



Town of Merrimack, New Hampshire

Community Development Department

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Planning - Zoning - Economic Development - Conservation

MERRIMACK ZONING BOARD OF ADJUSTMENT APPROVED MINUTES WEDNESDAY, JULY 30, 2014

A regular meeting of the Merrimack Zoning Board of Adjustment was conducted on Wednesday, July 30, 2014 at 7:00 p.m. at the Matthew Thornton Room.

Chairman Fran L'Heureux, presided:

Members of the Board Present: Tony Pellegrino
Phil Straight
Richard Conescu, Alternate
Leonard Worster, Alternate

Members of the Board Absent: Patrick Dwyer, Vice Chairman
Nathan Barry, Alternate

Also in Attendance: Jillian Harris, AICP, Planning & Zoning Administrator

1. CALL TO ORDER

Member Pellegrino led in the Pledge to the Flag. Member Conescu read the Preamble. Chairman L'Heureux swore in members of the public who would be testifying.

2. ROLL CALL

Chairman L'Heureux appointed Leonard Worster to serve as a voting member in the absence of Patrick Dwyer.

There being no objection the Board went out of the regular order of business to take up Item #12.

12. Convenient MD Urgent Care (petitioner) and KJB Ventures, LLC. (owner) - Variance under Section 17.10.4(a) of the Zoning Ordinance to allow a 172.7 sf. wall sign whereas 134.50 sf. is permitted. The parcel is located at 4 Dobson Way in the C-2 (General Commercial) and Aquifer Conservation Districts. Tax Map 3D, Lot 003-03. Case # 2014-32.

Chairman L'Heureux informed the Board of the Petitioner's request to continue the item until the Board's August 27, 2014 meeting, due to a family conflict.

MOTION BY MEMBER PELLEGRINO TO CONTINUE THE ITEM TO AUGUST 27, 2014 AT 7:00 P.M. IN THE MATTHEW THORNTON MEETING ROOM
MOTION SECONDED BY MEMBER STRAIGHT
MOTION CARRIED
5-0-0

Chairman L'Heureux spoke of the number of people in attendance wishing to address the Board. She requested speakers be provided the courtesy of speaking without interruption or distraction. All wishing to do so will be provided the opportunity to speak. Given the number of individuals wishing to provide testimony, each will be provided a period of 3 minutes to share their opinion with the Board.

The Board's policy for a 10:30 p.m. end time for meetings was noted. The general consensus of the Board was to exceed the end time, if necessary; however, it was noted productivity is typically reduced after the 10:00 p.m. hour.

MOTION BY MEMBER CONESCU TO EXTEND THE JULY 30, 2014 MEETING PAST 10:30 P.M. IF NECESSARY
MOTION SECONDED BY MEMBER PELLEGRINO
MOTION CARRIED
5-0-0

- 3. New Cingular Wireless PCS, LLC. (petitioner) and Alan & Erin Walsh (owners) - Special Exception under Section 2.02.1(B)(3), Section 2.02.1(B)(1)(a-e), and Section 2.02.4(B)(21)(a) of the Zoning Ordinance to allow the construction of a Telecommunication Tower in the R (Residential) and Aquifer Conservation Districts. The parcel is located at 121 Joppa Road. Tax Map 6C, Lot 329. Case # 2014-16. This item is continued from the May 28, 2014 and June 25, 2014 meetings.**

The Petitioner's representative, Brian Grossman, Anderson & Kreiger, LLC, was reminded to limit his discussion to issues before the Zoning Board of Adjustment (ZBA).

Mr. Grossman noted a fairly sizable packet has been submitted, which includes numerous pages of how the proposal complies with the relevant provisions of the zoning ordinance. He summarized by stating AT&T has had a significant gap in coverage in its wireless communications network for some time in this area. In general, the gap covers Joppa Road, Bedford Road north towards the Town line, to the east near Wire Road, to the west near Mitchell Street, and to the south down towards Baboosic Lake Road.

The need for the site is in part driven by network and subscriber developments over the last several years. The advent of the iPhone and other smart phones, tablets, etc. is currently driving network development for AT&T as well as other carriers. The need to deliver quality, high-speed or Long Term Evolution Services commonly known as 4G to meet subscriber demand for data services is a key component of AT&T site development. The site will also assist AT&T in providing quality voice service.

Proposed is a 150' monopole; a standard style monopole, which is then designed and camouflaged to appear as if a pine tree, which is in compliance with the ordinance requirements for camouflaging. It will be located within a 50' x 50' compound; will have 12 antennas along with other hardware, remote radio, head units, and cabling that will run from the antennas down within the monopole over to AT&T's equipment shelter. AT&T will have an equipment shelter (approx., 11'5" x 16') in which its radio communications equipment will be located.

The site is connected to standard utilities. Once constructed, the site will only be visited 1-2 times per month for routine maintenance. As an unmanned facility, it will not require water, sewer, or other municipal services.

The ordinance does require towers to use camouflaging techniques. Monopines are one of those techniques, given the setbacks of the tower in terms of its location on the property, the surrounding area, vegetation surrounding the area, etc. Use of the Monopine style allows for carrier flexibility not only for AT&T, but also encourages co-location. Other styles have other trade-offs and limits in terms of the ability for other carriers to utilize the towers.

As laid out in the report of the Site Acquisition Specialist, Shannon McManus, AT&T has engaged in an exhaustive search for a location at which it could locate a facility and meet its coverage objectives. It has taken several years to locate a site that is available, appropriate, and constructible that meets AT&T's wireless communications coverage needs and complies, to the extent feasible, with zoning.

Section 2.02.1(B)(1)(a-e)

The site provides for the required setbacks (from the proposed tower to nearest property line over 150'). Mr. Grossman stated that the site does not adversely impact the neighborhood. A report has been provided by a real estate appraiser who has done a site specific analysis. That report has determined the proposed facility will not result in a diminution of property values. To the extent feasible, it utilizes existing vegetation to screen the facility from view.

Because the site is unmanned and has limited traffic (1-2 times per month), it does not present a hazard to pedestrians or vehicles in the area. The site design provides for a parking space turn around for the one vehicle that will be there 1-2 times/month. Existing vegetation is fairly heavy surrounding the area of the compound, and will provide a buffering of the base of the tower as well as the compound itself.

Section 2.02.4.B.21(a)

Mr. Grossman continued his discussion of the proposal noting that the distance to the nearest property line would be 151'. The tower itself would be 150'.

The question was raised of whether the proposed setback is the highest piece on the lot, e.g., is the proposed setback minimal and the ability present to set the tower back further. Mr. Grossman responded one of the reasons for the specific location of the compound is due to wetlands in the area. The tower is proposed to be located outside of the wetlands and wetland buffers.

The shelter and other equipment meet the minimum zoning setbacks. The Monopine design includes non-reflective colors.

When asked, Mr. Grossman stated the company looked at 12 specific location candidates that were identified and raised to the level of investigation and evaluation. He explained part of the site acquisition process is not necessarily cataloguing every specific property in an area. Part of it involves viewing Assessor's maps, ordinance, driving the area, etc. to focus a search. There are a number of properties in an area that by training and experience you would, as a Site Acquisition Agent, exclude automatically. The 12 identified were fully investigated and vetted. Some did not work for radio frequency reasons, some were not available for purchase, and a few not available due to property restrictions that could not be resolved.

Member Straight noted the ZBA has been quite good about working with applicants on variances for setbacks.

Mr. Grossman read the points of law into the record:

Section 2.02.1(B)(1)(a-e)

- a. The specific site is an appropriate location for such a use or uses in terms of overall community development.

The property is an appropriate location for the proposed facility and will not have an adverse impact on overall community development. The location of the proposed facility utilizes the existing

vegetation on and near the property to help minimize any adverse visual impact. Further, in order to minimize any impact, AT&T proposes to camouflage the proposed tower to resemble a pine tree. AT&T's proposed facility complies with this requirement of the ordinance as set forth in the report of Andrew G. LeMay of Real Estate Consultants of New England, Inc.

The proposed facility will not result in a diminution of real estate values in the neighboring area. The proposed use complies with the ordinance to the extent reasonably feasible and will reduce the number of new structures ultimately needed to provide wireless communication services in the surrounding area by providing opportunities for co-location. The proposed facility is unmanned and passive in nature, and will involve no overcrowding of land or undue concentration of population. The facility will only be visited 1-2 times per month by authorized personnel in an SUV-sized vehicle; therefore it will have no material impact on traffic near the property. The facility will not generate any excessive heat, noise, smoke, glare, affluent odor or pollution. The facility will benefit the neighborhood by providing enhanced wireless communication services to residents, visitors, and businesses in the vicinity of the property.

- b. The use as developed will not adversely affect the neighborhood and shall produce no diminution of real estate values in the neighboring area.

AT&T's proposed facility complies with this requirement of the ordinance as set forth in the report of Andrew G. LeMay of Real Estate Consultants of New England, Inc.

- c. There will be no nuisance or serious hazard to vehicles or pedestrians.

The proposed facility is unmanned and passive in nature. The facility will only be visited 1-2 times per month by authorized personnel in an SUV-sized vehicle. Therefore, will have no material impact on traffic near the property. As depicted on the plans, one turnaround area/parking space will be located near the proposed facility for use by authorized personnel. As a result the proposed facility will not have a material impact on pedestrian or vehicular traffic and safety on or near the property.

- d. That an adequate parking area is provided for motor vehicles on the premises.

The facility is unmanned and passive in nature. It is only visited 1-2 times per month by authorized personnel in an SUV-sized vehicle. It will have no material impact on traffic near the property. There is one turn-around area/parking space located near the proposed facility for use by authorized personnel. Therefore, the facility includes adequate parking for the proposed use.

- e. A buffer shall be erected and maintained to screen existing residential uses. Buffers may be fence screens, dense plantings of suitable trees and shrubbery, or naturally occurring shrubs and trees.

As demonstrated by the plans and photographic simulations submitted herewith, the proposed facility will be surrounded by a dense growth of trees that already exist on the property. In order to minimize any impact, AT&T proposes to camouflage the tower to resemble a pine tree.

When asked what the buffer would consist of, Mr. Grossman responded there is a dense growth of trees already on the property, which surround the area. Other than the area of access and the compound itself, AT&T is not proposing to clear any other part of the property. The existing vegetation on the property will buffer both the base of the compound (shelter and fencing) as well as the lower portions of the tower from view.

Section 2.02.4.B.21.a

- 1) Towers shall be set back from the property line by a distance equal to the height of the tower. The Planning Board may permit a lesser setback where alternative protections to abutting properties are provided by way of easement, covenant or other adequate deed restriction or where the proposed tower is designed in full compliance with all applicable building codes and building/construction plans submitted to the building inspector are certified and stamped by a licensed structural engineer prior to the issuance of a building permit.
Prior to the issuance of a Building Permit, the tower design and plans shall be reviewed by a structural engineer designated by the Town.

As depicted on the Plans, AT&T's proposed tower will be setback a minimum of 151' from the nearest property boundary; and, therefore complies with this provision of the Ordinance. AT&T will provide the required construction drawings and structural information to the Building Inspector with its application for a building permit.

- 2) Accessory facilities must satisfy the minimum zoning district setback requirements.

As depicted on the Plans, AT&T's proposed compound will be setback approximately 126' from the nearest property boundary; and, therefore complies with his provision of the Ordinance.

- 3) Towers shall maintain a neutral, non-reflective color so as to reduce visual obtrusiveness.

AT&T's proposed stealth facility, camouflaged to appear similar to a pine tree, will comply with this provision of the Ordinance. The tower and antennas will be painted with a non-reflective paint (brown and/or green) and the faux branches and faux Pine needles are molded in a non-reflective material.

- 4) For security purposes, towers and ancillary facilities shall be enclosed by a minimum six (6) foot fence.

AT&T's proposed facility complies with this provision of the Ordinance. As depicted on the plan submitted herewith, the proposed compound will be surrounded by a 6 foot-high chain-link fence topped with 3 strands of barbed wire.

- 5) All utility buildings and structures accessory to a tower shall be screened from view by suitable vegetation from any adjacent residentially zoned property or public roads.

As demonstrated by the plan and photographic simulations submitted herewith, the proposed facility will be surrounded by a dense growth of trees that already exist on the property. Also as depicted on the plan, AT&T's proposed compound will be setback approximately 126' from the nearest property boundary and approximately 147' from Joppa Road. Due to the distance from the nearest property lines and the existing vegetation on the property, the proposed facility will be suitably screened from adjacent properties.

- 6) Any proposed communications tower shall be designed, structurally, electrically, and in all respects, to accommodate both the applicant's antennas and comparable antennas for at least three (3) additional users if the tower is over 100 feet in height or for at least one (1) additional user if the tower is less than 100 feet in height. Towers must be designed to allow for future rearrangement of antennas upon the tower and to accept antennas mounted at varying heights.

AT&T's proposed facility complies with this provision of the Ordinance. As depicted on the plans submitted herewith, AT&T's proposed facility includes adequate space and capacity for up to three (3) additional wireless communications carriers.

Chairman L'Heureux declared the Public Hearing open at 7:30 p.m.

PUBLIC COMMENT

Bill Barry, 3 Cardinal Court

Mr. Barry stated he has been a resident of Merrimack for 40 years. He commented cell phone reception in his neighborhood is horrific at best. He stated, for the record, he does not now nor has he in the past nor will he in the future have any fiduciary relationship with AT&T, Cingular, or any of the cell phone carriers.

He stated the reception to be so poor he acquired a femtocell/network extender. He spoke of individuals utilizing only cellular telephones, and remarked if it is not now it will soon be a public safety hazard, e.g., contacting police, fire, etc. He acknowledged the need for a cell tower in this section of Town. Mr. Barry commented on having followed the court case in Manchester and suggested members of the Board read up on it. He stated his belief a similar situation will occur in Merrimack.

Nicole Tomaselli, 11 Knollwood Drive

Ms. Tomaselli provided a PowerPoint presentation. She stated the proposed site to be approx. 1,000' from her residence, although she is not considered an abutter. She stated her concern over the location of the tower, and noted one of the criteria that have to be met is that the project is for the benefit of the community, which she does not believe to be the case. She remarked the 12 other sites that have been investigated are nowhere near Merrimack.

She stated she is an avid technology user and in favor of wireless coverage; however, she is for responsible and appropriate installation of towers so that the coverage needed is obtained and the public safety benefits achieved. She projected an image that depicted the aquifer, and noted the entire area is under water. She highlighted the area of the landfill, and suggested there are more appropriate areas in town for location of a tower. She spoke of Merrimack having won awards for having one of the most prolific and clean aquifers in the entire country. Consideration of constructing a telecommunications tower on it is something she finds appalling.

Ms. Tomaselli stated there are 10 homes on Knollwood and Ridgewood, which are all on private wells. She questioned whether AT&T would offer to test the water each year. She commented on the impacts to the watershed, e.g., installation of a road, a propane tank, fencing, etc. noting any such activity will impact the watershed and the wells. She questioned who would be responsible for the associated costs if an accident was to occur and the aquifer became contaminated. She stated her opinion the project is not in the best interest of the community or the most responsible location for something of this nature.

Charles Mower, 4 Depot Street

Mr. Mower noted he has been a resident of Merrimack for 65 years. Although the proposed location is not in his backyard, he is concerned. He commented the community has gone through a great deal of difficulty improving planning and zoning issues over time. It is to the benefit of those who invest in their homes and businesses that all should be treated fairly and equally according to the community plan. Merrimack is a unique community in the way it is configured; residential district west of the turnpike.

Mr. Mower stated his opinion there is adequate coverage, and he does not believe it to be the business of Merrimack or the government to ensure AT&T can provide the very finest and state-of-the-art technology to every resident in the Town of Merrimack.

He stated concern AT&T may have a plan for the community, which has not yet been revealed. He believes this to be part of a plan while being treated as an individual project that is consistent with the need to service the area, which by their own account is touted as being moderate to good to best. They speak of gaps, but don't admit to any gaps on the maps they utilized in promoting their product. There are also devices available that can improve coverage. He finds that to be a better alternative than turning the planning of the Town on end to facilitate a cell phone industry that was allowed to do this in the Telecommunications Act to incentivize a new technology and now all these years later we are finding it to be creating an onerous burden, and not consistent with the long-term needs of the community.

He reiterated AT&T has a plan that is not yet known to the Town. They want a cell tower and have admitted their plan is to sell part of their cell tower to other carriers. He does not believe the Town should be in the business of providing that kind of opportunity for a leg up on the competition in the private marketplace.

Member Straight commented that is part of the 1996 Telecommunications Act; they have to share. Mr. Mower stated he does not know that to be true, but he does know to be true that they have the ability to come before the Board and get a cell tower. He stated the original intent of the Act is being abused to simply further their revenue streams.

Gregory Roberts, 9 Cardinal Court

Noted he is a former ZBA member, and a neighbor to Bill Barry. He echoed comments made regarding cell phone coverage and noted he has miserable coverage at his residence. Mr. Roberts stated his support of the proposed project. He spoke of how the community is connected through telecommunications. He provided an example of search and rescue being able to track an individual's whereabouts through a cell phone. If there are gaps in coverage, an individual who may have become disoriented cannot be located through his/her cell phone. Searching in this way allows rescuers to locate an individual more quickly and avoids searching in areas where they don't need to.

Member Conescu questioned if members of the Civil Air Patrol (CAP) utilize ham radio antennas on their homes. Mr. Roberts stated some do. He commented he is an amateur radio operator and was before joining CAP. He has several antennas and technologies that he can use in his home, has had them in his car, and has portable radios. Member Conescu noted the ability for Mr. Roberts to broadcast an RF signal from his residence. When asked how far he could broadcast, Mr. Roberts stated he could bounce a signal off the moon and talk to someone in Japan. He remarked that is what ham radio is all about, but the point is there are very specific license and frequency grants for what they are allowed to use and are also power restricted. One of the things they are prohibited against is transmitting on frequencies that are used for the transmit/receive on cell phone towers. When asked if anyone has complained about his broadcasting of RF frequencies from his residence, Mr. Roberts responded no; if someone had ever lodged a complaint he would have been contacted by the FCC.

Michael Thompson, 99 Joppa Road

Requested the Board deny the proposal from New Cingular Wireless PCS, LLC. He stated his request to be based on the following items, which have not been met in accordance with zoning regulations:

Application does not show compliance with Section 2.02 of the Town of Merrimack Zoning Ordinance and Building Code.

No study has been provided by an independent source to assure it meets the requirements from Section 2.02. The application does not comply with Section 2.02.B.1 - No use of any kind shall be permitted in any district, if it in any way would be injurious, noxious, or offensive by way of odor, fumes, smoke, dust, vibrations, noise, light, or other objectionable features or if it would be hazardous to the

community on account of fire or explosion or any other cause, or Section 2.02.1.B.3(d) - Written evidence demonstrating that no existing structure can accommodate the applicant's proposed antenna if the applicant is proposing to build a new tower. This evidence can consist of an analysis of the location, height, strength, and potential interference which would make co-location impractical.

He stated he has confirmed that tower NH41424-T at 42 Baboosic Lake Road has the opportunity to allow two additional antennas at this time. Based off the submitted application, that was not reviewed.

With regard to market research on real estate values, a report was not provided by an independent company. The company was paid for by AT&T. Listed market research is out of date (2004, 2005, etc.). Due to the fact the market research is out of date and commissioned by an applicant, he advised the Board not to take it into consideration.

Section 2.02.1 (b) states: The use as developed will not adversely affect the neighborhood and shall produce no diminution of real estate values in the neighboring area. The proposed design does not meet the definition of disguised used by Section 2.02.1.

Robin Warren, 17 Knollwood Drive

Ms. Warren stated she was not informed she would not be allowed to submit information at the time of the meeting. She spoke of the amount of time she put into preparing the document and commented on the Petitioner's representative having been given more than 3 minutes to speak.

Chairman L'Heureux responded the Petitioner's representative was included on the agenda to speak. Given the number of speakers wishing to give testimony, the three-minute rule was being utilized. Ms. Warren stated several people have given her their 3 minutes.

It was suggested she present the material she wished to provide. Ms. Warren stated the proposed cell tower would be 151' from her property line. She is the closest abutter and also an AT&T cell phone user. She chose AT&T because they provide the best service in her area of town.

She wished to put into perspective what a 150' tower would look like by noting the neighborhood houses are 15-25' tall. Telephone poles are a regulation 30'. She utilized her cell phone to take 450 pictures of the number of bars appearing on her phone as she traveled around the 15 streets identified as the area of significant gap in the targeted coverage area. At her residence she gains 2 bars and has exceptional service. In the other areas she noted 1-3 bars.

AT&T has a distributed antenna system they are pushing in other parts of the country where they simply put a cell tower on top of an existing structure. It would add 9' to the telephone poles. That is the way of the future. She provided a copy of AT&T's coverage map for the area showing good voice coverage. She noted one of the streets listed in the application does not exist.

With regard to the other locations considered for placement, most were in Bedford and ruled out because they do not provide sufficient coverage for the significant gap. Of the four alternate tower locations that were considered two were denied by restriction and two the owners refused to work with them. She provided information on Town owned land that was not considered. She questioned why AT&T only considered alternate sites to the north and northeast. If Merrimack truly is the significant coverage gap why did they not investigate any other sites around the area?

The 9th U.S. Circuit District Court ruled that a significant gap in coverage is not sufficient. The radio frequency maps did not prove there was a significant gap in coverage and in fact a gap has to be truly significant and the TCA does not guarantee that there will never be any dead spots. There is precedent for saying, in the absence of a significant coverage gap the tower should not be approved.

Raquel Perez, 48 Bean Road

Ms. Perez remarked she had used AT&T as her cell phone carrier; however, due to horrible coverage, she switched to Verizon. She spoke of retaining a land line in case of emergencies and/or power outages. She stated, for her, the tower would not be useful.

Henry Richards, 6 Heritage Drive.

He and his wife both utilize AT&T, and have experienced fabulous reception. They had previously utilized Verizon; however, the lack of reception proved frustrating. He stated his opinion that the tower is not necessary. He is not in agreement with the proposed location, and commented the 150' tower would be his view from his windows. He spoke of having seen these types of camouflage in the past, and does not believe it leaves the tower looking like a pine tree. He stated his opinion it does not belong in a residential area.

Mr. Straight questioned whether it is the phone that achieves greater reception rather than the particular carrier. Member Conescu responded the answer breaks down to the four different frequencies that operate on GSM and the permeability of the different frequencies. As you move higher in the spectrum you will discover the permeability goes down significantly. If using an older 3G phone you will notice a difference in coverage from an LTE network. He added, he does not believe any of this discussion to be relevant to the decision of the Board, he simply wished to address a question posed.

Thomas Maurice, 105 Joppa Road

Stated his opposition to the project commenting it does not belong in a residential area. It has been stated there would be one parking space; however, the plans depict 4 potential carriers. There could be up to 4 vehicles entering the area twice a month, and they could conceivably all be there at the same time.

Daniel Szymanowski, 124 Joppa Road

Stated the proposed structure would be located in his front yard about 10' past the 150' line. He is a Federal Communications Commission licensed radio telephone broadcast engineer as well as a radio amateur. He does not believe commercial structures such as this tower belong in a residential neighborhood. The proposed pine tree stealth structure of 150' in height is 70' above the current tree line. Having been associated with RF structures for over 50 years, he believes the proposed tower is overkill at best for the 15 streets that allegedly have no service. At a height of 150', AT&T has made accommodation in the proposal for additional cell carriers to install antennas and equipment presumably at a premium price so they can easily recoup costs and provide a continuous stream of revenue while not necessarily benefiting the Merrimack residential community.

A smaller structure, although probably adequately providing the anticipated service for the 15 street area would not be as attractive to other carriers so why not try for 150'. He strongly urged the Board, before any decision is made, engage the services of an independent wireless telecommunications professional engineer to evaluate the proposal for; 1) actual services being provided to AT&T customers on the 15 streets to determine the current level of service, 2) actual power output of hardware being installed to determine if a smaller structure, not to exceed the height of the tree line, would provide the same level of service, and 3) if deemed necessary from evaluation from the first, confirmation if other commercial properties or sites in Merrimack are available that could accommodate AT&T's proposal without a variance to construct in a residential area if deemed necessary from evaluation of 1 and 2 above.

Brian Tomaselli, 11 Knollwood Drive

Stated he has owned his property for 9 years, and not once had a land line. He has had cell phone coverage for 9 years and has not had a single issue. With regard to camouflage of the tower; at 150' tall and 70' taller than the existing tree line, it will be seen. He spoke of aircraft approaching the Manchester Airport on a daily basis right over his residence. At that point in time, at that location, they are very low. The tower is proposed in an area that is within the landing zone of the Manchester airport. It is very likely there will be lights all over the tower camouflaged as a pine tree.

One of the streets in the proposed coverage gap is Lawrence Road. The transfer station is located on Lawrence Road. That would be more of a commercially zoned alternate site, and likely a more appropriate place to put a tower.

Finlay Rothhaus, 14 Kittredge Lane

Stated his belief the Telecommunications Act of 1996 was absolutely necessary at the time as no one had cell phones and communities didn't want towers sticking up through their landscape. Times have changed; there are towers all over and cell phone use is rampant. Weak coverage is generally minimal at best. If it were all about the benefit to the community it would be one thing; however, it has been pointed out that coverage isn't apparently the problem it has been represented as being. In their own literature they appear to say just that. He agreed with comments made around the proposal being more about potential revenue. He spoke of the statement around the height of the tower not being necessary for the pocket area identified as needing coverage. In this case, the tower height could be reduced.

He commented the application includes language suggesting the need for fewer towers if the proposed tower is erected. He commented he is unsure if the community or the ZBA are aware of what the number of towers ultimately might be. He is unsure if a plan has been seen or information requested. However, since the claim is made that placement of this tower would lessen the overall number of towers, that information should be provided to the ZBA. Where there are pockets of potentially weak coverage throughout all communities, he questioned what the appropriate amount of coverage would be. He questioned, at what point, the Telecommunications Act says enough is enough.

Councilor Rothhaus stated he does not believe the Council has ever come before the ZBA looking for certain answers or to intimidate the Board in any fashion, as was indicated earlier. He added, if the perception is you are being intimidated, you are not. Chairman L'Heureux responded; personally, she did not take it that way. Member Straight stated he has been on the Board for 9 years, and the Council has provided the space needed for the Board to operate properly. The Council has been very good about not steering the Planning or Zoning boards.

Dick Debelis, 15 Knollwood Drive

Stated he is a lifelong resident, and has resided at his current address for the past 30 years. His property abuts the abutters at 121 Joppa Road. He commented the proposed tower should be a concern for all residents. He agreed with all who have spoken in opposition to the proposed project.

The proposed imposition of a 150' tower would not be a pleasing site to any of the families in the neighborhood. If allowed, it would set a precedent. He suggested no one else would like it in their backyard or neighborhood. If it is necessary, it should not be constructed in a residential neighborhood, but placed somewhere on a commercial property or on a designated public lot where revenue would benefit the citizenry.

Peter Gagnon, 130 Bedford Road

As Mr. Gagnon was not present at the start of the meeting, Chairman L'Heureux swore him in.

Mr. Gagnon stated a desire to specifically address Section 2.02.1(B)(1)(a), and in doing so stated the site truly is not an appropriate location for such a use or uses in terms of overall community development. He noted the Telecommunications Act does not guarantee there will be no gaps in coverage. The important issue is that of overall community development and planning. The Town is noted for its environmental planning and issues adopted by the Townspeople over time.

He suggested that particular location comes with its own built-in problems. The area is completely surrounded by pipestone soils at an elevation of 111. The proposed site is considered to have Hinckley soils. The water table in that Hinckley soil is typically 6' down. They would be at the 112 elevation. He stated concern with the possibility a tower would be placed on a marshmallow. You cannot be totally surrounded with high water table that is at or near the ground's surface and then within a little finger of 300' of existing soil that has a water table 6' down. He acknowledged that to be a Planning Board issue.

He stated the important thing to be is the proposed project part of the overall community development; absolutely not because we have wetland zoning ordinances, site specific ordinances for industrial, commercial, residential, etc. The Town has a very comprehensive set of regulations that have governed the planning of the Town over the past 3 decades. He stated his belief the Petitioner has not proved there to be a substantial need for them to sit on that particular location.

Bill Boyd, 139 Joppa Road

Is a direct abutter to the project, and is opposed to it. Councilor Boyd echoed Councilor Rothhaus' comments and thanked member Straight for amplifying the sentiments that exist in the community regarding the relationship between the Council and the ZBA.

He stated there to be three points he would like to make regarding issues that do not support the special exception criteria in Section 2.02.1(B)(1)(a, b, and c). He spoke of testimony provided that indicated agreement the community benefits from the best technology possible. However, he finds it difficult to look at a strict commercial application being applied in an established residential neighborhood on an existing housing lot. He stated his opinion that is spot zoning. With regard to the Manchester court decision, he noted a dramatic difference between that decision and what the Board's responsibility is. First the ZBA in Manchester had two bites of the apple; they were for it before they were against it (before it went to court). It was a 4.5 acre parcel of land that was a stand-alone vacant housing lot. There was nobody living on that piece of property. That case does not apply to the situation that exists in Merrimack as this is a property owner who is looking to lease property. The case in Manchester was for a variance, and what is being sought in Merrimack is a Special Exception; two different sets of criteria.

There are other communities the petitioner's representative spoke of; Windham, Hooksett, etc. Merrimack is not any of those communities. There are 12 locations in Town where cell towers exist on industrial properties. There is one that sits on a residentially zoned property; Legion. A variance request was made of the ZBA in 2006, and was granted. Points to note include the setback, buffering, and the fact it was a 75' tower sitting on the turnpike not 150' monopole, which is why there was no opposition to the project, and why the cell tower remains at that location. The project does not meet the criteria of community development as opposed to the cell tower that exists at the American Legion property as that is located in the center of Town.

With regard to public safety; in 2008 there was a cell phone tower on Columbia Circle where acid from the battery inside the containing facility ignited materials that were inside of the building. The Fire

Department not only had to respond to extinguish the fire, but also had to send a hazmat crew to the scene. Should such an event occur at the proposed location, which sits above an area rich in ground water and is surrounded by private wells, he would have great concern the neighborhood would be placed at tremendous risk. He conceded it is a remote possibility; however, if it happened at Columbia Circle, it could happen on Joppa Road.

He requested the Board weigh all of the testimony provided, and vote to deny the special exception based on Section 2.02.1(B)(1)(a, b, and c).

Rodney Weaver, 142 Joppa Road

Stated his residence is 300' from the proposed site. He purchased his home last August. While in agreement with all of the testimony provided, he wished to raise the issue of the criteria relative to Section 2.02.1(B)(1)(b) – "The use as developed will not adversely affect the neighborhood and shall produce no diminution of real estate values in the neighboring area." He remarked, had there been a 150' tower in that location a year earlier, he would not have purchased the home. He suggested anyone that lives within sight of this tower will have a difficult time should they wish to sell their property.

Kathleen Cook, 6 Heritage Drive

As Ms. Cook was not present at the start of the meeting, Member Pellegrino swore her in.

Stated she has experienced great service with AT&T, and is able to gain access all through Merrimack. She remarked her husband has called her from all of the identified streets without issue. He also called her from Bradford Woods, which is one of the sites the Petitioner has stated was considered. Again, they experienced no difficulty with connection. She spoke of her displeasure with the possibility the view out of her windows could be that of the cell tower. She too spoke of difficulty trying to sell the property should the tower be erected.

Anne Whitney, 130 Joppa Road

Resides directly across the street from the proposed location. Every day of this past winter she witnessed a large red balloon floating in the air. She could see it very clearly. When she and her husband purchased the property 20 years ago, it was zoned residential, and she believed it would always be residential. Both the proposed location and her property are in the current use program. By placing a tower on the property the Petitioner will be subjected to the Land Use Change Tax, and taxes on that portion of the property will increase.

She spoke of the view that will be present from November until April when the trees are without leaves. She requested the Board consider the land is zoned residential and there is truly no necessity for a cell tower.

Christine Adams, 4 Ridgewood Drive

Stated her opposition to the project. She spoke of the view she will have of the tower from her residence.

As members of the public wishing to provide testimony arrived after the initial group was sworn in, Member Pellegrino swore them in.

Elona Lucas, 60 Joppa Road

Stated her belief the arguments that have already been made are lucid and convincing arguments

against putting the tower at 121 Joppa Road. The most pressing argument is that the area is zoned for residential use. She stated her agreement property values will be affected negatively.

Richard Gele, 9 Knollwood Drive

Stated his opposition to the tower. He commented it does not take a lawyer to figure out property values will be affected by the tower. He questioned why the tower would need to be camouflaged if not believed to be an eyesore.

Sherry Nassauer, 10 Woodbine Lane

Stated she does not reside in the immediate neighborhood, however, has seen these structures off of highways. It is very clear what they are. She stated her belief everyone in the extended area surrounding the proposed site, will see the tower, which will detract from the appearance of the area. She agreed the tower would decrease property values in the area.

Bev Fulling, 116 Joppa Road

Noted she resides in the cluster of houses across the street from the proposed site. She has lived at that residence for 36 years, and purchased the home with the thought it was a nice residential, country road. Placement of the tower will certainly take away from that. Getting closer to retirement age and considering the possibility of downsizing, she has to consider the decrease in market value that would result from a tower being erected across the street.

Roger Van Wert, 94 Joppa Road

As a 30-year resident of Merrimack, he has witnessed a lot go through the Town. He spoke of attempts to put in a heliport in a residential area, which were unsuccessful. He does not believe a cell tower is appropriate in a residential area, and remarked it would definitely reduce property values (up to 20%). He spoke of the wetland designation for the area, which he believed should categorize it as a non-buildable area. He stated there to have been studies that concluded cell towers may negatively affect one's health. He spoke of testimony the tower would be in the path of aircraft landings/takeoffs, and remarked even if not directly in the path, it would definitely be a distraction for the pilot.

Kenneth Page, 6 Ridgewood Drive

Has resided at this location for nearly 47 years. The area has developed into a beautiful residential area. He stated concurrence with all of the testimony provided in opposition of the project. The tower, if located there, would be clearly visible from his backyard.

Paul Fulling, 116 Joppa Road

Stated agreement with testimony provided in opposition of the project. He spoke of the trees that surround the area, and expressed concern there does not seem to be anything that would prevent the property owner from harvesting the trees at some point in time, which would make the tower even more visible.

Nicole Tomaselli, 11 Knollwood Drive

Spoke of researching 121 Joppa Road as a parcel. There was a ZBA decision in 2003 when the previous owner petitioned the ZBA to sub-divide the property in order to construct an additional two homes. The ZBA denied the petition based on soil conditions (wet). They could not see the ability to safely create a septic system in that wetland. She suggested the precedent for this parcel may have already been set; it is not suitable to build on.

Charles Mower, 4 Depot Street

Added to his previous remarks by stating a concern this proposal cannot be viewed as anything other than an incomplete application until the Petitioner provides the full strategic plan for full coverage for the Town of Merrimack. They, in their response, have stated this will reduce the need for cell towers in the Town of Merrimack relative to the overall strategic plan. Without understanding the full plan, the statistical evidence of that cannot be understood. He is unsure how the Board could adequately determine a positive outcome for the Petitioner without knowing what portion of the plan they have testified to as being in the public good.

Chairman L'Heureux noted the ZBA cannot make a decision based on what will occur in the future. The Board is required to vote on what is before it at this time. Mr. Mower responded the Petitioner has testified that it would reduce the overall need for cell towers in the Town of Merrimack, but that has not been quantified.

Michael Thompson, 99 Joppa Road

Wished to bring to the Board's attention FCC Ruling 09-99 issued on November 18, 2009, which states that zoning authorities need to decide within 150 days of receiving the application or it goes forward. He does not believe that will be an issue; however, wished to bring it to the forefront. He spoke of a statement made regarding the ability to purchase a femtocell/cell repeater, and commented he is able to pick up on the cell repeater of his neighbor who is about 100' away.

Robin Warren, 17 Knollwood Drive

Reiterated her respect for AT&T and the service she has received from the organization. She remarked she traveled all of the streets and where she identified having achieved 1 bar on the iPhone, she successfully placed a cell phone call to another AT&T cell phone to understand what the coverage really was. She reiterated her belief the significant coverage gap the application contends is not supported by the data, and that the proposed project would not be a benefit to community development for the neighborhood.

Chairman L'Heureux declared the Public Hearing closed at 8:46 p.m.

Chairman L'Heureux noted receipt of a letter addressed to the ZBA from Brian Allen of 5 Heritage Drive. In his letter, Mr. Allan states his opposition to the project. A communication was also received from Andrew Kosko. Chairman L'Heureux noted Mr. Kosko is the individual who initiated an online petition (change.org). In his communication, Mr. Kosko stated his opposition to the project.

Michael Thompson stated the abutter notification states e-mail communications would be read into testimony. Member Straight suggested a little leeway should be allowed as the intent of the communications has been relayed. Chairman L'Heureux noted the 159 names of individuals who signed the online petition (Change.Org) were not included in the communication. She brought that information forward so the public is aware of the online petition.

When asked how many communications were received, Jillian Harris, AICP, Planning & Zoning Administrator, responded she received 1 e-mail and 1 letter in advance of the meeting from individuals interested in providing a statement, but unable to be in attendance.

Elona Lucas, 60 Joppa Road

Stated she too had forwarded a letter. Ms. Harris was asked to look into the matter.

The petitioner's representative, Brian Grossman, requested the opportunity for rebuttal. He displayed a document that detailed proposed coverage from the facility. He wished the public to understand what the proposal is covering aside from what has been enumerated. He commented several speakers spoke of femtocells as alternatives for problem areas. There is a 9th Circuit Court case that states clearly those kinds of technologies that a person can obtain for themselves, while a benefit to that particular consumer, are not an appropriate alternative to a proposed site such as this one, which is called a macro site that provides the broad geographic base of coverage. Individualized solutions while available to solve someone's particular problem don't solve the greater problem as a whole. That is demonstrated in the Radio Frequency report included in the application package.

Approximately 3,500 people or 10% of the population of Merrimack is included within the coverage gap that AT&T has identified in its network. That is the additional new coverage that would be provided. Those residing inside the coverage footprint shown on the map would now have adequate service. It represents approximately 3.13 square miles of new coverage for AT&T.

He stated a desire to be very clear about AT&T's business model; AT&T is not a tower developer. If someone is going to levy the accusation that the only reason they are proposing a tower is to profit from the revenue, that is not AT&T's business model. AT&T's business model is to provide wireless communication coverage to its subscribers in the areas they want it. If the tower were going to be a single purpose tower, meaning only AT&T would be on it and AT&T would expect to see no revenue from it in the future other than the provision of service, they would still construct it. Additional carriers utilizing a tower would be a benefit and is a requirement. From a land use planning perspective, it reduces the likelihood of a new tower. Member Straight interrupted and reminded the speaker the ZBA is only responsible for addressing whether or not this is proper land use. It cannot factor in the business model, etc.

There being no objection, the Board took a five-minute recess at 8:58 p.m.

The Board reconvened at 9:03 p.m.

Mr. Grossman addressed concerns raised regarding flight path by informing the viewing audience all carriers are required to comply with FAA regulations. In addition, they have tools available to them to run compliance checks. The compliance checks (copy in packet) have demonstrated the facility would not need to be marked or lit, and doesn't require registration with the FAA.

The package also includes a diagram of new coverage provided by the facility. There is spillover coverage into Bedford; however, the vast majority of new coverage is provided in Merrimack within the area of need, identified by AT&T's radio frequency engineers, and in the report provided by Mike Laughton who is a radio frequency engineer expert. The location is chosen because the coverage to be provided must be provided in or near the area of need. It cannot be provided from 3-5 miles away. When a gap such as this one, which is significant based on the 3,500 new population count, land area, and traffic counts, is identified, you need to locate a facility in or near that area in order to provide the coverage in that area.

He commented there has been a lot of anecdotal evidence about being an AT&T customer with great service; however, that is anecdotal evidence, not expert testimony such as the report submitted by Mr. Laughton, the radio frequency propagation maps that are used and relied upon by courts in evaluating questions over the existence of a gap and whether or not its location is significant. Courts have routinely rejected the anecdotal evidence, as it is not scientific.

Chairman L'Heureux opened the floor to questions from the Board:

Member Conescu noted his understanding of the points made, e.g., from a frequency standpoint, data rates will be affected by distance to tower, etc. Addressing the areas for which the Board is responsible

he remarked under Section 2.02.1(B)(1)(a); “The specific site is an appropriate location for such a use or uses in terms of overall community development.” He is of the opinion that is a bit vague, and the Board could spend a great deal of time arguing the point. The primary concern that remains for him is with Section 2.02.1(B)(1)(b); “The use as developed will not adversely affect the neighborhood and shall produce no diminution of real estate values in the neighboring area.”. In addition to the information provided in the packet, he has done extensive research on the subject, and has discovered there are a great many opinions and few facts.

Member Pellegrino questioned whether the ground at the location has been checked at any point to determine whether it is solid enough. Mr. Grossman responded geological testing of soils is done in preparation for the final tower and foundation design, which is typically only done after approval as it can be invasive.

**MOTION BY MEMBER STRAIGHT TO DENY THE SPECIAL EXCEPTION UNDER SECTION 2.02.1(B)(3), SECTION 2.02.1(B)(1)(A-E), AND SECTION 2.02.4(B)(21)(A) OF THE ZONING ORDINANCE TO ALLOW THE CONSTRUCTION OF A TELECOMMUNICATION TOWER IN THE R (RESIDENTIAL) AND AQUIFER CONSERVATION DISTRICTS.
MOTION SECONDED BY MEMBER PELLEGRINO**

ON THE QUESTION

Member Straight remarked the request was difficult. He does not know whether it is needed or not, but can accept the fact it is needed in that general area, but can't accept the fact this is the best site. The size of the tower seems excessive, and he believes a better location could be identified.

MOTION CARRIED

4-1-0

Member Worster voted in opposition

There being no objection the Board went out of the regular order of business to take up Item #13.

13. Shawn Pacheco Professional Martial Arts Academy (petitioner) and G&G Scully, LLC. (owner) – Special Exception under Section 2.02.3(C)(1) of the Zoning Ordinance to allow a commercial recreational use in the C-2 (General Commercial), PRD, Elderly and Aquifer Conservation Districts. The parcel is located at 370 D.W. Hwy. Tax Map 4D-3, Lot 003-01. Case # 2014-33.

Chairman L'Heureux informed the Board of the Petitioner's request to continue the item until the Board's August 27, 2014 meeting.

**MOTION BY MEMBER STRAIGHT TO CONTINUE THE ITEM TO AUGUST 27, 2014 AT 7:00 P.M. IN THE MATTHEW THORNTON MEETING ROOM
MOTION SECONDED BY MEMBER PELLEGRINO
MOTION CARRIED
5-0-0**

4. Thomas & Kathleen Benoit (petitioners and owners) - Variance under Section 3.02.A of the Zoning Ordinance to permit the construction of a single family residence on an existing lot with 20 ft. of frontage whereas 250 ft. is required. The parcel is located on Woodbine Lane in the R (Residential) District. Tax Map 6B, Lot 186. Case # 2014-24.

Joseph Maynard, Benchmark Engineering, read the points of law into the record.

Member Pellegrino questioned the location of the land, and was informed it is behind the house at 15 Woodbine Lane. It was a recreational parcel created as part of a 1970 subdivision. The courts ultimately gave those parcels back. His clients acquired it when they purchased their home at 15 Woodbine Lane. The Right-of-Way is in existence today to the right of their existing home.

Member Worster spoke of a Declaration of Covenants, and questioned how the property became private property instead of part of the land covered under the Covenants. He questioned whether the Association was not formed, disbanded, etc. Mr. Maynard responded the Association was never formed, that he could find proof of it on record, and there was a New Hampshire Supreme Court case or a number of them in the late 1970s/early 1980s that ruled that it was a taking by the boards who were requiring these open space parcels; and, therefore, they were actually granted back to the original developer if they remained intact/in place. Had an Association been formed, it would have been granted to the Association, and the Association would have paid taxes on it, etc. Those things didn't happen as an Association could not be identified. Subsequently the Town of Merrimack took it for taxes. The Town sold it to the individual he believes to have been the previous owner. When his clients purchased the home in 2001 they purchased that also. Since that time they have paid nearly \$40,000 in taxes on that piece of property.

Mr. Maynard stated the petitioner's legal counsel was requested to review the associated documents, title, etc. prior to beginning this process. The opinion provided was they have clear title to the property and could move forward with the request. It was believed the Association is defunct. Therefore, the documents didn't apply.

Chairman L'Heureux declared the Public Hearing open at 9:22 p.m.

Testimony in Favor - None

Testimony in Opposition

Larry Demers, 17 Woodbine Lane

Stated the Association was never formed because the developer never followed through with his obligation. When 51% of the properties were sold it was intended the contractor would form the Association. He did not. Regardless of that, the Covenants stay with the property, and are strictly for conservation and recreational use. An existing well is on one of the corners of the property (southwest corner of existing house lot). The New Hampshire Department of Environmental Services requires 71' between a well and a property line. He acknowledged what is in place are existing conditions (well is approximately 20' from Right-of-Way). If a house lot is granted and a driveway put in, that well could very well become contaminated being that close to a driveway. Chairman L'Heureux questioned the origin of the well. Mr. Demers stated the well feeds Mr. Benoit's home.

Mr. Demers spoke of the wildlife in the area; a herd of 7 deer that travel through the area and a few bear. Construction would impact wildlife in the area. He reiterated the area is intended to be for conservation and recreation. He stated his belief the area was referred to as common land prior to the term green space.

He noted one of the site maps indicates the Town of Merrimack as an abutter, which is incorrect.

Lou Yelgin, 10 Woodbine Lane

Mr. Yelgin stated he moved to Merrimack some 30 years ago and they raised their daughter here. They chose Woodbine Lane as it is a quiet residential area where residents walk and children play in the street. The insertion of this home, without the proper frontage (250'), would create a hidden driveway. He described the area; two homes next to each other and then a 20' easement area, which

would become a driveway to a home that would be behind all of the other homes on Woodbine Lane. He spoke of a document signed by the abutters stating the creation of this hidden driveway in order to place this home onto the property that is behind all other properties would create a safety hazard for those residing in the neighborhood and utilizing the area for recreational purposes.

Mr. Yelgin stated his opinion granting the variance request would be contrary to public interest, the spirit of the ordinance would not be observed, and granting this variance would do substantial injustice.

He commented the understanding he gained from a direct abutter is that the buildable part of that property is ledge, and in order to put a foundation in there, blasting would have to occur. He questioned what affect the construction process would have on the lands in the neighborhoods; wells, drainage, aquifer, etc.

The original use of that property was for recreational purposes. The ball was dropped and the residents were not even aware the parcel was available for recreational use. It was only learned when the previous owner paid the taxes. The requirement is for 250' of frontage and this proposal wants 20', which is 8 percent of the requirement.

Gordon Hollis, 19 Profile Drive

As Mr. Hollis was not present at the start of the meeting, Member Pellegrino swore him in.

The location where the house is proposed is in the back of his property on the hill. He is opposed to the project, and noted a concern the trees/woods he has had as a view from his residence for the past 21 years will be replaced with a house. He spoke of runoff during the spring and concern that it would increase as the area above would no longer have the same absorption properties. He spoke of taking walks on the property (assumed to be common land) and commented on the beauty of the land and its abundant wildlife.

Member Conescu questioned whether the land referred to as common land falls within the border that constitutes the Benoit's property. Mr. Hollis stated it does. He stated he has always known the parcel simply as a wooded area. He did not know anyone owned it.

Raquel Perez, 48 Bean Road

Ms. Perez remarked she was in attendance on behalf of her neighbors. Her home is located in the middle of Profile and Woodbine. She spoke of runoff that comes from Woodbine and past her home. It does not affect her home, and measures are being taken to address the runoff. However, if the land were to be cleared it would result in a large increase to the amount of runoff.

Member Straight noted if submitting a plan to construct a home, runoff would have to be addressed. If it were not it could result in a civil suit.

Ms. Perez commented those that have spoken and whom she represents are her neighbors, and they have spoken of preserving the character of the neighborhood, and keeping the common land. Member Conescu questioned the reference to common land. Ms. Perez stated the area was common land up until the time taxes were no longer paid on it, and the Town took ownership. Chairman L'Heureux remarked although the residents believe it to be common land, it is owned by someone, and therefore no longer common land.

Member Straight remarked he understands the concerns expressed; however, the owner of the property also has a right to develop something. When zoning boards throughout the State typically go against the land owner, the courts will more than likely support the side of the landowner as he/she has the right to develop and do something with the land he/she owns.

Sherry Nassauer, 10 Woodbine Lane

Ms. Nassauer questioned the reasoning behind the 250' frontage requirement. Member Straight stated his belief, typically the 250' has to do with the tightness of the soil and how that relates to a septic system. Ms. Nassauer stated her belief the Board is in receipt of a communication from the adjacent neighbor who is concerned about his well. She acknowledged that to be a Planning Board issue; however, stated her knowledge when work was done on putting in the water system along Woodbine one of the people on the other end of Profile Drive, who had never had a problem with water previously, had a completely flooded basement. There are those issues to consider.

Ms. Nassauer stated her primary concern to be with a 20' driveway. Her driveway is directly across from the adjacent neighbor. The 20' driveway is at most 20' away from his driveway, and her next door neighbor has part of their driveway coming pretty close to hers as well. She is concerned with the number of directions she will have to view just to pull out of her driveway, and referred to it as a safety issue.

Member Straight remarked Merrimack has all kinds of irregular lots, and it occurred to him that this lot was designed the way it was with the 20' going up to the road so that someone would have access to develop the 7 acres in the back. It is his assumption that was the plan and that is why that 20' opening was put in place. Ms. Nassauer stated the original intent was for that to be access to the common land, not a private driveway.

Chairman L'Heureux reiterated the property is now privately owned. Ms. Nassauer stated her belief those who would have been part of the Association had it been formed, would have been happy to pay the taxes had they been informed and provided the opportunity.

Tom Worster, 34 Bean Road

Although not an abutter, he has resided in his home for 30 some odd years; one of the original owners/residents in the area. In his deed is reference to this so called common land. He never received notification of its sale. He stated his belief he has, within his deed, something of value in addition to his property. He has access to this recreational land. If all of a sudden a house lot goes on there it has taken value from his property/deed.

Prior to the 1970's when the development was ongoing, common land was required for developments of a certain size, this being one such development. It was basically non-buildable land because it is all ledge.

Chairman L'Heureux noted receipt of a letter from Concerned Citizens and Abutters to 13 Woodbine Lane. In the body of the letter the citizens/abutters have provided views of the five points of law. There are signatures of 8 abutters and 8 concerned neighbors who are against the project.

Chairman L'Heureux declared the Public Hearing closed at 9:51 p.m.

Chairman L'Heureux opened the floor to questions from the Board:

Member Conescu spoke of the multiple times the private lot of land has been referred to as common land, and questioned how abutters are notified when something like the sale of land occurs in a subdivision. Chairman L'Heureux stated her assumption if the Town took the property by tax deed, it likely went up for auction. Ms. Harris noted the auction would have been noticed.

Chairman L'Heureux noted Town auctions have to be posted in the newspaper, would be identified on Channel 20, and posted in different areas of town. Member Conescu questioned whether the transition from public to private property would have been public information, and was informed it is. Member

Worster remarked in order for the Town to have sold the land, after taking it for taxes, it has to go to public auction.

Larry Demers, 17 Woodbine Lane

Stated the land was not auctioned, it was purchased at a tax sale. The covenants follow through with the land; the covenants being the restrictions on the land. The covenants follow through no matter what happens. No matter who owns the land the covenants apply. The restrictions are conservation and recreation. The 20' Right-of-Way is for access to the common land.

Ms. Harris reminded the Board the Private Covenants could not be considered in its decision. This decision is to be based solely on the zoning ordinance requirements.

Member Worster stated his belief the situation is relatively simple; the Association was never formed; therefore, anything that has to do with the Covenants of the Association is worthless because there is no Association. He remarked he understands what has been pointed out regarding language in a deed; however, in a subsequent deed that should have gone away because there is no Association, there is no land, there are no covenants.

**MOTION BY MEMBER WORSTER TO APPROVE THE PETITION FOR THE VARIANCE FROM THOMAS AND KATHLEEN BENOIT (PETITIONERS AND OWNERS) UNDER SECTION 3.02.A OF THE ZONING ORDINANCE TO PERMIT THE CONSTRUCTION OF A SINGLE FAMILY RESIDENCE ON AN EXISTING LOT WITH 20 FEET OF FRONTAGE WHEREAS 250 FEET IS REQUIRED.
MOTION SECONDED BY MEMBER CONESCU
MOTION CARRIED
5-0-0**

FINDINGS OF FACT

1. The values of the surrounding properties would not be diminished because zoning in the area is Residential. This is an allowed use in this district. A new home will be of equal or greater value to other homes in the general area;
2. The granting of the variance would not be contrary to the public interest because single-family homes are allowed in this district. All other zoning requirements will be met.
3. A. Denial of the variance would result in unnecessary hardship to the owner because the following special conditions of the property make an area variance necessary in order to allow development as designed. This lot was created in the 1970s with a 20' Right-of-Way. There is no additional land available to meet the frontage requirement.
B. The same benefit cannot be achieved by some other reasonably feasible method that would not impose an undue financial burden because there is no other access to the land that would meet the current zoning. If there was the cost to purchase the land to meet that requirement would make developing this lot as a single-family property unfeasible.
4. Granting the variance would do substantial justice because granting the variance will allow the property owner to have a single-family dwelling on their lot such as some of the other homes in the area. The owner has been paying taxes on the property, since purchase in 2001, as a single-family building lot.
5. The use is not contrary to the spirit of the Ordinance because single-family homes are allowed in this area. Property only needs relief from the frontage requirement. All other portions of the Ordinance will be met.

- 5. Raquel Perez (petitioner)** – Request for Re-Hearing regarding Case # 2014-17, in which the Board voted to deny the appeal of an administrative decision under Section 2.02.1(A)(3) of the Zoning Ordinance, regarding the interpretation of the Community Development staff that a dump trailer in the Residential District does not constitute external evidence of a Home Occupation. The parcel is located at 46 Bean Road in the R (Residential) District. Tax Map 6B, Lot 101. Case # 2014-25.

Member Straight commented although the ZBA used information available to it at the time of the denial, the Petitioner claims evidence was given to staff that was not provided to the ZBA. He stated his opinion the Board has an obligation to follow up on that.

Chairman L'Heureux noted it is the burden of the Petitioner to prove the ZBA was not provided with all available information. Member Conescu questioned whether additional evidence has been provided.

Member Worster suggested tabling the item and request staff reviews their records and compare the information against that which was provided the Board to determine whether evidence exists that was not provided. Chairman L'Heureux questioned whether the Petitioner would be agreeable to such action.

Raquel Perez, 48 Bean Road

Stated she would not only because she would like to specifically explain some of the photos of which there are many.

MOTION BY MEMBER STRAIGHT TO GRANT THE REQUEST FOR RE-HEARING REGARDING CASE #2014-17

MOTION SECONDED BY MEMBER PELLEGRINO

MOTION CARRIED

4-1-0

Member Conescu voted in opposition

- 6. Matthew King (petitioner/owner)** – Special Exception under Section 2.02.2(C) of the Zoning Ordinance to allow a single family residence in the C-1 District. The parcel is located at 575 D.W. Highway in the C-1 (Limited Commercial) and Aquifer Conservation Districts and the Wellhead Protection Area. Tax Map 6D-1, Lot 102. Case # 2014-26.

Mr. Matthew King read the points of law into the record:

Chairman L'Heureux declared the Public Hearing open at 10:05 p.m.

Testimony in Favor - None

Testimony in Opposition - None

Chairman L'Heureux declared the Public Hearing closed at 10:05 p.m.

Chairman L'Heureux opened the floor to questions from the Board:

MOTION BY MEMBER CONESCU TO GRANT THE SPECIAL EXCEPTION UNDER SECTION 2.02.2(C) OF THE ZONING ORDINANCE TO ALLOW A SINGLE FAMILY RESIDENCE IN THE C-1 DISTRICT.

MOTION SECONDED BY MEMBER PELLEGRINO

MOTION CARRIED

5-0-0

FINDINGS OF FACT

- a) The specific site is an appropriate location for such a use or uses in terms of overall community development because he would like to return his residence from a business or commercial to a home or residential. No longer using as previous business, which was a massage clinic.
 - b) The use as developed will not adversely affect the neighborhood because I operate as a home and do not often have guests. When he does it has been tasteful and contained.
 - c) There will be no nuisance or serious hazard to vehicles or pedestrians because the structure is of his property, is his home, and is away from the street and traffic.
 - d) Adequate and appropriate facilities will be provided for the proper operation of the proposed use or uses because the house is being utilized as a residential structure. There is a kitchen, bedrooms, bathrooms, and living space. There are no facilities for commercial use.
- 7. Matthew King (petitioner/owner)** - Variance under Section 3.05 of the Zoning Ordinance to allow the construction of a deck (36'x14') within 10 ft. of the side property line setback whereas 20 ft. is required. The parcel is located at 575 D.W. Highway in the C-1 (Limited Commercial) and Aquifer Conservation Districts and the Wellhead Protection Area. Tax Map 6D-1, Lot 102. Case # 2014-27.

Mr. Matthew King read the points of law into the record:

Chairman L'Heureux questioned the need for the deck to be so large (36' x 14'). Mr. King stated the idea to be to allow for the pathway to go to the back and extend slightly above where the second level is and also cover a purchased hot tub that will be placed underneath it. It will create a cover for that as well. The length is from the side of the house continuing all the way to the back. The actual size of the back deck will be approximately 14' x 11'. Member Worster commented had the proposal been presented as two decks it would show one being approx. 6' x 25' and the other 14' x 11'. He suggested, if approved, a copy of the plan stay with the application to clarify it is not a 14' x 36' deck.

Member Straight questioned whether a land surveyor assisted in the location of the property line. Mr. King stated the only illustration of the property line that he has so far has been gained through information retained at Town Hall. Staff assisted and the lot map was used to identify the property line.

Member Straight stated a concern with constructing the deck within 10' of the property line. That could mean 9', 1.5', etc. He suggested it would have to be set back a minimum of 10' from the property line as the abutter is acceptable to that.

Ms. Harris noted the staff memorandum states the deck will be located 10' from the property line. Member Worster remarked the Board packet did not include notification the abutters were contacted. Having reached out to the neighbor, he was informed the property owner is okay with a little bit of give, but if less than 10' it would not be what was discussed. Mr. King stated he does not intend to have the deck right up on the property line. Member Worster stated he was acceptable to the language no more than 10' from the property line, and the abutter had indicated the same.

Mr. King remarked reviewing the plots and discussing it with the Fire Department as well as staff, it appears as if even the house infringes upon the original 20' appropriate area for visual obstruction. That is where the hardship is on his end, e.g. he cannot place any structure there without infringing.

Chairman L'Heureux stated if unsure of the exact location of the property line, it would be in his best interest to have the property surveyed prior to building.

Chairman L'Heureux declared the Public Hearing open at 10:17 p.m.

Testimony in Favor - None

Testimony in Opposition - None

Chairman L'Heureux declared the Public Hearing closed at 10:17 p.m.

MOTION BY MEMBER STRAIGHT TO GRANT THE VARIANCE UNDER SECTION 3.05 OF THE ZONING ORDINANCE TO ALLOW THE CONSTRUCTION OF A DECK (36'X14') NO CLOSER THAN 10 FT. OF THE SIDE PROPERTY LINE SETBACK WHEREAS 20 FT. IS REQUIRED.

MOTION SECONDED BY MEMBER PELLEGRINO

MOTION CARRIED

5-0-0

FINDINGS OF FACT

1. The granting of the variance would not be contrary to the public interest because the proposed structure does not impose upon the privacy of the neighbors as it continues toward the back end of the property away from their residences. The desire is to extend upon an existing structure that was there as part of the house prior to purchase. The construction would add value to the house and help the property value of the neighborhood.
2. The use is not contrary to the spirit of the Ordinance because the current level of privacy will be maintained as the view is not being increased. Nor does the deck obscure any existing view the neighbors have.
3. Granting the variance would do substantial justice because when purchasing the house he had envisioned a wrap-around deck. There is a pre-existing structure, which he plans on adding to.
4. The values of the surrounding properties would not be diminished because adding a nice deck will add value to the house, which in turn will maintain or even increase the value of surrounding property.
5. A. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:
 - 1) No fair or substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property because the narrow lot and the pre-existing entryway with deck leave no other reasonable location for the deck. The existing deck is necessary due to the slope and in order to use the entryway. The current deck, while necessary to access the doorway is not visually appealing. The proposed construction will both improve the image and allow for a safe level pathway to access the rear of the property.
 - 2) The proposed use is a reasonable one because due to the pre-existing entryway and sloping property, the deck would add an appealing and safe use for the farther side of the house. It is a continuation of a necessary pre-existing structure.
- B. If the criteria in sub-paragraph A are not established, explain how an unnecessary hardship will be deemed to exist if and only if owing to special conditions of the property that distinguish it from other properties in the area. The property cannot be reasonably used in strict conformance with the Ordinance. A variance is therefore necessary to enable a reasonable use of the property. The side of the house is unusable due to the narrow passageway and the sloping hill. This variance will allow for additional egress from the house through a secondary entryway while adding beauty to an existing structure and raising the overall value of the lot.

- 8. Roland Paradis and Hawthorne Suites by Wyndham Hotel Group (petitioners) and 246 D.W. Highway BACM (owner)** - Variance under Section 17.10.3(b) of the Zoning Ordinance to allow a ground sign 13 ft. from the front property line whereas 20 ft. is required. The parcel is located at 246 D.W. Highway in the I-1 (Industrial) and Aquifer Conservation Districts. Tax Map 3D-2, Lot 005-01. Case # 2014-28.

Roland Paradis, Petitioner, read the points of law into the record.

Chairman L'Heureux declared the Public Hearing open at 10:23 p.m.

Testimony in Favor - None

Testimony in Opposition - None

Chairman L'Heureux declared the Public Hearing closed at 10:23 p.m.

Chairman L'Heureux opened the floor to questions from the Board:

MOTION BY MEMBER PELLEGRINO TO GRANT THE VARIANCE UNDER SECTION 17.10.3(B) OF THE ZONING ORDINANCE TO ALLOW A GROUND SIGN 13 FT. FROM THE FRONT PROPERTY LINE WHEREAS 20 FT. IS REQUIRED.

MOTION SECONDED BY MEMBER CONESCU

MOTION CARRIED

5-0-0

FINDINGS OF FACT

1. The granting of the variance would not be contrary to the public interest because the sign as shown clearly shows the entrance to the property. The sign would not be contrary to the public interest in that the sign, as shown, would be more easily read.
2. The use is not contrary to the spirit of the Ordinance because the size of the sign, as shown, will not significantly alter the character of the area, and will not threaten public safety.
3. Granting the variance would do substantial justice because the ability to read the sign from a distance is important. If a motorist can only read the sign from a short distance they may try to slow down quickly and cause an accident.
4. The values of the surrounding properties would not be diminished because the surrounding area is commercial and there are similar signs in the area.
5. A. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:
 - 1) No fair or substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property because the sign is important to identify the entrance to the Hawthorne Suites as the entrance is on the opposite end of the freestanding sign. The freestanding sign is also close to the Quality Inn entrance. By having the entrance sign, as drawn, there will be no confusion as to where the entrance is.
 - 2) The proposed use is a reasonable one because motorists will be able to clearly see the entrance sign from the distance it needs to be read from. Also with a setback of 13' instead of 20', it will be seen earlier making it safer for motorists who will be looking for the entrance.
- B. If the criteria in sub-paragraph A are not established, explain how an unnecessary hardship will be deemed to exist if and only if owing to special conditions of the property that distinguish it

from other properties in the area. The property cannot be reasonably used in strict conformance with the Ordinance. A variance is therefore necessary to enable a reasonable use of the property. The need exists to identify the entrance to Hawthorne Suites and not be confused with the entrance of the Quality Inn.

- 9. Roland Paradis and Hawthorne Suites by Wyndham Hotel Group (petitioners) and 246 D.W. Highway BACM (owner) -** Variance under Section 17.10.3 of the Zoning Ordinance to allow a 59.16 sf. ground sign whereas 48 sf. is permitted. The parcel is located at 246 D.W. Highway in the I-1 (Industrial) and Aquifer Conservation Districts. Tax Map 3D-2, Lot 005-01. Case # 2014-29.

Roland Paradis, Petitioner, read the points of law into the record.

Chairman L'Heureux questioned whether there would be a line of site issue given the increased size of the sign. Mr. Paradis responded the proposed sign would be no closer to the road than the existing sign. There would continue to be 13' to the road, and the same line of site would be available.

**MOTION BY MEMBER CONESCU TO GRANT THE VARIANCE UNDER SECTION 17.10.3 OF THE ZONING ORDINANCE TO ALLOW A 59.16 SF. GROUND SIGN WHEREAS 48 SF. IS PERMITTED.
MOTION SECONDED BY MEMBER WORSTER
MOTION CARRIED
5-0-0**

FINDINGS OF FACT

1. The granting of the variance would not be contrary to the public interest because the sign as shown clearly shows the entrance to the property. The sign would not be contrary to the public interest in that the sign, as shown, would be more easily read.
2. The use is not contrary to the spirit of the Ordinance because the size of the sign, as shown, will not significantly alter the character of the area, and will not threaten public safety.
3. Granting the variance would do substantial justice because the ability to read the sign from a distance is important. If a motorist can only read the sign from a short distance they may try to slow down quickly and cause an accident.
4. The values of the surrounding properties would not be diminished because the surrounding area is commercial and there are similar signs in the area.
5. A. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:
 - 1) No fair or substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property because the sign is important to identify the entrance to the Hawthorne Suites as the entrance is on the opposite end of the freestanding sign. The freestanding sign is also close to the Quality Inn entrance. By having the entrance sign, as drawn, there will be no confusion as to where the entrance is.
 - 2) The proposed use is a reasonable one because motorists will be able to clearly see the entrance sign from the distance it needs to be read from. Also with a setback of 13' instead of 20', it will be seen earlier making it safer for motorists who will be looking for the entrance.
- B. If the criteria in sub-paragraph A are not established, explain how an unnecessary hardship will be deemed to exist if and only if owing to special conditions of the property that distinguish it from other properties in the area. The property cannot be reasonably used in strict conformance with the Ordinance. A variance is therefore necessary to enable a reasonable use

of the property. The need exists to identify the entrance to Hawthorne Suites and not be confused with the entrance of the Quality Inn.

10. Roland Paradis and Hawthorne Suites by Wyndham Hotel Group (petitioners) and 246 D.W. Highway BACM (owner) - Variance under Section 17.10.3 of the Zoning Ordinance to allow a 121.15 sf. freestanding sign whereas 48 sf. is permitted. The parcel is located at 246 D.W. Highway the I-1 (Industrial) and Aquifer Conservation Districts. Tax Map 3D-2, Lot 005-01. Case # 2014-30.

Member Straight questioned, if having to choose between the ground sign being larger or the wall sign being larger, which would be preferred. Mr. Paradis responded the ground/freestanding sign.

Roland Paradis, Petitioner, read the points of law into the record.

Chairman L'Heureux declared the Public Hearing open at 10:33 p.m.

Testimony in Favor - None

Testimony in Opposition - None

Chairman L'Heureux declared the Public Hearing closed at 10:33 p.m.

MOTION BY MEMBER WORSTER TO GRANT THE VARIANCE UNDER SECTION 17.10.3 OF THE ZONING ORDINANCE TO ALLOW A 121.15 SF. FREESTANDING SIGN WHEREAS 48 SF. IS PERMITTED.

MOTION SECONDED BY MEMBER CONESCU

MOTION CARRIED

5-0-0

FINDINGS OF FACT

1. The granting of the variance would not be contrary to the public interest because the sign would be more easily read by passing motorists. The size of the wording on the sign would be appropriate for the distance it will be read from and also considering the speed of the traffic.
2. The use is not contrary to the spirit of the Ordinance because the size of the sign, as shown, will not significantly alter the character of the area, and will not threaten the public safety.
3. Granting the variance would do substantial justice because the loss of advertising exposure by not allowing the sign, as shown, outweighs any gains to the public interest, by only allowing a much smaller sign, which would be hard to read when passing by the property.
4. The values of the surrounding properties would not be diminished because the surrounding properties are commercial not residential. There is also a large Quality Inn sign near the Hawthorne property.
5. A. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:
 - 1) No fair or substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property because the sign is set back from the road at such a distance as to require the sized sign as applied for, and for it to be easily visible from the road.
 - 2) The proposed use is a reasonable one because Hawthorne Suites believes the size, as proposed, is the size required to advertise its property being a large property needing substantial sign advertising to attract passing motorists.

- B. If the criteria in sub-paragraph A are not established, explain how an unnecessary hardship will be deemed to exist if and only if owing to special conditions of the property that distinguish it from other properties in the area. The property cannot be reasonably used in strict conformance with the Ordinance. A variance is therefore necessary to enable a reasonable use of the property. As the building is set back a fair distance the sign, as proposed, is needed to identify the property from the road.

11. Roland Paradis and Hawthorne Suites by Wyndham Hotel Group (petitioners) and 246 D.W. Highway BACM (owner) - Variance under Section 17.10.4(b) of the Zoning Ordinance to allow a 259.81 sf. wall sign whereas 30 sf. is permitted. The parcel is located at 246 D.W. Highway in the I-1 (Industrial) and Aquifer Conservation Districts. Tax Map 3D-2, Lot 005-01. Case # 2014-31.

Roland Paradis, Petitioner, read the points of law into the record.

Chairman L'Heureux declared the Public Hearing open at 10:37 p.m.

Testimony in Favor - None

Testimony in Opposition - None

Chairman L'Heureux declared the Public Hearing closed at 10:37 p.m.

Member Conescu commented it seems like an excessive variance, but at the same time if you look at any hotel that is located near a highway this is what you see. He commented it makes him wonder about the variance itself.

MOTION BY MEMBER CONESCU TO GRANT THE VARIANCE UNDER SECTION 17.10.4(B) OF THE ZONING ORDINANCE TO ALLOW A 259.81 SF. WALL SIGN WHEREAS 30 SF. IS PERMITTED.

MOTION SECONDED BY MEMBER WORSTER

MOTION CARRIED

4-1-0

Member Straight voted in opposition

FINDINGS OF FACT

1. The granting of the variance would not be contrary to the public interest because the sign advertises to the highway so there is no impact to the public.
2. The use is not contrary to the spirit of the Ordinance because the size of the sign, as shown, will not alter the character of the area.
3. Granting the variance would do substantial justice because the loss of advertising exposure by not allowing the sign, as shown, outweighs any gains to the public interest by only allowing a 30 sq. ft. sign.
4. The values of the surrounding properties would not be diminished because the sign will be advertising to the highway and will not affect surrounding properties in any way.
5. A. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:
 - 1) No fair or substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property because the

traffic speed on the F.E. Everett Turnpike is such that a large sign is needed so that it can be seen and read as motorists approach the exit 11 off-ramp.

- 2) The proposed use is a reasonable one because the sign, as shown, is a reasonable size for the wall it would be installed on. The size of the sign, is figured by sign professionals, to look visually pleasing and in correct proportion to the building.
- B. If the criteria in sub-paragraph A are not established, explain how an unnecessary hardship will be deemed to exist if and only if owing to special conditions of the property that distinguish it from other properties in the area. The property cannot be reasonably used in strict conformance with the Ordinance. A variance is therefore necessary to enable a reasonable use of the property. The sign is advertising to the highway and is blocked from view by many trees. To be able to see the sign where there are less trees, the sign must be the size as shown on the drawing.

14. DISCUSSION/POSSIBLE ACTION REGARDING OTHER ITEMS OF CONCERN

The Board was reminded its August 27, 2014 meeting is the Annual Meeting during which the Board will elect a Chairman and Vice Chairman as well as consider any amendments to the Bylaws.

15. APPROVAL OF MINUTES

Merrimack Zoning Board of Adjustment June 25, 2014

**MOTION BY MEMBER CONESCU TO APPROVE AS PRINTED
MOTION SECONDED BY MEMBER STRAIGHT
MOTION CARRIED**

3-0-2

Members L'Heureux and Pellegrino abstained

16. ADJOURNMENT

**MOTION BY MEMBER PELLEGRINO TO ADJOURN
MOTION SECONDED BY MEMBER CONESCU
MOTION CARRIED**

5-0-0

The July 30, 2014 meeting of the Merrimack Zoning Board of Adjustment was adjourned at 10:55 p.m.