

## February 24, 2003

MEMBERS PRESENT: Mr. Fitzherbert, Mrs. Friedman, Mr. Martin, Mr. Owen

MEMBER ABSENT: Ms. Page

ALTERNATES PRESENT: Mr. Abella, Mr. Shapiro

STAFF PRESENT: Mrs. Hill, Mrs. Luckey, Mr. Solley

ALSO PRESENT: Atty. Leary, AT&T Wireless Representatives, Mr. and Mrs. Chapin, Ms. Levitt, Mrs. Avery, Mrs. Rourke, Ms. Dupuis, Mr. McNaughton, Mrs. Kirk, Mrs. Tracy, Ms. Habib, Mrs. Werner, Residents, Press

### PUBLIC HEARINGS

#### **AT&T Wireless, PCS/Petition to Amend the Zoning Regulations/ Sections 13.19.8.o and 13.19.8.q/Continuation**

Mr. Martin reconvened the public hearing at 7:30 p.m. and noted the legal notice had previously been read into the record. He seated Members Fitzherbert, Friedman, Martin, and Owen, and Alternate Shapiro for Ms. Page.

Mr. Martin read the list of documents that had been submitted since the last meeting. (See attached list.) He noted he had asked Mr. McGuinness of the Council of Governments what the provisions for setbacks were in the model regulations the Commission used when writing Section 13.19. Mr. McGuinness said there were no setback requirements for wireless facilities in existing buildings in the model regs. Mr. Martin interpreted this to mean that the wording in Washington's regulations was not just transferred from the model regulations without thought, but had been intentionally added at the time of adoption.

Mr. Martin reminded those present the hearing was not about specific sites, but was to consider proposed text amendments that would enable the installation of telecommunications facilities within enclosed structures without having to meet the current setback requirements. He noted this was a townwide issue.

There were no questions or comments at this time from the Commissioners.

Atty. Leary renewed AT&T's request to approve the petition that would exempt facilities enclosed within existing structures from the setback requirements, saying there would be no visible impacts and that any other issues were "neutralized." He reminded the Commission the federal government has ruled it may not regulate based upon health issues. He said the current Regulations were "inoperative" if based on health issues and approval of the petition would give the Town the chance to "correct itself." He noted that the current Regulations exempt repeaters from setback requirements even though they are external and visible. He also noted if the petition is approved the Commission would have to grant a Special Permit before a facility enclosed within an existing structure could be installed. Mr. Martin noted setback requirements could be based on criteria other than health concerns such as aesthetics, public safety, nuisance, property values, or commercial projects in the R-1 District. He disagreed with Atty. Leary that the Regulations needed remediation. Atty. Leary responded that nuisance and safety issues also have no bearing and said AT&T would have to show a proposed facility complied under the Special Permit criteria. Mr. Shapiro noted the Regulations acknowledge they do not regulate on the basis of health effects of radio frequency emissions, and said the

setbacks were included for other reasons.

Mr. Martin asked for comments from the public.

Mr. Hank Dutton said granting of the petition would permit AT&T to take away the value of properties within the setback area. Due to perceived health issues, he said, no one would want to purchase property within the setback area. He said whether the facility could be seen or not made no difference since property valuation would be affected as long as the public knew there was a telecommunications facility in the immediate area. Atty. Leary said the courts had rejected property devaluation as a basis for denial of an application if the devaluation was based on the perception of health concerns due to radio frequency emissions. Mr. Martin asked Atty. Leary to submit a copy of this decision for the record.

Ms. Levitt cited the case, AT&T vs. Virginia Beach and said it had been ruled it is possible to consider some health concerns as long as that is not the only concern raised. She said that decision also ruled repeated widespread objection could be taken into account. She submitted this case and a case regarding a ruling in Texas on liability issues where a judgement was made against a town for allowing a cell tower too close to private residences. She noted insurance companies do not want to underwrite telecommunications facilities and so it puts the average citizen in the position of having to come to the Town for claims. She stated the Zoning Commission would be liable in perpetuity for the decisions it makes.

Atty. Leary cited Sprint Spectrum vs. Farmington, 1997. He said the federal court had expressly held that one of the grounds to set aside the Commission's denial was it had cited as a reason for denial the effect the radio frequency emissions would have on property values. He also stated in the same case the prudent avoidance doctrine was rejected. Mr. Martin said the Commission has always encouraged public input irrespective of what it might be, but tries to abide by the law when it makes a decision. He said the Commission would be interested in hearing more about this case from its attorney. Atty. Leary said he would fax the case to Atty. Zizka.

Ms. Levitt informed the Commission that Dr. Holzworth could not attend the hearing, but had asked her to relay her thoughts that the Regulations were working well and should not be changed.

Mrs. Kirk noted she had spoken at the first session of the hearing of her experiences with health, safety, and nuisance issues when she lived near a cell tower and did not want to repeat her testimony except to counter Atty. Leary's assertion that devaluation of property values may not be considered. She stated she had trouble selling her house and had to practically "give it away."

Mr. Chapin thought the Commission had done a good job allowing the public to speak about what its concerns were whether or not they could be considered according to federal law. He stated the Commission had enacted the provisions of this section for specific reasons that were not site specific and thought it should leave well enough alone.

Mr. Lockwood agreed with Mr. Chapin that the Regulations should not be changed. He noted that future technology might permit several facilities within a single structure.

Mr. Owen asked Mr. Solley if the Board of Selectmen had a position regarding this petition. Mr. Solley noted the letter written about cell

towers had addressed the proposed Rabbit Hill Road facility only. He said he personally did not think the Regulations should be revised, but said the Board had not discussed it. Mr. Owen asked if the Commission were to vote against the petition and this resulted in an appeal, would the Town support the Commission? Mr. Solley said the Board of Selectmen had come up with an alternate site to the New Preston Congregational Church steeple and so noted the applicant would have other options if the petition were denied. Mr. Martin noted the Zoning Commission is independently empowered by the state statutes and does not need approval from the Board of Selectmen regarding its decisions. He said the two bodies often try to work together, but they are both independently elected bodies.

Mr. Martin reminded everyone the petition under consideration was not site specific. He noted the idea of an alternate site came up at the last session of the hearing as an example of other sites that might be available and that the Commission hoped AT&T would pursue and evaluate. He noted, too, that the alternate locations would probably not offer the possibility of concealing the facility. Mr. Martin said the public had expressed the Town's values through the public hearing process and had indicated concealment of such a facility was not its priority and so other options should be pursued. Atty. Leary referred to the New Preston Firehouse and said AT&T had to know whether it was available or it could not be considered a viable option. Mr. Martin advised him the mechanics of any particular site did not apply in this hearing to consider a text change and asked him to consult with the Board of Selectmen. Mr. Chapin noted that anything that might be done at the firehouse site would require both Planning Commission and possibly Town Meeting approval and so the Board of Selectmen could not give a definite answer.

Mrs. Friedman noted the Planning Commission did not support the proposed amendments and so a 4-1 vote of the Zoning Commission would be required to approve the petition.

Ms. Levitt stated she did not think the federal Telecommunications Act would apply in this case because it was a petition for an amendment to the Regulations and not an application for a facility. She advised the Commission to carefully read the court cases she submitted prior to acting on the petition. Mr. Martin noted Atty. Zizka had advised the Commission that if the courts found the Town had tried to block coverage either by denial of an application or by virtue of its Regulations, it would be problematic under the FCC Act.

Mr. Lombino asked if grounds for denial of the petition would include the argument that approval could cause further proliferation throughout Washington since facilities in church steeples can accommodate only one carrier. Mr. Martin noted that AT&T indicated the New Preston Congregational Church steeple could accommodate only one carrier, but it was not known how many carriers other existing buildings could accommodate. He said if the petition were approved, thus enabling an application for wireless facilities in the New Preston Church steeple it would not reduce proliferation and the Commissioners might take that into account before voting. Atty. Leary stated that steeple as it currently exists can accommodate only one carrier, but if its faade was replaced with something transparent it might accommodate more. He then advised Mr. Lombino this was not an appropriate matter for the Commission to consider.

Mrs. Friedman noted Atty. Leary had listed many issues that according to him the Commission could not consider. She asked Atty. Leary what it **was** allowed to consider. Atty. Leary responded it could consider the criteria used when this zoning regulation was adopted. Mrs. Friedman asked if the perception of property devaluation could be considered. Atty. Leary said property devaluation based on perceived health issues was not permitted under the law.

Mr. Dutton argued this was not law, but precedent, which could always be struck down by the court in a subsequent case.

Ms. Levitt noted there would soon be a ruling on a lawsuit based on property devaluation in Cincinnati.

Mr. Lockwood, a former telecommunications company employee, said AT&T proposed the revisions so it could install facilities the cheapest way possible and so if passed, facilities enclosed within structures would probably proliferate. Mr. Martin noted it was not cost, but the impact of the proposal on the Town that mattered to the Commission.

Ms. Dupuis said the current Zoning Regulations protect residents' health and property values, but also help to protect the character of Washington. She stressed that allowing a telecommunications facility so close to residences would devalue properties.

Mr. Martin noted that if the Commission does not grant the petition, it would preclude wireless facilities virtually in all the church steeples in Town since most of the churches were near residential areas. This means more freestanding towers would be constructed. He asked if this was really what the Town wanted. Mr. Fitzherbert responded that changing the Regulations would not necessarily have any affect on the number of freestanding towers eventually constructed because the extent of colocation possibilities was not known.

Mr. Abella asked if there were any wireless facilities enclosed within structures in this area. Atty. Leary listed several including a church on the New Milford green and said the company had always been encouraged to use existing structures.

Mrs. Rourke noted churches are typically located in higher density areas and said the current setbacks were in place to protect residents for whatever reason.

Mrs. Chapin agreed wireless facilities should not be permitted near residences, and suggested the Commission consider language that would allow them in enclosed structures that are not located in a residential zone.

Mr. Daft asked if there were any towns that have decided not to permit telecommunications facilities. Atty. Leary said the federal Act mandates interconnected seamless service throughout the nation and towns can not forbid these facilities. He said under the law service in New Preston is required and so it will be provided. Mrs. Friedman asked if service in other areas of Town was deficient. Atty. Leary said he did not know, but if there were a need it would have to be addressed.

Mr. Dutton said if the Commission did not approve the petition it would not mean the telecommunications companies would be prevented from providing seamless coverage.

Mr. Martin noted that if facilities were excluded from church steeples external mounted facilities would be required. This type of installation would be under the jurisdiction of the Ct. Siting Council and so the Town would loose control. Mr. Shapiro thought it could not be known whether the Town would retain its control if the petition were granted because freestanding towers would probably be needed anyway.

Mr. Lockwood advised the Commission that existing structures have a finite capacity for colocation.

Ms. Levitt noted the FCC had recently considered satellite service to be wireless service that could be used to provide universal coverage for dead spots. She also noted the current Regulations reserve the right to require stealth designs and said the Commission could go to the Siting

Council to request a stealth design for a freestanding tower. She also pointed out there is already good coverage along the Rt. 202 corridor and said the FCC deems 75% coverage is adequate, especially in hilly areas. She stressed that safety and environmental issues were important reasons for setback requirements, noting the problems associated with the use of batteries at these sites. Mr. Martin asked if the Ct. Siting Council could now consider satellite service as a viable alternative. Ms. Leavit said that had not yet been determined.

Atty. Leary stated the Town's RF engineer had confirmed the coverage along Rt. 202 was deficient. Mr. Martin noted that engineer had been hired by the Washington Environmental Council, a private, non profit institution. Mrs. Tracy noted the engineer's report did not say he was an expert. Atty. Leary also stated that AT&T's petition did not request a change in the wetlands setbacks.

Mr. Owen asked what was the typical maintenance schedule for a wireless facility? Atty. Leary said each carrier is inspected once a month by a service technician.

As there were no further comments from the public, the Commissioners discussed whether to close the hearing. Mr. Martin noted closing the hearing would not prevent the Commission from consulting with its attorney. Atty. Leary was concerned if the hearing were closed he would not have an opportunity to comment on the cases submitted this evening by Ms. Levitt. Mr. Martin said the Commission would listen to the advice of its attorney rather than assertions by either Ms. Levitt or Atty. Leary regarding case law. Noting consideration of the petition was not site specific, he asked Atty. Leary if he had any other practical matters to submit for the record. Atty. Leary said he had none.

MOTION: To close the public hearing to consider the petition submitted by AT&T Wireless, PCS to amend Sections 13.19.8.o and 13.19.8.q of the Washington Zoning Regulations. By Mr. Owen, seconded by Mr. Fitzherbert, and passed 5-0.

It was the consensus the vote would be taken at the March meeting. Mr. Martin closed the public hearing at 9:03 p.m.

### **Brown-Long View Landing/96 Romford Road/Special Permit: Section 13.11.3/Detached Accessory Apartment**

Mr. Martin reconvened the public hearing at 9:09 p.m. and noted the legal notice had been read at the first session of the hearing. He seated Members Fitzherbert, Friedman, Martin, and Owen, and Alternate Shapiro for Ms. Page.

Mrs. Hill stated she had spoken with Dr. Brown earlier and he had advised her he would submit a written request for an extension of the public hearing.

MOTION: To continue the public hearing to consider the Special Permit application: Section 13.11.3 submitted by Brown-Long View Landing for a detached accessory apartment at 96 Romford Road to March 24, 2003. By Mr. Owen, seconded by Mr. Shapiro, and passed 5-0.

At 9:11 p.m. Mr. Martin continued the hearing to March 24, 2003.

### **Cass-DePecol/46 June Road/Special Permit: Section 13.11.3/ Detached Accessory Apartment**

Mr. Martin called the public hearing to order at 9:12 p.m. and seated Members Fitzherbert, Friedman, Martin, and Owen and Alternate

Shapiro for Ms. Page. Mrs. Friedman read the legal notice published in **Voices** on 2/12 and 2/19/03.

Mr. Martin reviewed the list of documents in the file (see attached list) and noted both the Inland Wetlands Commission and the Health Department had approved the application.

Mr. DePecol reviewed the application to convert the existing cottage to a detached accessory apartment. He noted the cottage had a finished basement, which brought the building over the 1200 sq. ft. maximum for apartments, but he showed the Commissioners the proposed floor plan to address this requirement. He proposed to block off a section of the basement per Exhibit 3, "Proposed Finished Basement, 290 sq. ft." He noted this would take a bedroom out of the basement. He also pointed out the existing kitchen and bathroom on the existing floor plan and submitted a written statement that he would reside on the premises for the duration of the permit.

Mr. DePecol presented the revised map, "Site Development Plan," by Berkshire Engineering, revised to 1/22/03, which the Inland Wetlands Commission had approved. He said Land Tech had reviewed the plans for both wetlands and zoning issues and they had been revised according to Land Tech's recommendations. He submitted a copy of the Land Tech report dated 12/6/02.

No one from the public spoke for or against the application. It was noted four of the six certified mailing receipt cards had been received.

Mr. Owen noted no changes were proposed to the exterior of the cottage.

**MOTION:** To close the public hearing to consider the Special Permit application: Section 13.11.3 submitted by Cass-DePecol for a detached accessory apartment at 46 June Road. By Mr. Owen, seconded by Mr. Shapiro, and passed 5-0.

Mr. Martin closed the public hearing at 9:19 p.m.

### **Rumsey Hall School/184 Romford Road/Special Permit: Section 4.4.10/Faculty Housing**

Mr. Martin called the public hearing to order at 9:20 p.m. Mrs. Friedman read the legal notice published in **Voices** on 2/12 and 2/19/03. Seated were Members Fitzherbert, Friedman, Martin, and Owen and Alternate Shapiro for Ms. Page.

Mr. Martin reviewed the 2/24/03 ZEO Report, which stated there were no wetlands within 100 feet of the proposed structure and the Health Department had signed off on the application.

The ZEO Report noted that the survey map by Bradford E. Smith and Son, dated 11/15/02 was not complete and would have to be amended to show the proposed building site.

Mr. Martin also noted the public hearing would have to be continued because the applicant had not notified the adjoining property owners of the public hearing.

**MOTION:** To continue the public hearing to consider the Special Permit application: Section 4.4.10 submitted by Rumsey Hall School for faculty housing at 184 Romford Road. By Mrs. Friedman, seconded by Mr. Owen, and passed 5-0.

At 9:23 p.m. Mr. Martin continued the public hearing to March 24, 2003.

These public hearings were recorded on tape. The tape is on file in the Land Use Office, Bryan Memorial Town Hall, Washington Depot, Ct.

## REGULAR MEETING

### Regular Business

Mr. Martin called the Regular Meeting to order at 9:25 p.m and seated Members Fitzherbert, Friedman, Martin, and Owen and Alternate Shapiro for Ms. Page.

### Consideration of the Minutes

MOTION: To accept the 1/27/03 Regular Meeting minutes and 1/29/03 Special Meeting minutes as written. By Mr. Owen, seconded by Mr. Shapiro, and passed 5-0.

### Pending Applications

Mr. Martin noted the public hearings for the following two Special Permit applications had been continued to March 24th:

**1. Brown-Long View Landing/96 Romford Road/13.11.3/Detached Accessory Apartment**

**2. Rumsey Hall School/184 Romford Road/4.4.10/Faculty Housing**

**Cass-DePecol/46 June Road/Special Permit: Section 13.11.3/ Detached Accessory Apartment**

Mrs. Friedman asked what would prevent the applicant from finishing off the entire basement once the permit was issued. Mrs. Hill responded the C of O would not be issued if the building was not in compliance with the zoning permit and thereafter there would be reval inspections every four years. Mrs. Friedman was not sure this would be effective as the reval inspectors do not enter the building.

MOTION: To approve the Special Permit application: Section 13.11.3 submitted by Cass-DePecol for a detached accessory apartment at 46 June Road. By Mr. Owen, seconded by Mr. Fitzherbert, and passed 5-0.

### Other Business

**Washington Montessori School/240 Litchfield Turnpike/Request to Modify Approved Site Plan**

Mr. Martin noted a letter dated 1/28/03 had been received requesting a modification of the Special Permit approved on 9/9/01 to add a driveway to access parking spaces located in Warren. He reminded the Commissioners at the time of the application the applicant had said additional parking in Warren was being considered and the Commission had thought it was a good idea. Mr. McNaughton, representing

Montessori School, noted a condition of the Inland Wetlands Commission approval had been that 36 parking spaces on the lower level had been removed. The map, "Additional Parking Plan," by DyMar, dated 1/10/03 was reviewed. Mr. McNaughton noted the Washington Inland Wetlands Commission had approved the revision, the Warren Inland Wetlands Commission had no jurisdiction, and the Warren Zoning Commission had scheduled a public hearing for March 11, 2003. The modifications requested were the addition of a 100+ ft. driveway to access the 106 Warren parking spaces and the installation of two additional catch basins. Mrs. Hill said this was a minor change that could be considered without a public hearing. Mr. McNaughton said there would be no access to the school from Couch Road and said all work would be at least 250 feet from adjoining property lines. It was noted neither the driveway or the new parking area would be visible from Rt. 202 because the view would be blocked by the new building. Mr. McNaughton said the modifications would not be built if Warren did not approve its application for the parking lot.

**MOTION:** To approve the request by the Washington Montessori School for modifications to its approved site plan for construction of a school at 240 Litchfield Turnpike per the map, "Additional Parking Plan," by Dymar, dated 1/10/03 because the Commission determined the modifications were minor and subject to the approval of the plans by the Warren Zoning Commission. By Mr. Owen, seconded by Mr. Martin, and passed 5-0.

### **AT&T Wireless, PCS/Petition to Amend the Zoning Regulations/**

#### **Sections 13.19.8.o and 13.19.8.q**

There was a brief discussion about the public concern regarding the issues of health, safety, nuisance, property values, etc. vs. the realities of the FCC law. Given all the issues Atty. Leary told the Commission it could not consider under the Telecommunications Act, the Commission decided to consult with Atty. Zizka about what criteria it could use as the basis of its decision on the petition.

#### **Revision of the Zoning Regulations/Section 17**

The Commissioners had reviewed proposed amendments to Sections 17.4.a and 17.4.b. (See attached pages.) Under b, the phrase that begins in the fifth line, "...that is located on a legally existing, nonconforming lot" will be deleted. Also under b, Mrs. Friedman questioned what was meant by "promote a public policy goal." She thought the wording was so vague that 1) it was meaningless and 2) it could be used as the rationale to approve just about anything. Mr. Martin explained the premise was to give a fair amount of discretion to the ZBA, but only in matters pertaining to yard setbacks for single family dwellings. He reminded the Commission that the ZBA has been doing a good job evaluating hardships for variances and adopting a Special Exception provision would reintroduce some needed flexibility to the process. The ZBA reviewed the proposed amendments at its 2/20/03 meeting and its comments are due by 3/6. It was agreed Mr. Owen would write an introductory paragraph regarding the intent of the Special Exception section. Due to the public notice requirements, a public hearing may not be held to consider these amendments until the April meeting. If all comments are in so that a final draft can be prepared by 3/15, the hearing will be scheduled for 4/28.

Lot coverage was discussed. Mr. Owen said he had met with ZBA Members Owens and White a few months ago to get their views on what should be counted as coverage and how it should be measured. Mr. Martin recommended a follow up meeting be held to clarify these guidelines and to make sure the Zoning Commission and ZBA are in agreement.



## Communications

Mr. Martin noted he had received a request from the Conservation Commission for a Zoning Commissioner to serve on a committee writing a welcome to Washington brochure. Due to the heavy zoning workload of late there were no volunteers. Mrs. Hill was directed to inform Mrs. Payne.

Mrs. Hill announced Mr. Byerly of the Planning Commission and Mr. White of the ZBA would be honored by the Ct. Federation of Planning and Zoning Commissions for their years of service on these boards. A banquet will be held at the Aqua Turf on 3/20/03.

Mr. Martin thanked the Commissioners for the time, effort, and teamwork put in over the past several months and for their good nature and sense of humor shown during the deliberation of several difficult issues.

MOTION: To adjourn the meeting. By Mr. Owen.

Mr. Martin adjourned the meeting at 10:30 p.m.

FILED SUBJECT TO APPROVAL

Respectfully submitted,

Janet M. Hill, ZEO