without getting into the definition, it does talk about the facilities and what the Board or the Zoning Law is looking for are stealth facilities. He explained that the problem they have is they're also in a residential

district and then there is the question about the need for the use variance if it's an alternative tower structure. He stated they are here submitting for the use variance, but that if you look at the Zoning Map there is no property that is not residential or a PUD from well north of us, too well south, well east and west. He stated there is simply no property that is any sort of business or commercial property that is zoned that way that they we can go on. He explained they had looked at other properties within the search ring and advised there are several other large properties. He referenced one such property to the north of Grooms Road which had been discussed and turned down; another property on the south side of Grooms further east, filled with wetlands and then another one that they could not use. He explained there had also been discussion about the small Verizon Wireless building on a postage stamp size property off of Exit 8, which is too far east; too close to their other facilities and had no fall zone or setbacks on that property and that for those reasons, was discounted.

Mr. Cifor pointed out that the small Verizon Building is at Exit 8A and Mr. Brennan agreed.

Mr. Brennan reiterated they are applying for a use variance because they are surrounded by residential or PUDs and there is simply no area where they don't need a use variance to fill this gap. He added that for a tower they need to be 500' from any residential property line and therefore it is both a use variance and an area variance that has been applied for. The distinction and frankly the reason they are here he explained, is because they are a public utility. They are not like a doctor's office. Verizon Wireless needs to be where the roads are and where the residences are to serve. He added that sometimes they can serve from surrounding areas around, but they are already all the way around this particular area with other facilities, both in the community of Clifton Park as well as in Halfmoon and Professor Johnson has clearly identified time and time again, that we have a gap in coverage and we need to fill it from a facility within this area.

Mr. Cifor asked Mr. Brennan how he defines gap in coverage. He explained that he and his wife had lived at 9 Balsam Way, which if you look at the Verizon map, would be the dead center of where there is no coverage. He added that for the 6 years they lived there, they were never not able to use their phones. He added that although he was not able to use internet on his phone, he could always make and receive phone calls and explained he is talking about ability to use a phone, which is the monopoly benefit of a utility, as versus entertainment.

Mr. Brennan responded that they have submitted both Root Metrics data from an independent testing company showing that there were dropped calls and insufficient connectivity along Grooms Road and Moe Road, as well as their own drive test data demonstrating that the signal strength within that area is not strong enough to maintain clear calls or connectivity. He explained that there is not a big island within Clifton Park where a phone absolutely doesn't work, but there are people that are not in this room today who live in this area that have contacted them to say their phone doesn't work. He added that unfortunately those people don't come out to these meetings even when they ask them to.

Mr. Cifor advised that the Board had received some of those type e-mails.

Mr. Brennan explained that part of the reason why this changes over time, is when there is more and more capacity being used, whether we agree or disagree on whether it's my son playing a video game that's connected over the phone or whether you're looking at a menu trying to order from a restaurant, does your phone work and the answer is no - over time the additional users within the network take that coverage that's coming from Halfmoon, from the Town's ball field, from the Elks Club and coming from eventually Vischer Ferry and it uses up that signal before it penetrates into this area of the community and exaggerates and

exacerbates the lack of coverage. He stated that Professor Johnson had looked at the signal strength they are trying to deploy and found it consistent with what is deployed by the industry to provide adequate and safe coverage within the community.

Mr. Dudick asked if he was in an area where signal is diminished, and there are people streaming a whole bunch of stuff, does that then diminish the ability of people drawing from that tower or that area, to make a simple phone call or if those were 2 separate data draws. In other words, would he have less of a chance of his phone call going through if all of his neighbors are using heavy data, such as streaming.

Mr. Brennan asked Mr. Address to respond to that question. For a simple example, Mr. Address advised that if there are 100 channels for use, currently there is 30% set aside for voice and 70% for data, it can adjust or adapt on the fly to accommodate one or the other if you need more. He added that if there was a ton of data usage it would eat into the capacity available for the voice and vice versa.

Mr. Dudick asked if there would be less of a chance of a voice call being connected because there is that much less availability for signal.

Mr. Address replied that was correct. He added that all of the maps they have shown are at 700 megahertz, which is the best case coverage scenario and that Verizon owns 2 higher band FCC licenses for around 2 gigahertz, which don't penetrate through trees and into homes nearly as well. Therefore, he stated if they showed prediction coverage for those higher frequency bands, there would be a much larger gap and why that is important is the way the 4G technology works and upcoming 5G is, its able to add all of these frequency bands together so instead of a 10 megahertz chunk of spectrum, all of a sudden you have a 35 megahertz chunk of spectrum and you start getting up into the 100 meg download speeds and that type of thing. He added that if you have 700 coverage, then you are not able to use the rest of the frequency bands Verizon owns and you're not allowing the customers to get the super high speed data rates, as well as the capacity that offers.

Mr. Fantini stated that the last time Mr. Address was here, he had discussed that 4G runs at a higher frequency and therefore, it doesn't transmit as far.

Mr. Address replied that is correct, which is why it's important for them to be in the center of the gap as opposed to just putting another site on the outskirts of the gap shooting in, because what happens then is you have all these sectors shooting in from relatively far away, none doing it very effectively, and they all just interfere with each other and you get your phone ping ponging between all these other cell sites

Mr. Cifor advised that the point he was making is that he lived right in the middle of where he should have zero coverage according to their chart and for 6 years they were never were not able to accept or make a phone call. He again asked if they are talking about entertainment value or public safety.

Mr. Address advised it's a reliability factor and that is both, using the example that if there was an accident on the Northway and a ton of people are using the network, your ability to get on the network would almost go to zero.

Mr. Cifor asked whether it was just coincidence they were never not able to make or accept a phone call even though they were geographically in the center of where they are saying there is no coverage.

Mr. Andress replied that they don't say there's no coverage. They say the reliability is outside of what is considered to Verizon specs as a reliable network. He inquired whether Mr. Cifor's internet acted up or if data speeds were extremely slow. Mr. Cifor responded that was not something they would ever use because the coverage was weak. He added that if the neighbors were not able to use their cell phones right now, he didn't believe that any of these people would be here tonight.

Mr. Andress pointed out that they had the third party Root Metrics drive through there, they had plotted all of this stuff and this is one of the worst performing areas of the market.

Mr. Cifor advised he doesn't disagree that its weak coverage, but stated you can still make a phone call and accept a phone call with almost 95% reliability.

Mr. Andress responded, right but I'm paying a lot of money to get high speed internet access and I don't get that or what if I want to work from home and do video conferencing.

Mr. Lemire asked Mr. Andress to clarify what he meant by Verizon being able to adapt to on the fly.

Mr. Andress replied that the software within the hardware does adjust such that if all 70 channels were used and there were only 20 channels being used for voice, then on the fly the network could use the other 10 channels for data and less so vice versa, but it is possible.

Mr. Dudick asked if they have 100 channels and at any given moment 80 channels of data are being demanded and 70 channels of voice are being also demanded at the same time, what gets bumped.

Mr. Andress advised he would expect that it would stay the same proportion, but you would get slower data rates and not able to access the network for a voice call. He explained that if all 30 channels are occupied then you cannot access the network and used 911 in New York City as an example of when the entire network was jammed, explaining you cannot get on it if there's not available coverage

Mr. Dudick opined that would probably be true even if they were granted a variance, as they are not equipping themselves to tolerate that kind of scenario. Mr. Andress agreed, but stated they would be able to handle that scenario 9 times better than they currently can.

Mr. Fantini opined that the reason Mr. Cifor has cell phone service but not great data is that the voice service runs at a lower frequency so it covers a longer distance and inquired as to whether the Verizon coverage map being shown is just 4G and not necessarily voice. Mr. Andress advised that it takes less power to communicate and you don't need nearly as high of a data rate to communicate just a simple voice call and that if you're sending a text message, it doesn't take anywhere near the network resources as a video conference would.

Mrs. McCoy opined that as they are looking ahead to do this coverage and prepare again, not for basic phone calls that people need to make from a necessity standpoint, but as people in our society start using more data and work from home and possibly don't have cable and use their internet off of their hot spot in their house, to accommodate more data use and data functionality that our society is moving toward more than the phone call.

Mr. Andress advised that at some point it will all just be one blended in together so you'll need the high definition calling, 4G calling - whatever you want to call it now - the voice over the LT network – that all just gets blended in together. You still need to be guaranteed a certain data rate in order to accomplish high speed for things like face time and be able to see the person on the other side. He indicated the other factor in Mr. Cifor's scenario is that he might very well be on the 3G network which is being phased out in 2 years.

Mr. Cifor advised there were on 4G and had Apple phones the whole time.

Mr. Dudick asked whether face time uses data, voice or both. Mr. Andress replied that is more of a blend as channels from the data side as well as the voice side are being used.

Mr. McCarthy asked Mr. Andress to explain to the Board what standard negative 95 dbm return signal is.

Mr. Andress replied that it is a threshold in order to communicate, explaining that you have a downline path meeting the cell tower to your phone and then your phone – which is 1 watt a $\frac{1}{4}$ of a watt – has to be able to penetrate back through your house, through trees and see back to the antenna. Therefore, the signal strength that is established is what's called a link budget, meaning that the base station can transmit at a higher power than your small phone does, but because of the distance and because the electronics aren't as good on your cell phone, on the reverse path, you have a much larger piece of equipment, a much better radio so its able to decode smaller signal strengths. He explained that signal strength is established which says they can allow this much loss from antenna to cell phone and still communicate.

Mr. McCarthy inquired whether that was a Verizon standard and Mr. Andress replied it is pretty much an industry standard depending on which manufacturer you have. Mr. McCarthy asked if that refers to signal strength and Mr. Andress replied yes exactly. It's like if we're communicating and we put a wall in between us and it's only an inch thick, I can still hear you but its muffled. If the wall gets thicker and thicker to a point where I can't hear you anymore. He stated that signal strength is what determines how much loss can be tolerated for them to still communicate.

Mr. Bloss commented that his understanding of Professor Johnson's opinion so far, is that he's pretty much in lock step with Verizon and agrees that they've done their due diligence to identify the best suitable location and that based on all the testing there is definitely a need.

Mr. McCarthy clarified that Dr. Johnson's analysis is technical advice and not legal advice and that he is reviewing and analyzing the RF data presented by Verizon and providing the Town with an opinion as to whether the standards that they're articulating, the signal strength and the channels that Mr. Andress just went through are reasonable industry standards and whether the propagation maps that have been put forth are reasonable in the industry, which he would say in total, his reports validate. He added that although Professor Johnson has validated that there is a gap in service, he does not believe he has validated that the site does meet that service or has gone so far as to say it's the best site or the only site.

Mr. Bloss stated that he believes he read a document where Professor Johnson talked about all of the sites and one site is deemed to be better, but that Verizon didn't come to an agreement with that property owner. He was however, unable to locate that document. Mrs. McCoy indicated she had read the statement as well, but also could not locate it.

Mr. Brennan advised that there is a property to the north that they had looked at that a gentleman out of state's mother owns, but that when they approached and asked him to lease the property, they said that they would not lease it to them.

Mr. Dudick inquired as to whether that property would have been more desirable and if they had gone to that property first.

Mr. Brennan replied that when they find an area within which they need to have a site, they go and look at a variety of those properties. He advised he did recall this large acreage site, but that the landlord wanted to turn it into a large subdivision and did not want to lease to Verizon Wireless. He mentioned another great one that's 3 doors to the east that has a large brand new subdivision on and one next to it that is covered with wetlands, advising they had went through all of these in many iterations over the course of the months. He added that Professor Johnson agreed they need a site within this general area and stated that they had looked at all of those very hard, but if they offer the money and the lease to the property owner and he says no I'm not interested in leasing it to you I want to develop it as a subdivision or just hold onto it, then they need to discount that and move on to another location.

Returning to the discussion about the variance standards for public utilities, Mr. Brennan stated the reason why there is a different standard for Verizon Wireless, National Grid and other public utilities is because unlike the doctor's office that gets relegated to a particular district which people can drive to, they need to be in the area of the people that are using the service and stated that Dr. Johnson has agreed with them. He explained that as a result, as these matters have gone through the Court system over the years, the Court of Appeals has said that there's a different standard for public utilities. It's not the traditional 4-part use variance test, the big one being that there is no economic return or no economic use of the property that's allowed under the zoning regulations and it's not the 5-part area variance test. He advised there is a case called *Rosenberg* which started out as a Con Edison case for a public utility and then it was applied to wireless communications, which basically says that the variances required to render safe and adequate service, there's compelling reasons, economic or otherwise for needing the variance. He indicated there are other iterations that we can talk about on what the standard is, but basically, we need to show that we need a facility and we need it within this area, which he believes they have done and done well. He added that Professor Johnson has issued 4 letters agreeing with them and that there is a compelling reason, economic or otherwise, for needing the variance – which is the lack of coverage if we don't deploy.

Mr. Brennan went on to state that there is another case from the Third Department which talks about this, but basically again reiterates that cellular telephone companies are treated as public utilities and the general principles for area or use variances don't apply. He explained they are in a different legal standard and that they need to establish a gap in coverage. He again stated that they have time and time again, described to the Board and Professor Johnson has backed them up, that there is a gap in service and that the location proposed will remedy the gap. He stated that Professor Johnson has agreed that a site within this area will remedy the gap. He added that the Third Department case talked about the facility presenting a minimal intrusion upon the community and they would suggest that a 100' monopole, surrounded by existing tall trees that are very thick, that is not visible from anywhere but one location, satisfies that this is not an intrusion in the community. He went on to state they are not proposing a 200' lattice tower or a 150' monopole. They are proposing something just over the tree line that all of the simulations show is not visible.

Mr. Dudick opened the Public Hearing and advised he was going to limit the time for any questions or comments to 4 minutes so that everyone would have an opportunity to be heard. He advised that people who had spoken in the past would have an opportunity to speak again. He also reiterated that the speakers would be speaking to the Board; that it would not be a direct one on one questioning of the applicant; and that the applicant would have the opportunity after your time is done, to come up and respond to the question, or to come up and respond at the end to multiple questions. Mr. Dudick then asked for questions or comments.

Al Czerpak of 20 Balsam Way, the neighborhood adjacent to the proposed location of the tower, expressed concerns regarding the proper cell location. He passed out some written information to the Board which he described as comments and pictorials of visual aspects of the proposed location. He advised that he appreciates Verizon's efforts to identify deficiencies in their communication paths and thanked the Board for being open minded and allowing a process to continue even though the Town regulations have already stated a position of prohibition of any type of new towers in an R-1 district. He added he believes the community appreciates that we have an open government and we have a commercial enterprise that's looking out for our welfare. He stated that there will be a significant negative adverse impact in the aesthetics of the region due to various historical, cultural and other pertinent community aspects for the people that live there and that he believes the laws that were put into the Town regulations are in fact, consistent with the reason people object to the intrusion of a commercial, brand new construction tower in an R-1 development. He believes there are many more open options to consider that weren't addressed and that those options should be better documented. He stated that the language in the Town regulations shows there's going to be a much more determined effort to vet the application to justify why they want to change the character of an R-1 location. He stated that if you look at the mapping of the towers in Clifton Park, most of them follow the paths of commercial business along 87 and 146 where the concentration of towers is. In this particular situation he stated, we have a tower that's trying to penetrate where we've been before and doing it in an intrusive nature, which he believes is contradictive to the goal of Clifton Park. He stated the regulations say they're going to protect the residences in R-1 and he believes doing anything contrary is going to be a disservice to the people and to the Town. He stated that the State has already established a case basis where violation with adverse conditions for a Town with an R-1 type of violation by creating a new tower is suitable grounds to deny the application variance of use.

Mr. McCarthy advised Mr. Czerpak and the public that the Town has received a lot of e-mails during the process and that a lot of folks have consistently referred to the R-1 standard and the fact that the Town has put R-1 as the lowest priority for towers. He went on to state that as discussed with the applicant's counsel, the local Town Zoning Code doesn't control this application. He added that it is the State and Federal standard that the Board has to go by and therefore it is not determinative of this outcome. He reiterated that the legal standard that applies to this application is based on whether they identified a gap, does this application meet the gap and does it do so in the least intrusive means.

Mr. Czerpak reiterated the fact that the State Appeals Court has taken the position that aesthetic adverse effects on a community is a defensible reason for denying a variance in tower construction. He added that there is a higher court that has taken the position, of what he believes the residents here are seeking, which is a denial for the application. He concluded by stating that he supports Verizon and what they're doing, but that there are other locations that should be followed up on more judiciously and with more creativity in order to accomplish a real goal here, which he fully supports, adding that where he lives, they haven't lost one call in about 5 years .

Mr. Lemire asked what case he was referring to.

Mr. Czerpak replied he believes it was casing involving Voorheesville or another Town in the Helderbergs probably 4 or 5 years back, indicating he has specifics, but just didn't have them with him.

Mark Raciti of 522 Grooms Road questioned whether DEC can exempt to allow a cell structure to be put in wetlands. He advised that he had contacted DEC prior to buying his property which has wetlands on it and was advised that there are exemptions to the rules. He stated that he is ground zero there and can't get any closer to the center of where the tower is proposed than his property. He stated that he has good cell service in the dead zone. He added the perception of wetlands is that people think there's cattails and marshes and moose running along, but it isn't like that at all. He advised that his land is fairly dry with the exception of a few locations where there might be some streams crossing over and his question is, has the applicant talked to DEC to determine if they can use a wetland area to put up their tower in a location that is not near their homes.

Gia Lemerise of 275 Moe Road questioned the need for this tower and asked whether the e-mails and concerns the Town had received were from Verizon clients or if it was all cell service providers that are dropping calls.

Mr. Dudick responded that he doesn't recall, but since they are responding to the request for Verizon, he got the impression, especially from the ones in favor of the application, that they are Verizon clients.

Ms. Lemerise stated her concern is that Verizon has a financial interest in building and keeping their clientele and that the need for an actual tower for Verizon to service this area is a need for Verizon to build upon what they already have. She stated that other carriers may not be dropping and in that case - is there really a need to add a tower - because couldn't a Verizon client just go to AT&T? She stated she has AT&T and has no coverage problems. She stated she had been in attendance 3 years ago when they wanted to come in and do the same thing at the Fire Station and not 1 person could be found that was losing service in the same kind of area that they identified. She concluded that she is concerned that it is not to the interest of the community - it's to the interest of Verizon and questioned whether there really a need for a tower or if it is just a need for Verizon to continue growing their company.

Shawn Just of 327 Moe Road advised that his cousin is the one putting the cell tower up and that it will be in his backyard. He handed out a picture to the Board which was taken Saturday when the applicant put up the test balloon. He indicated he had his property surveyed and that Cellico says they're trying to hide the tower behind the hedgerow and that it is 104' from his property line. He stated that the Board had said it needed to be 110' from a residential line and his picture shows its already almost in the middle of the field and therefore it has to go over 6 more feet, as it is to be that 110' buffer from the property line. He added that the applicant is saying the property owner has the trees, but that the whole row on the side is JR's who was going to put the building lots in. He pointed to the photograph stating that the back property owner who was just speaking only owns a few trees and that the rest of the trees are his.

Mr. Dudick asked how he was able to determine that the balloon is 104' from his property line and Mr. Just responded that his survey stake is right next to the balloon and that he had measured it with a tape measure. He added that on the Town website, the law made in 2002 says it's supposed to be 500' away. Mr. Just referenced the historic nature of the property; the little red schoolhouse that his whole family went to; the vegetable stand he stated he owned as a kid and worked at with his uncle; his farm which has been there since 1895 and that they had owned Grooms Tavern which they were going to put a restaurant on, but that

his Aunt Kathy Hedrick had sold it to the Town to keep everything historic. He added that they are trying to keep this all historic and a cell tower just doesn't belong in this area.

Mr. Just indicated that with regard to the road frontage on their map, he had measured from his stake to the house and stated it is only at 38' 9" where they're going through. He advised he had to have the Sheriff Department there Saturday when they dropped the balloon because there was one car in the narrow driveway and they trespassed and tore up the grass just to go around the pole.

Mr. Dudick asked Mr. Just if he was saying that his cousin doesn't have a driveway to get onto his property. Mr. Just replied that there not a driveway, so they have to go in his driveway and there's only 38 inches. He stated that the doesn't think they can put a roadway because there's no buffer to his property. He reiterated its exactly 38 inches from his house to his stake.

Mary Raciti of 522 Grooms Road was present with her daughter Rachel. She indicated they had a power point presentation, but that the Board apparently didn't have time. She indicated she had taken pictures when the balloon was launched as well and that she doesn't think that her property and many of the neighbor's properties are well demonstrated by the balloon test that Verizon has supplied the Board. She distributed a photo of her land to the Board showing the balloon. She stated that although it looks like a small balloon now, when this is a 100' monopine with a 100 SF fence around it, it will be different. She advised that there is a very small buffer of not very substantial trees, some of which are falling over, are very thin and many that are old, which is all that buffers their land. She added that they live in the Town of Clifton Park because they value and cherish the comfort, the safety and the sense of community that this Town offers its residents. She stated that the specific purpose in buying this land is now being threatened and their plans and dreams are in jeopardy as their children would have to accept living next door, in full view of a 100' cell tower, surrounded by a 100' fence with a pad, a generator, a fuel tank and various other equipment. She stated that 24/7 access for commercial trucks, equipment and workers would be necessary both on the ground and in the air and that workers would have to be suspended on a tower 100' up, which would also affect their privacy, not to mention the ambience the rest of Clifton Park gets to enjoy and what they have become accustomed to and quite frankly, expect and deserve from their community. She stated this is not acceptable and there is no way this can ever be explained that would change the fact that this variance would forever change the essential character and the quality of the existing neighborhood and the community and without a doubt have an adverse impact on the properties in this area. She stated they should not have to abandon their plans for future intended use of their property due to the greed of a neighbor who has no regard for the impact this would create. She stated that every homeowner has the right to profit from their property, but it should not be at the expense of others and that Verizon stands to make the most. She stated that cell towers have a purpose and we all depend on them to communicate and to function in this world, but they also have a place and that place is a commercial area away from established residences. She added that Clifton Park has many commercial parcels and Verizon should be focusing on those areas and not changing the character of their residential area to accommodate this cell tower complex. They're a multi-billion dollar company with many assets, many other options and resources, which may cost more, but it would solve their need for improved coverage. This change would impact this area negatively and this scenario does not belong next door in our backyard or near any residential property. She went on to state that she is aware Verizon cited surveys, but suggested that anyone can find the same ones she has, which show that 94% of people consider it negative to live near or around a cell tower and that it negatively impacts their property value and that the values of their property have been shown to decrease as much as 25%. She concluded by stating they are asking the Town of Clifton Park to enforce the rule they have on their books and to stand with the residents and not allow this variance to pass

Upon inquiry from Mr. Dudick, Mrs. Raciti confirmed that she rents to a cell tower company with 3 cell carriers on her commercial property located in Latham. She also confirmed that she owns a little over 18 acres and that the picture she presented was not taken from her home, but was taken from a road they have that goes behind their pasture fence which is a cleared, very developable area that her children would like to have to build their homes on.

Catherine Hull of 334 Moe Road commented with regard to the balloon test and the pictures presented, advising that she believes the Board already has proposals in front of them for developments along Grooms Road and that the pictures that have already been taken, are sort of a moot point because many of those trees on the surrounding the property are going to come down. She disagreed that there's enough of a buffer of trees on the property. She pointed out that once Verizon co-locates on the Exit 8A tower or if they go to the transfer station, people very well then have service. She asked what carrier is on the Exit 8A tower and what is holding up the process and preventing Verizon from being able to co-locate there.

Mr. McCarthy advised he thought it was AT&T and Mr. Brennan advised he thought it was T-Mobile. Mr. McCarthy explained that the problem is the tower itself was built over the line and there is pending litigation with the State of New York over that issue and they can't lease to additional people until that litigation is resolved. Mr. Brennan advised that was his understanding as well

Ms. Hull advised she works from home and uses Time Warner Cable – now Spectrum to get her data. She stated that she believes the *Rosenberg* case is more with regard to cellular technology, telephones and whether a 911 call can get through or not, which she believes is their basis for actually being here. She stated that Verizon is proposing this tower for projected needs and their argument is based on the *Rosenberg* ruling from 1993 and is leveraging *Rosenberg* in a way that was not intended. She expressed concern that if Verizon is allowed to place cell towers where they say it is necessary or will be necessary in the future, that opens the door for all carriers to have the same right and that the Town would be setting a precedent. She stated that most people know what a public utility company is and it would be a monopoly on a service that it provides, adding that she just named other carriers that provide the same service. She believes Verizon is trying to cherry pick what they need from this public utility status based on *Rosenberg*, getting the benefits without the price and the service regulation. She added that Verizon has a history of playing both sides of the fence for their own benefit and that they have been criticized for installing Fios in only wealthy areas and placing cell towers in less wealthy areas to avoid higher costs and stronger opposition, which she finds insulting. She advised that site acquisition specialists receive bonuses when placing towers in less expensive areas, which is a conflict of interest and questioned whether they are finding the best location to provide the most useful coverage or the most cost effective location for Verizon? She added that the owners of most feasible spot would not accept the price that Verizon was willing to pay so why we pay the price Verizon wasn't willing to.

Ms. Hull stated that another example of Verizon's MO is title shopping. She explained that Verizon told their Courts and the FCC that they should not be forced to use old legacy telecom regulations – something called Title 2 – but should be classified as a Title 1, which is information services and which doesn't have any regulation obligations, but then Verizon FTTP fiber to the premises networks are using the Title 2 classification so that they can charge regular phone customers for network upgrades and they get the right of ways, etc. Another example she stated is Verizon's response to our inquiry as to why their marketing material states full coverage if they need this cell tower. She opined that they want us to look at the marketing

materials for sales only. Then they want us to use other technical findings to see where they need to place the cell towers.

Mr. Dudick asked if he was in his home using his cell phone and it switches over so that he's using the Wi-Fi which is coming from the cable so he can watch Netflix, if he then makes a phone call does that also go to the Wi-Fi or does that still go through the cell tower

Mr. Andress replied that it depends on what model phone he has, but if he is not on the 4G network you will not have that ability. He explained that is would be cell phone dependent and software dependent on your cell phone.

Margot Elacqua of 5 Towline Road questioned if this is such a dead zone why is AT&T, Sprint, T-Mobile and everybody else not sitting here asking the Board for the same thing and why is it only Verizon that supposedly needs this tower in this exact place. She commented that if Verizon doesn't maintain ownership of the tower and sells it to another company, what says that company has to keep Verizon. She also indicated that the day the balloon was up a couple weeks, she had gone out with a camera and taken pictures which she did not have with her. She advised that the balloon could be seen from Grooms Road, Jarose Place and from the new neighborhood off Grooms Road and therefore it is not Moe Road it can be seen from as there are least 4 locations she had gone to quickly by car and very clearly you can see the red balloon in the air. She concluded by stating half of her 2 acres on Towline Road are wetlands that she can't do anything with and that the point the gentleman had made about it doesn't necessarily have to look like a swamp with cattails is very true and the wetlands are protected because of what grows there and what kind of wildlife is there.

The Chairman asked for further comments or questions. Being none, he made a motion to close the Public Hearing. Mr. Fantini seconded. All voted in favor and the Public Hearing was closed.

In response to the comments that had been made Mr. Brennan stated that as Mr. McCarthy had touched upon, while the Code talks about the R-1 zoning district and the uses allowed within it, this Board's sole job for the most part, is to deal with and consider variances. The Town's Zoning Law does speak to telecommunications towers and in this sort of area, and it talks about that for any new facility, a report must be submitted evaluating the use of existing structures, as well as the use of alternative tower structures or other stealth technology to meet the coverage needs addressed in the application. He emphasized again, they are not coming in with a standard monopole or lattice tower and they are not coming in with one at 200' that is visible from everywhere. In response to one comment, yes the balloon as our visual resource evaluation suggested, is visible through the trees. But when you look at the simulation of what a tree looks like behind dozens or hundreds of feet of trees, it becomes substantially invisible from almost every location.

Mr. Brennan stated that he had reviewed and talked about the Town's Open Space Trials and Riverfront Advisory Committee who had put out an advisory concept plan which identified the Town's nature preserve areas, historic hamlets, large open spaces identified as a proposed park, any identified key destinations within the community, proposed scenic road corridors, or from any proposed farmland protection area and pointed out that this site is no here near any of those resources that the Town's own Open Space Committee has evaluated as being significant to the community.

He went on to state that the legal case mentioned was actually a case from the Town of New Scotland where the basis for the denial was that the traditional cell phone tower of over 100' was visible from miles away.

He explained that particular tower could be seen from Helderberg Escarpment which is a scenic area where the park is. He stated this is not the same case and pointed out that any decision on this matter must reflect adequate proof that a reasonable person would accept to support the conclusion, adding that the generalized objections that have been repeated, don't become true because they're repeated and that they have presented expert proof that's been reviewed by the Town's experts as to the need for this facility, its location as well as its lack of visibility.

As to the suggestions made that Verizon could just go the existing tower at Exit 8 and if they were proposing a theoretical 180' tower at the Town transfer station, he suggested that would draw so much opposition the meetings would have to be held at a school, which is why they are proposing a facility that is very moderate in size, that is concealed from almost everywhere and will not have an effect on the community.

With respect to the red schoolhouse, Mr. Brennan advised they have a simulation its doorstep and there is no visibility from the schoolhouse.

Mr. Dudick asked how far the proposed tower will be from the neighboring property line.

Mr. Brennan replied that they would be 190' from the tower itself to the property line to the north headed towards Grooms Road; 114' feet to the southerly property line and that they are required to have a 110% fall zone or 110'. He added that since they are 114", they do not require a variance for the fall zone.

He went on to state that they are requesting a variance from the 500' setback required from a residential property line for a tower facility. He questioned whether Verizon falls under the definition of tower facility because they will be a stealth facility and in his view, the setback found in the Town Code is the impact of a standard tower trying to put them at a greater distance from residential properties to protect them. He again added that they are proposing a modestly sized, stealth tree that is not visible from these properties and that they have a survey indicating there are significant trees surrounding the property

Mr. Brennan explained there are 2 setbacks. There is a fall zone requirement which is 110% of the tower height from any property line and there is the requirement to be 500' from the tower structure to any residential property line. He advised they are 704' to the nearest residence, but that the property line is obviously closer than the residence.

Mr. Lemire asked Mr. Brennan if he was saying that a monopine is not a tower structure.

Mr. Brennan replied that if you look at the definitions, there's some question about what is an alternative tower structure and what is a tower structure. He stated that he'll live and die by the fact that they stayed here in front of this Board and didn't opt out on that, and opined it's not the best language about what is a tower or tower structure, but as to a tower with branches on it, are they an alternative tower structure that's stealth? He then added that by his read, an alternative tower structure is second priority and is allowed in any district.

He reiterated that he does not believe by definition, they are a traditional tower structure under the code, but had agreed a long time ago to stay away from that. He also reiterated that they have looked at all of the available properties; have looked at all of the Town properties including the transfer station; they have gone through all of the processes with Professor Johnson to vet this for the Board through very competent technical expertise; and that although it's a conflict of interest because he gets paid to say these things, if

Verizon didn't need this, they would pack up and go someplace else. He added that they are incessantly criticized by Root Metrics and other folks about the quality of the network in this area which is why they are here and if it wasn't necessary they wouldn't have used his time or the Town's time for the last year and would have used their money elsewhere to provide coverage where is also lacking

Upon inquiry from Mr. Bloss about entering upon the site through neighboring property, Mr. Brennan advised that if you look at the photo sims, there is a significant driveway going back most of the way that they plan on using and will stay entirely on the landowner's property. He added that their driveway is 12' wide; they don't need to be on the neighboring property and that he was not sure what happened as he was not there.

Mr. McCarthy pointed out that if the applicant got that far, they'd be dealing with the Planning Board on site plan issues as to that road anyway and Mr. Brennan agreed.

Mr. Dudick commented that technology is changing rapidly and that we are talking about Verizon trying to get ahead because 3G is going to be phased out in a couple of years and he imagines there's going to be a greater and greater reliance on using Wi-Fi to make phone calls as opposed to towers, which creates in his mind an interesting conundrum where on the one side, he sees where there's a greater need for a tower to be placed because of the phasing out of the 3G due to the changing technology, but also as the technology changes, there's a lesser need for a tower if more and more people are going to be making their phone calls off of the Wi-Fi systems which are connected to the cable, which would be Verizon's competitor and basically, who is going to get that phone call service – the tower or the cable. He commented that there's also an issue which that he has pondered as far as the whole idea that a utility gets certain perspective on these use variances is because of the public need and certainly for public safety issues. He added that if we go back 25 years ago, it was sometimes a matter of life and death to be able to make a phone call and you needed to access through utilities, which is the way laws were written and *Rosenberg* came along around the same time.

Mr. Dudick added that cell phones have become computers that you can also make phone calls with and therefore, the issue becomes does it still fit the public need to be able to watch movies and get weather reports and does that still hold to the same standard with regard to a utility so that they can bring greater bandwidth. He added that it also comes into the other issues as far as aesthetics, how reasonable something is as far as tower height, whether a monopine is truly displeasing and whether it is a tower and not a tower.

Mr. McCarthy advised that for purposes of this application, we've agreed that this is a new wireless communication facility under the local code and under the Federal act and whether it's a tower or not is not a question.

Mr. Lemire commented that his understanding is that the Telecommunications Act provides that a State and Local municipality regulation shall not prohibit the provision of personal wireless services within a Town and that he believes the purpose of Town Code Section 208.95 which is entitled Communication Towers, sets forth in its legislative intent that it was to follow the Federal and the State act if there is a State act that applies. He added that his understanding is that the *Rosenberg* case dealt with a situation where the municipality was denying cell coverage within their Town and the Court said that was not allowed. He went on to state that he believes the purpose of Section 208.95 is to allow telecommunication towers and public utilities within our Town and to regulate it and that is a provision in the law that the local municipality still has the authority to regulate the land use within their municipality, under the rubric of the Federal Act and

the case law that interprets that. He indicated that he is struggling with, and believes the applicant has conceded, that there are alternative sites within the zone that maybe available to cover the gap that they've identified and as long as there are alternative sites, he believes the case that the gentleman in the back was referring to, dealt with situations where there were alternative sites within the municipality that would have allowed the gap coverage to be filled in. Taking all of this into consideration, he advised he is struck with whether our Town Board has promulgated a statute that addresses the Federal Telecommunications Act of 1996 and the *Rosenberg* case. He added that this Board is not the Town Board and therefore, if Verizon is here for a use variance, why aren't we just addressing the use variance and the 4 elements that we should look at, just like any other use variance.

Mr. Brennan stated that he disagreed that they have identified alternative sites that are still available. He stated that this is the site, there is nothing else available and that he has not heard the Board or anyone from the community say that there's another location. He added that although there is one large parcel that won't lease to them, he disagrees with the assertion that there is other location within this area off Grooms and Moe Road that can be used.

Mr. Fantini commented that there has to be a reasonable accommodation to fill the gap of service and that although the law would like us to put them in certain areas, it seems like any area that Verizon has looked are all in residential zones.

Mr. Brennan commented that the gap in service is in the residential zone and they already have towers in all of the areas that they are allowed and yet they are still having problems, which is why they are coming in front of the Board with respect to filling the gap and having to fill it. He reiterated that Professor Johnson went over this and agreed that the gap needs to be filled from within this area.

Mrs. McCoy commented that even if Verizon decided upon the transfer station or some other spot that is allowed by zoning, doing a 180' tower is still going to affect an impeding neighbor somewhere.

Mr. Brennan agreed and added that Professor Johnson had looked at a hypothetical 180' tower along with and in combination with the tower at Exit 8A and there is a letter in the record saying that doesn't work and that he has reviewed Mr. Andress' analysis and it would still leave significant areas of Moe and Grooms Roads and other areas right in the heart of this unserved area with insufficient coverage.

Mr. McCarthy commented that it would narrow the gap but it wouldn't eliminate it.

Mr. Brennan replied that Professor Johnson still said Verizon is going require a locally based solution to the problem.

Mr. Lemire inquired whether the Telecommunication Act of 1996 requires that there be wall to wall coverage at whatever megahertz or does it just require that the Town doesn't prohibit the public utility from being within the Town? He commented that the evidence in the record is that there is coverage in this area, its just suboptimal and he doesn't believe anyone has answered that question, at least not to his satisfaction.

Mr. Gifford inquired as whether Verizon can go up 10% on their existing towers to get better coverage.

Mr. Brennan replied that doesn't solve the problem because going higher doesn't necessarily mean more coverage. What it usually does is increase interference, because as you go taller you're just shooting into one

another, not down low where you need to be. He added that when you're outside where we're trying to cover, you've got one sector pointed in and Professor Johnson has agreed that what happens is to the extent there is coverage there, it is used up over the miles before you get to this area and there's also not sufficient capacity because you're using one sector of 3 or 4 antennas, as versus 3 sectors which significantly increases the amount of capacity.

Mr. Dudick questioned how Verizon chose the locations of their existing towers so that it wasn't a problem 7 years ago.

Mr. Cifor and Mrs. McCoy commented that it is related to data, increased use and increased population.

Mr. Brennan agreed that penetration into the cell phone population has exploded, as has the network use and the data use. With regard to the siting requirements, he added that the allowable areas have been used up and it isn't getting any easier for them because the allowable areas have been used and service is being upgraded and fixed.

Jaelyn Hakes refreshed the Board and the members of the public on some of the bases of the SEQRA related to this particular application. She advised that this is an unlisted action under SEQRA; that a Part 1 has been prepared by the applicant and submitted as part of the application; a Part II draft has been prepared by staff and provided to the Board; and a Part 3 has been drafted and prepared by the staff for the Board review. She advised that procedurally, the actions the Board must take in order to comply with SEQRA is first to declare a Lead Agency. She explained that this application has undergone an uncoordinated review as an unlisted action and that a coordinated review is not required and therefore, the Zoning Board is the only potential Lead Agency under that uncoordinated review.

She further advised that the Board would need to confirm that it has reviewed the draft parts 1, 2 and 3 of the Environmental Assessment Form and identify any changes to those drafts. If the Board disagrees with any of the recommended answers to Parts 1, 2 or 3, then ultimately to complete SEQRA the Board would need to issue a SEQRA determination. She added that there are two options for a SEQRA determination. She explained that the first is the Board could issue a negative declaration, which means that the Board has reviewed all parts of the EAF and has determined that there are no significant and adverse environmental impacts as a result of this proposed project. At that point, the Board could move forward with review of the requested use and area variances. The second option would be to issue a positive declaration, which would mean that the Board has determined there are significant adverse environmental impacts that would be created as a result of this proposed project. She added that if a positive declaration is determined by this Board, that would trigger the development of an Environmental Impact Statement or an EIS and at that time, the Board would need to clearly identify which issues are triggering that and what would need to be further evaluated as a part of an Environmental Impact Statement and no action on the actual variances could take place until that EIS process is completed.

Mr. McCarthy pointed out to the Board that Part 2 of the EAF in draft form was handed out to them this evening, which is a checklist format where staff, Ms. Hakes, Mr. Myers and himself have gone through and answered a series of questions under SEQRA. He inquired of Ms. Hakes whether she had reviewed the applicant's Part 1 on behalf of the Town and whether she found it to be accurate and complete.

Ms. Hakes stated that she had reviewed Part 1 and found it to be accurate and complete.

Mr. McCarthy then sked Ms. Hakes what the staff recommendation is regarding the determination of significance and how that was arrived at.

Ms. Hakes advised that there were 4 impacts identified within the Part 2 which could be potentially moderate or significant and the reason that was important, is as we evaluate Part 3, we need to identify any particular issues or topics or questions that we indicated a moderate or large impact for and the Part 2 has to be evaluated in the Part 3. She went to state that Part 3 of this SEQRA Environmental Assessment Form provides the reasons in support of the determination of significance – again that’s either the negative declaration or the positive declaration – and that there are 4 aspects that were identified as having moderate to large impacts in Part 2, which are impact on aesthetic resources; impact on historic and archaeological resources; consistency with community plans and consistency with community character. She explained that the supplemental information is laid out to identify what the potential moderate to large impacts may be and then the importance of the impacts are identified and that there is a consideration of design or project changes. She went on to state that the application before the Board is for a stealth tower at a lower height than what was originally proposed and that based on that information, as well as staff review of the data and the additional materials that have been submitted by the applicant as well as the review by the Town’s RF consultant, Professor Johnson and the mitigation that has been identified through the stealth tower and the lower height, it is their opinion that a SEQRA negative declaration would be appropriate for this application at this time.

Mr. Dudick made a motion to declare the Zoning Board of Appeals as Lead Agency with regard to this application and to make a negative declaration with regard to this application. Mr. Fantini seconded. All voted in favor and approval was unanimous.

Mr. Fantini commented that the criteria the Board is looking at from the Federal laws, is that there is a gap of service, that the cell company has made a reasonable effort to look at different locations and no location would provide a solution.

Mr. McCarthy advised that he would articulate it right out of the site acquisitions case that was referred to earlier and that counsel spoke of, which is that the standard really is – has the applicant identified a true gap in the service; have they demonstrated that this location meets the gap in service necessary for the company to provide adequate and safe capacity and coverage for their users and for their facilities; and does the application present a minimal intrusion to the community; or are there alternatives sites in the record that are available that would service the gap in coverage and capacity and do so in a less intrusive manner to the community.

At the request of the Chairman, Mr. Brennan confirmed that the application request is for a 100’ tall stealth monopine tree, with one set of antennas at a centerline height of 91’ with no additional carriers at this time.

Mr. Bloss commented that from an engineering perspective, without adding height, an additional carrier would have to go below the applicant’s antennas at a centerline height of 91’, which would be below the tops of the trees, which would be difficult for them.

Mr. Brennan agreed and advised he would leave it to those carriers to make that determination, but advised the Board that it will be designed and structurally capable of holding another set of antennas should someone want to deploy on it. He added that he wouldn’t want to tie their hands or the Board’s hands on that option

and would leave it to Mr. McCarthy and the Planning and Zoning Departments on what that process is with the community should another carrier want to come in.

Upon inquiry from Mr. Cifor, Mr. Brennan clarified that on a standard monopole lattice type, self-support tower, recent Federal Law says they can go up 10% with or without approval, depending on a particular community. He added that his read of that law with respect to stealth facilities is that the automatic 10% does not apply because there is the potential that adding 10% to the top of stealth facility detracts from its ability to provide the stealth concealment and therefore, that does not get an automatic pass. He added that he would accept that as a condition or state it on the record as he just did, that they or the next person in doesn't get a free pass to put a little pole on the top of it or to up the thing by 10' because it's a stealth facility.

Mr. Lemire stated that he would make a motion, adding that under the Federal Telecommunication Act, cell towers can't be zoned out or regulated out of a municipality. That's not the case here in Clifton Park. It's also under the *Rosenberg* case and the other cases. That's not the case here in Clifton Park. The Clifton Park Town Board has enumerated in that the statute, the local Section 208.95, and allowed for cell towers. As I believe the applicant has conceded and as we all know, there are cell towers here within the Town of Clifton Park which provide for cell coverage often adequate, sometimes maybe spotty, but its certainly here within the Town. Under those circumstances and given that our Town Board has promulgated local legislation, taking into consideration the Federal Telecommunications Act, it's my position that the Zoning Board of Appeals deals with this solely as a use variance and an area variance. We have limited jurisdiction and there's certain things that we are supposed to take into consideration. So, this, in my humble estimation would be a use variance first pursuant to 209, 109 (C) (2) just like any other use variance which we need to take into consideration within the Town. I don't think we have jurisdiction to do anything other than that because we're only here as a Zoning Board of Appeals to address area variances or use variances or sign variances as they may come up. So taking that into consideration, I think part of what we do in considering an application is to try to balance the applicant's interests with the interests of the residents and the folks who live in the Town. So from doing that, for the use variance elements, which counsel has indicated do not apply, I think our obligation is to include that the applicant – whether it be Verizon or the actual landowner - have not demonstrated an unnecessary hardship for each and every permitted use within the R-1 zone. In fact, I don't believe that there has been any evidence submitted for several of the elements that are necessary for our consideration. Number 1 – I don't think there has been any evidence submitted that the Justs or the landowners cannot realize a reasonable return on their property, substantial, as shown by competent financial evidence. It clearly has not been demonstrated that this alleged hardship is unique and does not apply to a substantial portion of the district or the neighborhood. The hardship they are alleging, I assume would be true to any property within the zone. Number 3 – clearly the requested variance will alter the essential character of the neighborhood. The Town Board in 208.95 has clearly set forth that new communication towers are prohibited in an R-1 zone and number 4 – its crystal clear to me that the alleged hardship by the landowner/applicant and by their lease. Verizon - has been self-created.

Mr. Lemire concluded by stating for reasons he believes the granting of a variance for a cell tower in an R-1 district, at this particular site, especially when there are alternative sites that are available or that exist, whether they are still available or not, within the zone, is not in the purview of this Board and therefore we should deny the application.

Mr. Cifor seconded the motion to deny the application.

Mr. Dudick then reiterated the use variance criteria which are - cannot realize a reasonable return substantial as shown by competent financial evidence and stated that the Board has reviewed this aspect in the past with leniency with regard to utilities; alleged hardship is unique and does not apply to a substantial portion of a district or neighborhood; that the requested variance will not alter the essential character of the neighborhood and that the alleged hardship has not been self-created.

He went on to state that in his opinion, the biggest question is - does the proposed cell tower alter the essential character of the neighborhood given that the applicant is proposing a monopine stealth to minimize or negate the effects of having a tower there.

Mr. Cifor stated that in the *Rosenberg* case they define a public utility as private business, often a monopoly, which provides service so essential to public interest as to enjoy certain privileges such as eminent domain and be subject to government regulations such as fixing rates and standards of service. He added that in this particular the instance, he believes the intent of a utility is public benefit and safety, meaning to be able to make a 911 phone call, providing heat and electricity and he doesn't believe it was for entertainment value of getting on the internet which is really the issue we are talking about.

Mr. Fantini stated that based on the Federal criteria, which he believes should be applied, the question he has is more what is considered coverage and is the coverage adequate, or is it that the 4G coverage is not sufficient.

Mr. Cifor responded that the Federal standard was the purpose behind the Town Board Enacting Section 208.95 which still placed these limitations on the location of cell towers, prioritized location and made the 500' barrier which took care of the Federal Standard. He added that this Board is not here to interpret Federal standards. We are here to interpret the variance law as promulgated by the statutes of the State of New York and the through the *Otto* case, which first had it and that is what this Board is charged with determining. He stated that he would agree with Mr. Fantini if the Town Board had not enacted Section 208.95 and that because we are here reviewing a request for a use variance, we have very specific factors which we are supposed to take in to consideration.

Mr. Fantini replied that since any possible location to alleviate the dead zone would be in a residential area, he believes the Board has to provide the application with reasonable accommodations.

Mr. Dudick reminded the Board that there is a motion on the table to deny the application and that a vote of yes, is a vote to deny and that if there are 4 yes votes, the application will be denied.

The secretary called the Vote:

Ayes: Mr. Bloss, Mr. Gifford, Mrs. McCoy, Mr. Cifor and Mr. Lemire.

Noes: Mr. Fantini and Mr. Dudick.

Application denied.

Chairman Dudick made a motion to approve the minutes from the January 3, 2017 meeting. Mr. Dudick, Mr. Lemire, Mr. Cifor, Mrs. McCoy, Mr. Gifford, Mr. Bloss and Mr. Fantini, who were present at that meeting, all voted in favor and the minutes were approved.

Mr. Dudick made a motion to adjourn the meeting. The motion was seconded by Mr. Gifford. Approval was unanimous. The meeting was adjourned at 10:25 p.m.

The next meeting is February 21, 2017.

Respectfully submitted,



M. Kathleen Smith
Secretary, Zoning Board of Appeals

Cc: Town Clerk, Town Board, Zoning Board Members
Tom McCarthy, Esq., Town Attorney
Steve Myers, Department of Building and Development
Town Assessor, Town Highway Department

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