

TOWNSHIP OF LOWER MAKEFIELD  
ZONING HEARING BOARD  
MINUTES – NOVEMBER 2, 2009

The regular meeting of the Zoning Hearing Board of the Township of Lower Makefield was held in the Municipal Building on November 2, 2009. Chairman Malinowski called the meeting to order at 7:30 p.m.

Those present:

Zoning Hearing Board:        David Malinowski, Chairman  
   Paul Bamburak, Vice Chairman  
   Gregory J. Smith, Secretary  
   Jerry Gruen, Member  
   Keith DosSantos, Alternate Member

Others:                             Robert Habgood, Code Enforcement Officer  
   John Donaghy, Township Solicitor  
   James Majewski, Township Engineer  
   Allen Toadvine, Zoning Hearing Board Solicitor

Absent:                             Anthony Zamparelli, Zoning Hearing Board Member  
   Matt Maloney, Supervisor Liaison

APPEAL #09-1523 – MATRIX LOWER MAKEFIELD LAND II, LP

Mr. Toadvine stated he received a letter dated 11/2/09 from the Applicant's attorney, Gregory Duffy, which was marked as Board Exhibit 2. Mr. Toadvine stated Mr. Duffy has requested that the matter be continued until November 17, 2009 adding he is awaiting a response from the Board of Supervisors in connection with a revised proposal.

Mr. Donaghy stated while he was not aware of the request for a continuance, he did have a discussion with Mr. Duffy today; and the Township has no objection to a continuance.

Mr. Smith moved, Mr. DosSantos seconded and it was unanimously carried to continue the matter to November 17, 2009.

APPEAL #09-1531 – PATRICIA F. DONNELLY

Ms. Patricia Donnelly was sworn in. The Application submitted was marked as Exhibit A-1. Attached to the Application was a one-sheet Plan dated 4/28/09, and this was marked as Exhibit A-2.

Ms. Donnelly stated she purchased the home at 189 River Road in July, 2004. She stated the house was built in 1860 with a room on the first floor which was a shop and a bedroom above it. She stated since 1860 there have been two additions, one was a kitchen and bathroom; and this is the subject of the Plan. She stated she would like to do a renovation which would renovate the foundation where the kitchen and bathroom are now and renovate and update the kitchen and bathroom. She would also like to add a second floor above the kitchen and bathroom which would be an additional bedroom, much needed storage, and a porch that will overlook the Canal. She stated she feels this could be considered a hardship case since the house was built in 1860 and predates the Township Ordinances. She stated she feels this renovation is a modest approach to make the house more livable and maintains the structure and character of the house since the renovation is inward and will not encroach on the Canal or her neighbors' property. She stated the renovation will go up and will therefore not disturb the floodplain any further than does the existing structure except for the non-finished storage area in front of the renovation. She stated since she is in the 100 year floodplain, she needs permission from the Township.

Mr. Gruen asked if she is reducing the impervious surface, and Ms. Donnelly stated it will really be a trade off since the three foot extension of additional storage will be over top of an existing cement slab. They will not increase the impervious surface. She stated when she moved into the home there were two 3' by 6' dog runs, and she did remove these.

Mr. Donaghy stated while the Township is participating, they do not have any objection.

Mr. Majewski stated Ms. Donnelly's home is in the floodplain; and since she will be doing work on the foundation, it may be a good time to consider elevating the home 1 ½' in order to get out of the floodplain. Ms. Donnelly stated the house is already up on a hill, but she would be willing to consider this and would appreciate any help she can get. Mr. Majewski stated elevating the home may reduce the requirement for flood insurance.

There was no one in the public to speak in favor or against the Application, and the Public Hearing portion was closed.

Mr. Smith moved, Mr. Gruen seconded and it was unanimously carried that the relief requested be granted in the way of a Variance to the building in the floodplain restriction so that the proposed renovations can take place.

APPEAL #09-1520 – LIBERTY TOWERS, LLC

Mr. Richard Lemanowicz, attorney, was present with Mr. Philip Burtner, who was sworn in. Mr. Lemanowicz stated at the previous meeting, they had concluded the testimony of Mr. Burtner, and they were ready for cross-examination.

Mr. Chris Cummins, 517 Andrea Place, stated he lives very close to the proposed tower and was not advised by the Township of the Application so he did not have an opportunity previously to request Party status. He stated he lives approximately 400' from the proposed tower. It was agreed that Mr. Cummings would be granted Party status.

Mr. Sanjay Bajpai, 525 Andrea Place, stated he lives 400' away and did not get the notification from the Township and would also like to request Party status. He stated he did not get the first letter, but he did get subsequent letters from the Township about the balloon test. It was agreed that Mr. Bajpai would be granted Party status.

Mr. Nathan Edelstein asked Mr. Burtner if there is any reason why this cell tower could not be built at a location other than the Brookside property, and Mr. Burtner stated from an engineering standpoint there is no reason, but he does not feel the proposed location has anything to do with structural engineering. Mr. Toadvine stated this question would be better asked of the radio frequency engineer. Mr. Edelstein asked Mr. Burtner if in his area of expertise there is any reason why this could not be located elsewhere; and

Mr. Toadvine indicated from a structural engineering standpoint he has indicated there is no engineering reason.

Mr. Edelstein stated the property is in the R3-M Zone and the height restriction is 35', and Mr. Burtner agreed. Mr. Edelstein stated the tower is proposed to be 150', and Mr. Burtner agreed. Mr. Edelstein stated there is no structure on the Brookside property that is higher than 35', and Mr. Burtner agreed. Mr. Edelstein asked Mr. Burtner how high is the highest structure on the site, and Mr. Burtner stated he would estimate that it would be no higher than 15'. Mr. Edelstein stated the proposed tower would be approximately 135' higher than anything on the site, and Mr. Burner agreed.

Mr. Edelstein stated sometimes when there are cell phone tower cases, the proposed site has a water tower or other structure of that sort, and he asked if there is anything like that on the Brookside property, and Mr. Burtner stated there is not.

Mr. Edelstein stated Mr. Burtner indicated that he had visited the site and driven around the surrounding areas, and Mr. Burtner agreed he has. Mr. Edelstein asked if he drove through the nearby residential developments, and Mr. Burtner stated he did.

Mr. Edelstein stated when you exit the Brookside property and turn left on Stony Hill Road, this goes toward the development that has Judith Place, and Mr. Burtner agreed. Mr. Edelstein asked if he knows the name of the development; but Mr. Burtner stated he did not. Mr. Edelstein asked if he would estimate those homes to be within 400' of the proposed tower, and Mr. Burtner stated he would estimate them to be a little further than that. Mr. Edelstein noted the homes directly across the street from the Brookside property and asked how close those homes are from the cell tower, and Mr. Burtner stated he would estimate they would be over 900 feet. Mr. Burtner stated the closest homes would be on Andrea and Gayle.

Mr. Edelstein stated between the Brookside property and the homes on Andrea and Gayle there is no manmade structure higher than 35', and Mr. Burtner noted there are four SEPTA towers which are approximately 55' to 60'.

Mr. Edelstein stated Mr. Burtner previously testified that the proposed cell phone tower would be visible within a few thousand feet, and Mr. Burtner stated he is not sure how this was phrased. Mr. Edelstein asked Mr. Burtner if he knows how far from the Brookside property the tower would be visible, and Mr. Burtner stated up to 1500' and beyond that there is too much ground clutter. He added it is only visible at specific spots between the houses and the trees. He stated if you are walking down Gayle Drive, you will only see it if you look between two houses. Mr. Edelstein asked Mr. Burtner if he personally made this investigation, and Mr. Burtner stated he did. He stated the tower would be visible now and then and would not be visible all the time. Mr. Edelstein stated homes within 1500' have the potential of having this monopole within their view, and Mr. Burtner agreed.

Mr. Edelstein stated there was previously a question from a Board member about the antennas that will be on the pole, and Mr. Edelstein stated there will be as many as six antennas on the pole. Mr. Burtner stated he believes there will be as many as nine antennas on the pole as T-Mobile is proposing up to nine antennas. Mr. Edelstein asked about the height, and Mr. Burtner stated they show a 150' monopole, and the top set of antennas which will be T-Mobile antennas will be at 145' and the lowest set of antennas shown on the Exhibit have a center line at 95'. Mr. Edelstein stated all the antennas will be above any manmade structures between the Brookside property and the homes; and Mr. Burtner agreed that this is correct physically, but from a distance of 1500' the things that are closer will actually appear much taller than what is in the background.

Mr. Edelstein stated he is discussing visibility and all the antennas will be visible from the closest homes, and Mr. Burtner stated this is not true. Mr. Edelstein stated all of the antennas will be at a height higher than any manmade structures between Brookside and the homes, and Mr. Burtner agreed; but stated because the manmade structures and the trees are much closer to the viewer, they appear to be much taller, and in most cases because the trees are 100' away from you, you will not be able to see the lower sets of antennas. Mr. Edelstein asked if he would agree that where there are gaps between the trees and other structures, you will be able to see them; and Mr. Burtner stated in some places there will be a view.

Mr. Edelstein asked for a description of the antenna, and Mr. Burtner stated T-Mobile is proposing up to nine panel antennas that will be different sizes and the larger ones are approximately 10" wide and 4 ½' tall. Mr. Edelstein asked if they will be on a platform, and Mr. Burtner agreed.

Mr. Edelstein provided a picture which he stated he would like to show the Witness and ask him if this is an accurate depiction of the pole that will have the antenna on it. Mr. Edelstein asked that it be marked as an Exhibit. Mr. Toadvine stated this will be marked as Edelstein-1. Mr. Lemanowicz asked who took the picture, and Mr. Edelstein stated he took it and can testify as to its authenticity. Mr. Toadvine stated at this point, the picture is not yet entered into evidence.

Mr. Edelstein showed the picture to Mr. Burtner and asked him if it is a monopole; and Mr. Burtner agreed. Mr. Edelstein asked Mr. Burtner if it is a fair representation of the type of antenna that will be put on the proposed Liberty Tower monopole, and Mr. Burtner stated the antennas are, but the platforms are old and most now use low profile platforms. He noted the second platform from the bottom, if you took the handrails off it would be similar to what Liberty Towers would be using. Mr. Edelstein stated the antenna panels are similar to what they are proposing, and Mr. Burtner agreed. Mr. Edelstein stated if the Board wanted to see a visible representation of what the antenna will look like on the pole, they could look at the middle of the three platforms, and Mr. Burtner stated it would provide a representation of the distance that Mr. Edelstein was standing away from the pole. Mr. Edelstein stated he is asking about what it would look like in terms of configuration, and Mr. Burtner stated it is one of their antennas. Mr. Edelstein stated there could be as many as eight of these, and Mr. Burtner stated looking at the second set of antennas, this appears to be a T-Mobile installation. Mr. Burtner stated there could be six set of antenna arrays, but each carrier is different.

Mr. Edelstein asked the Board if he should move the picture into evidence now. Mr. Lemanowicz asked Mr. Edelstein how far away he was from the tower in the picture; and Mr. Edelstein stated he was 100' away. Mr. Lemanowicz asked if he zoomed in, and Mr. Edelstein stated he zoomed in one zoom.

Mr. Toadvine stated the Board is dealing with issues that are not related to what the tower will look like. He stated all Board members have seen a cell tower. He stated if this is the purpose of Mr. Edelstein's cross examination, it is superfluous as they all know what cell towers look like. He stated he feels Mr. Lemanowicz would stipulate that it will look like a typical cell tower. He stated he is not sure that where Mr. Edelstein is going will help the Board in coming to a conclusion about their Findings in this case. He asked Mr. Edelstein's point in his cross examination.

Mr. Edelstein stated questions were raised at a prior meeting by a Board member as to what the antennas would look like. He stated there are photo simulations on Exhibit A-10 as to what the tower will look like; but he does not feel it is a fair or accurate representation of what the tower will look like. Mr. Toadvine stated Exhibit A-10 was offered to show what the tower would look like from specific distances and not necessarily a specific tower. He stated the Board does not Zone based on aesthetics. He stated it is an issue as to whether or not this particular structure is permitted in this Zone; and if it is not permitted, the Applicant needs to meet its burden of proof in showing that there is a hardship. He stated what the tower looks like is really not relevant to the Board.

Mr. Edelstein stated there are plenty of cases that discuss the Board being able to include in its evaluation things such as aesthetics and the visual impact of cell towers on nearby residents. He stated the Applicant put Exhibit A-10 in to give the Board a visual depiction, and he does not feel it is accurate.

Mr. Lemanowicz stated he would object to Mr. Edelstein's photograph being entered into evidence as it is a picture of an existing tower with four carriers, cables on the outside; and it is not a fair and accurate representation of the tower they are seeking relief for.

Mr. Malinowski sustained the Objection.

Mr. Edelstein stated there was discussion on screening and Mr. Burtner had indicated that the fence would be screened. Mr. Burtner stated he did not recall this testimony. Mr. Edelstein asked Mr. Burtner if there is any screening of the tower proposed higher than the height of the surrounding fence, and Mr. Burtner stated there is not.

Mr. Edelstein noted Exhibit A-13, the Site Plan for the cell tower. He asked if the access road proposed is within the 100 year flood plain; and Mr. Burtner stated while it is currently shown that way, it is planned to be relocated out of the floodplain.

Mr. Edelstein stated the current Plan shows the access road in the 100 year floodplain, and Mr. Burtner agreed. Mr. Edelstein stated there is nothing else that has been presented to the Board, and Mr. Burtner stated his testimony was that they would move the access road out of the floodplain. Mr. Edelstein asked if there has been any analysis as to the impact of the access road in the floodplain, and Mr. Malinowski stated Mr. Burtner has indicated that the access road is going to be moved so this would not matter.

Mr. Edelstein stated as a Party and an Objector, he can only deal with what is here; and if they want to come in with another design and give him an opportunity to see it, he feels they are entitled to do that. He stated it is not clear to him where it will be relocated.

Mr. Toadvine stated the only Variance requested is a Variance to allow construction in the R-3M Zoning District, and they did not request any Variances from the floodplain or setback Variances; and Mr. Lemanowicz agreed.

Mr. Edelstein stated the design and the Plan proposed construction in the floodplain and they have not asked for this Variance. Mr. Toadvine stated if they have not asked for them, the Board will not grant those Variances. Mr. Malinowski stated the Township will not allow construction in the floodplain without a Variance. Mr. Edelstein stated the Applicant has presented a Plan to build a structure on a site where the access road is in the floodplain; and he feels that under the Ordinance they must make a demonstration that what they are proposing in its entirety “passes muster.” Mr. Toadvine stated they have not asked for a Variance to construct in the floodplain; and if this was their intent, they would need a Variance.

Mr. Burtner stated the road shown is an existing road that has been in existence for many years, and they propose to relocate it out of the floodplain.

Mr. Edelstein stated cell towers are well known to attract lighting, and Mr. Burtner stated while he is not sure that it is “well-know,” he would agree that they are tall structures that have grounding equipment on them. Mr. Edelstein stated there is a risk that they will attract lightening in the area, and Mr. Burtner disagreed adding if there is lightning already in the area, it will go to the cell tower as opposed to someone’s chimney.

Mr. Edelstein stated it will then be grounded and the electric energy will dissipate through the ground, and Mr. Burtner agreed. Mr. Edelstein asked how close the cell tower will be to the swimming pool, and Mr. Burtner stated he would estimate it to be 120’. Mr. Edelstein asked how close the cell tower will be the basketball and volleyball courts, and Mr. Burtner estimated it to be 50’. Mr. Edelstein asked Mr. Burtner if he is aware of homes within several hundred feet of cell towers that have been struck by lightning and have had electric circuitry and appliances blown out, and Mr. Burtner stated he has never heard this and does not believe it.

Mr. Edelstein asked Mr. Burtner if there is a site worse than a swimming pool in terms of safety risk from lightening to construct a cell tower.

Mr. Lemanowicz stated he did not understand this question.

Mr. Edelstein asked if the Board is not allowing his photograph to be put into evidence, and Mr. Malinowski agreed. Mr. Edelstein asked if he can assume that the Applicant's photo simulation and visual representations will also not be accepted into evidence, and Mr. Malinowski stated he should not assume this.

Mr. Smith stated he feels the biggest problem with the photo presented by Mr. Edelstein is a lack of foundation as they do not know what "one zoom" is, how far away he was, how tall the tower is, or where the tower is located. He stated the Applicants have put testimony in the record that shows where the photos were taken, distances, etc. He stated if Mr. Edelstein can provide some foundation maybe it would be admitted. Mr. Malinowski stated what Mr. Edelstein has provided is not a representation of the particular tower that is going to be installed. Mr. Edelstein stated he would be willing to lay a foundation for his photograph, and Mr. Toadvine stated it has been offered, there was an Objection, and the Objection was ruled on.

Mr. Donaghy stated Mr. Edelstein had asked if there would be any screening around the site, and Mr. Burtner stated they are not proposing any screening. Mr. Donaghy stated at the prior Hearing he had asked if they would be prepared to comply with all the requirements of the Zoning Ordinance in Article 13A, and they indicated they would. Mr. Donaghy stated one of those requirements is an evergreen screen, and Mr. Burtner stated they will agree to do this.

Mr. Donaghy stated there was a question at the last Hearing as to who were the members of the residents group, and he asked if they have this. Ms. Kristin Tyler stated she has this to offer this evening. Ms. Tyler presented a Resolution with Officers of their group listed, and this was marked as ReACT-1 and is a listing of Officers and members of ReACT which is Residents Against Cell Tower. Mr. Toadvine stated this also indicated that Kristin Tyler has been designated as the spokesperson.

Mr. Lemanowicz asked if ReACT has been registered in the State of Pennsylvania as a non-profit or a Homeowners' Association; and Ms. Tyler stated they are not, and they are a grass roots group. Mr. Lemanowicz asked if there are any formal formation documents, and Ms. Tyler stated they passed a Resolution and stated their purpose within that Resolution. Mr. Lemanowicz stated he would object as he does not know who the Party is. He stated he does see individual names who want to object to the Application, but ReACT is not an entity that can file an Appeal or be a Party. Mr. Toadvine stated it is an unincorporated association. Mr. Lemanowicz stated for the purpose of the Record, he is stating his Objection.

Mr. Donaghy stated ReACT-1 is the Resolution and list of members and Officers, and Mr. Toadvine agreed.

Ms. Tyler asked about the “fall-down zone,” of the proposed tower, and asked if the railroad tracks are within the fall-down zone. Mr. Lemanowicz asked that she define what she means by “fall-down zone,” and Ms. Tyler asked that he define it.

Mr. Toadvine stated Mr. Lemanowicz has asked that she clarify her question.

Ms. Tyler stated should the proposed tower break at its base and fall to the ground and fell in the direction of the railroad tracks, would it land upon the railroad tracks; and Mr. Burtner stated it would go out into the right-of-way but he is not sure it would make it to the tracks. Ms. Tyler asked Mr. Burtner the distance from the base of the proposed tower to the railroad tracks, but Mr. Burtner stated he did not know.

Ms. Tyler asked if there is a standard that Liberty Towers uses to calculate a “fall-down zone” of a tower of 150’, and Mr. Burtner stated there are design measures that can be designed into the pole.

Ms. Tyler asked in other construction done by Liberty Towers of monopoles, what requirements have been imposed upon Liberty Towers as far as space for a fall-down zone; and Mr. Burtner stated it would vary by Municipality, and it is not something that can be stipulated, rather it is written into their Ordinance and sometimes it is a one-to-one setback and sometimes it is a 50% setback; and generally these are the two most common. Ms. Tyler asked what is it in this instance; and Mr. Burtner stated they are not in an allowed Zone for this use so there is not a requirement. Ms. Tyler asked if it were in an allowed Zone, what would the requirement be, and Mr. Burtner stated he believes it is a one-to-one setback. Ms. Tyler asked assuming there would be a one-to-one setback and the 150 foot tower, within the Brookside Swim Club are there any recreational amenities located within the 150 foot zone; and Mr. Burtner stated there is a basketball court, a volley ball court, and tennis courts.

Ms. Tyler asked if the 150 foot fall down zone exceeds the property boundaries on any of the sides, and Mr. Burtner stated it does to the north and to the south. He added it would exceed it by approximately 30’ to the north and approximately 20’ to the south.

Ms. Tyler asked what lies 20’ to the south and north, and Mr. Burtner stated it is woods.

Ms. Tyler asked if Liberty Towers able to accommodate the one-to-one ratio on the proposed property, and Mr. Burtner stated they are not.

Ms. Tyler asked the present Zoning for the Brookside Swim Club, and Mr. Burtner stated it is the R-3M Residential. Ms. Tyler asked if Mr. Burtner is aware if the Swim Club is a non-conforming use for that District, and Mr. Burtner stated he is not sure.

Ms. Tyler stated on Exhibit A-10 Liberty Towers submitted four photographs purported to demonstrate the location of the proposed cell phone tower from various views throughout the neighborhood. She asked if those simulations were based upon actual photographs, and Mr. Burtner stated they were. Ms. Tyler asked who took the photographs, and Mr. Burtner stated they were taken by members of his staff. Ms. Tyler asked when the photographs were taken, and Mr. Burtner stated they were taken in August. Ms. Tyler asked if the photographs were taken in conjunction with the flight of the balloon, and Mr. Burtner stated they were. Ms. Tyler asked at what height was the balloon flown for the August photographs, and Mr. Burtner stated it was flown at 150'. Ms. Tyler asked if it was not 140', and Mr. Burtner stated it was 150'. Ms. Tyler asked if the photographs exist unaltered, and Mr. Burtner stated they do. Ms. Tyler called for the production of the photographs for a comparison study.

Mr. Malinowski asked if the photographs were not included in the Exhibit, and Ms. Tyler stated the only photographs that were put into Exhibits were the altered photographs. Mr. Lemanowicz stated he had no objection to submitting the unaltered photographs.

Ms. Tyler asked how many members of Mr. Burtner's staff took the photographs, and Mr. Burtner stated they were taken by one staff member – Eric Ritter. Ms. Tyler asked what type of equipment he utilized to take the photographs, and Mr. Burtner stated it was a Canon A-540. Ms. Tyler asked why type of lens it is equipped with, and Mr. Burtner stated it is a Canon lens. Ms. Tyler asked the specific type of lens – wide angle, panoramic, etc.; and Mr. Burtner stated it was a regular lens. Ms. Tyler asked Mr. Burtner if he knows where he took the photographs from as far as distance from ground level, and Mr. Burtner stated there is an aerial exhibit that shows from where they took the pictures. Ms. Tyler stated she is asking where was the camera as compared to ground level and asked if he was sitting down on the curb or standing, and Mr. Burtner stated he was standing up so the camera was probably located 5'6" above ground level. Ms. Tyler asked Mr. Burtner if he has some document to verify the numbers as to the height at which they were taken. Mr. Burtner asked what kind of document she would be looking for, and Ms. Tyler asked if he documented the distance from the proposed site when taking the photographs.

Mr. Malinowski asked how this would help the Board reach a conclusion, and Ms. Tyler stated she does not believe the photographs Liberty has submitted in support of their Application with a simulated cell phone tower are based upon mathematical calculations; and therefore, she does not believe they are fair nor accurate representations of the height nor the size of the tower.

Mr. Smith stated he does not feel the photographs have been entered into the Record and feels the proper time to challenge them would be at the time they wish to enter them into evidence. Ms. Tyler stated she believes that this is the Witness who is testifying as to the photographs, she and asked if they are going to bring in another Witness who will be able to testify as to the photographs. Mr. Lemanowicz stated he does not know but since he does not feel they will conclude this matter this evening, this could be determined.

Mr. Toadvine asked if there was not a balloon test done recently, and Ms. Tyler agreed. Mr. Toadvine stated he felt the balloon test was done so that the residents could get an accurate depiction of where the pole would be in relation to the various sites throughout the Township, and Ms. Tyler agreed. Mr. Toadvine asked why the issue of the photographs is being raised at this point since the balloon test was done to supplement and clarify the photographs from the last Hearing. Ms. Tyler stated that is irrelevant to the issue of the Applicant submitting photographs for the Board's consideration representing that it will be the placement and the look of the tower. She stated she is challenging the photographs submitted as Exhibit A-10 whether they are in evidence or not; and she feels this is the only Witness that is going to be able to testify as to who took the pictures, the distances they were taken from, and the height they were taken from. She stated the other Witnesses proposed are RF engineers and are on a completely different topic. She stated she is calling for the production of the original photographs. Mr. Toadvine stated Mr. Lemanowicz has indicated that he will produce them. Ms. Tyler stated while she understands this, what she intends to establish with those photographs is the distance from which they were taken and the height from which they were taken so that they can provide accurate representative pictures of the proposed size and location of the tower.

Mr. Toadvine stated the purpose of the balloon test was to establish for the neighbors and the Board the height of the proposed tower and the visibility of the proposed tower from various locations throughout the Township. Ms. Tyler stated she understands that was the purpose of the test, but what she is challenging is the Application and the documents that are before the Board. She stated she assumes they will try to put into the evidence the four photographs as representations of the tower, and she believes that the photographs that they have submitted are distortions and are not based upon mathematical calculations and therefore they are neither a fair nor accurate representations of what they are applying for.

Mr. Toadvine stated while he understands this, he thought this is why the balloon test was done. He stated he also felt that she had asked about the size of the rope and was going to have someone there. Ms. Tyler stated their request was ignored. She stated they sent a letter to Counsel for Liberty Towers with a copy to Mr. Toadvine requesting that they be permitted to attend the balloon flight and measure it and verify that it indeed went up to 150'. Mr. Toadvine stated he felt that Ms. Tyler had asked that question at the last meeting, and the Board Chairman indicated there were no restrictions whether they could

be there or not. Ms. Tyler stated what the Board Chairman stated was he was without power to allow them on private property. Mr. Toadvine stated the Board does not have the right to say whether she could go or not go. He stated the point is, it was visible and was in a public area. Ms. Tyler stated this is irrelevant to her challenging the photographs that are being submitted with the Application.

Mr. Smith asked when Ms. Tyler was provided with the Exhibits, and Ms. Tyler stated she received them when they were submitted. Mr. Smith asked if she went to each one of the spots marked on the map when the balloon was flown and took her own photos, and Ms. Tyler stated they did. Mr. Smith suggested they submit those photos, and Ms. Tyler stated they will when they present their case. She stated currently she is cross examining this Witness on the evidence he has submitted. Mr. DosSantos stated they have not been submitted into Evidence and are just Exhibits for the Board's perusal at this point.

Mr. Donaghy stated Ms. Tyler has a legitimate basis for challenging the admission of the photographs at the time they are provided for submission, and he feels it is appropriate now since this Witness is present to ask questions of that might become relevant as part of any objection. He suggested that Ms. Tyler be permitted to continue her line of questions, and she will then present her own photographs; and Mr. Lemanowicz could object to those Exhibits if he wishes.

Mr. Malinowski stated he assumes that the photographs will be requested to be submitted as evidence as representations of what the pole would look like from various locations; and he assumes they are not meant to be completely accurate as there is no way they could be, and they are representations of what it proposed to look like when it is erected based on the flight of a balloon which the Applicant put up in August.

Mr. Lemanowicz stated his position is that if the objecting Party wants to produce an Exhibit of what they feel it will look like when it goes up, they are free to do so; but they have yet produced that document.

Mr. Malinowski stated the Board will weight all the evidence and determine which is more accurate and base their decision on this.

Mr. Donaghy stated he is only indicating that this is not an improper line of questioning.

The Board took a short recess at this time to confer with Counsel. The meeting was reconvened at 8:50 p.m.

Mr. Toadvine stated during the break, he had a discussion with Mr. Lemanowicz who indicated that he will have the individual who took the pictures available for cross examination at the next meeting.

Mr. Lemanowicz stated during the questioning, Ms. Tyler indicated that the pictures were distorted, and he asked for clarification on what she meant by this.

Ms. Tyler asked through what mechanism the cell tower was depicted in Exhibit A-10, and Mr. Burtner stated it was Photoshop. Ms. Tyler asked if calculations were entered into Photoshop for the photos. Mr. Burtner stated the process they used was they blew up the balloon to 4' in diameter and floated it 150'. He stated they know that the antennas are approximate 4' so that when you take the Photoshop view of the monopole and superimpose it on the photo they have a 4' diameter ball that they can use to gauge. He stated it may not be accurate to the nearest inch

Ms. Tyler asked Mr. Burtner if they calculate the distance from the tower that the photograph is taken in the Photoshop calculations; and Mr. Burtner stated you do not calculate it, you measure it. Ms. Tyler asked if that measurement was used when they Photoshopped the photos, and Mr. Burtner stated it was not. Ms. Tyler asked if any measurement of surrounding structures were utilized to Photoshop the photos, and Mr. Burtner stated there were no surrounding structures.

Ms. Tyler asked Mr. Burtner if he was aware that there is a calculation that can be used that would accurately depict both the height and the width of the proposed tower, and Mr. Burtner asked if she is referring to the Pythagorean Theorem; and Ms. Tyler agreed and stated she is referring to a very specific mathematical formulation. Mr. Burtner stated they believe their empirical methods of creating these photo simulations are more accurate than any calculations. Ms. Tyler stated they did not use a mathematical calculation that took into account the distance the photo was taken to the proposed site along with foreground objects such as houses or anything else to place the tower both in size and location, and Mr. Burtner stated they placed the tower utilizing the balloon location. Ms. Tyler asked how they garner the perspective that is shown in Exhibit A-10. She specifically noted View #3 of Exhibit A-10 and asked what numerical data was entered, and Mr. Burtner stated they did not use any numerical data. Ms. Tyler asked if such a calculation existed, could they have; and Mr. Burtner stated he did not think so.

Ms. Tyler asked other than the insertion of the proposed cell tower in the four photographs in Exhibit A-10 were any other alterations made to the photo, and Mr. Burtner stated there were not.

Ms. Tyler asked how many millimeters was the lens used, and Mr. Burtner stated he will bring the camera to the next hearing.

Mr. Malinowski questioned the relevance of the line of questioning and stated he does not feel this will help the Board make a determination as to whether or not a cell tower should be on this particular property. Ms. Tyler stated it is relevant because of the aesthetic value of the imposition of this cell tower in this neighborhood which is one of

their arguments against its placement and how it will dominate the skyline and overtake and overshadow the trees. She stated the fact that the photographs are being presented to the Board for the purpose of showing how the cell tower will look is objectionable. She stated these are not accurate representations as to how the cell phone tower will look. Mr. Malinowski stated it is not supposed to be. Ms. Tyler asked why it is being presented. Mr. Malinowski stated it is merely a representation and aesthetics have no bearing on the Board's decision. Ms. Tyler stated the character of the community is relevant to the Board's determination and it is specifically contemplated in the Variance statute.

Mr. Malinowski asked that they move on.

Mr. DosSantos asked that the individual who took the pictures bring with him the camera and exact lens he used when he comes to the next meeting

Ms. Tyler asked who did the Photoshop, and Mr. Burtner stated he would have to check. Mr. Bamburak asked if they could provide the version of Photoshop used and the operating system it runs on, this may also be helpful.

Ms. Tyler stated she also wants to make sure that she will be getting the original photographs, and Mr. Toadvine stated Mr. Lemanowicz indicated these would be provided. Mr. Lemanowicz stated he will provide these no less than ten days prior to the next meeting.

Ms. Tyler asked if Liberty Towers ever installed a tower that exceeded the one-to-one ratio on setback, and Mr. Burtner asked that she further clarify her question. Ms. Tyler asked if Liberty Towers has ever been permitted to put up a pole, that assuming catastrophic failure, would exceed the property boundaries; and Mr. Burtner stated this was done in Rush Township in Dauphin County. He stated there were two which he estimates were fifty feet from the property line and it was a 150' tower. Ms. Tyler asked about the surrounding property, and Mr. Burtner stated the only significant feature was Route 325.

Mr. Smith asked Ms. Tyler for an offer of proof why she is requesting this, and Ms. Tyler stated they have concerns that this tower would fall down outside the property line were it to fall down.

Mr. Toadvine asked how the relevancy of a tower exceeding the property boundary lines in Rush Township bears on this Application. Ms. Tyler stated she was wondering if it were ever permitted. Mr. Toadvine asked how this would bear on this Application; and Ms. Tyler stated she would argue that it is impermissible to install a tower that would exceed the property line.

Ms. Tyler asked how many trees have to be removed from the property to proceed with what is shown on the Application, but Mr. Burtner did not know. Ms. Tyler asked if there are trees within the area of the proposed construction; and Mr. Burtner stated there are, but they are largely going to be located in the clearing behind where the existing volleyball court is currently located.

Ms. Tyler asked if they have conducted any environmental impact studies concerning placement of the cell tower in this particular location, and Mr. Burtner stated these are in process. He stated T-Mobile is a Federally-licensed entity and must comply with the National Environmental Policy Act of 1972; and they have to analyze floodplains, historic structures, wetlands, and a number of different line items. Ms. Tyler asked how many of these items are in this location; and Mr. Burtner stated the floodplain is present, and there are possibly some wetlands on the property but they will not be impacted by the installation. He stated he is not sure if any of the structures are historic; and if they are, whether the State Historic Preservation Office would deem them to be significant.

Ms. Tyler asked about the floodplain and the access road, and Mr. Malinowski stated this has already been covered; and he asked that she move on. Ms. Tyler stated she would like to know where they propose to move the road to. Mr. Malinowski stated this is irrelevant. Ms. Tyler stated the floodplain issue is relevant to the FCC and 704 that they have to deal with. She stated if it is existing in the floodplain, Liberty Towers must get an okay from the Federal Government to erect the tower so it is irrelevant. She stated the construction contemplates a road, and the road will be included in the construction. Mr. Malinowski stated this has been addressed already, and he asked that Ms. Tyler move on.

Ms. Tyler asked Mr. Burtner who is conducting the impact study, and Mr. Burtner stated employees of CMX. Ms. Tyler asked if the impact study will be submitted in furtherance of this Application or will these be internal documents, and Mr. Lemanowicz stated they will provide a copy of the NEVA Compliance Report as well as the Pennsylvania SHPO prior to the next meeting.

Ms. Tyler asked if any other studies are being undertaken at this time, and Mr. Burtner stated they also conduct a Phase I Environmental Study with CMX employees. He stated the Township does not require this, so he does not feel it will not be submitted. Ms. Tyler stated she would be calling for any studies conducted by his company in furtherance of this Application. Mr. Lemanowicz stated he would not address a blanket request for studies. Mr. Toadvine stated if there is a request for production of documents and a request for issuance of Subpoena, they will deal with this as requested.

Ms. Tyler asked about the environmental study noted by Mr. Burtner, and he stated it is a Phase I Study which is basically a review of the environmental data bases, involves a site visit, and a review of whether there are any old barrels of chemicals, etc.

Ms. Tyler asked if they have performed any studies of impact to the surrounding residential neighborhoods other than the photographs submitted as Exhibit A-10, and Mr. Burtner stated CMX has not. Ms. Tyler asked Mr. Burtner if he is aware of any other entity who has done so on behalf of Liberty Towers. Mr. Burtner stated Ms. Tyler is asking questions about his testimony; and while this may come up in the case, he did not testify to this. Ms. Tyler asked who could testify to this.

Mr. Toadvine advised Ms. Tyler she should be asking Mr. Burtner questions about his testimony. Ms. Tyler stated Mr. Burtner is advising that he is not competent to ask this question of, and her next question is who would be. Mr. Toadvine stated the underlying question was not based on his testimony. Ms. Tyler stated she is not limited to what this attorney asked of his client in her questioning. Mr. Toadvine stated this is cross examination and is based on Mr. Burtner's direct testimony. Ms. Tyler was advised that she can ask Mr. Burtner about his direct testimony. Ms. Tyler stated there are issues that were not asked nor addressed by the Applicants' counsel on direct examination which she is entitled to ask him about. Mr. Toadvine stated this is cross examination, and Ms. Tyler can ask Mr. Burtner questions about his direct testimony, and she cannot call him as her Witness. He stated if Ms. Tyler has a Witness, she can present her Witness on her case. Ms. Tyler stated she disagrees, but agreed to continue on another line of questioning.

Ms. Tyler asked about the balloon test that took place in October, and Mr. Lemanowicz stated Mr. Burtner did not conduct the balloon test that took in October; and he has another Witness available to testify to this.

Ms. Tyler asked Mr. Burtner if he is aware as to whether any actual Agreement exists between Liberty Towers and T-Mobile, and Mr. Burtner stated he is. Ms. Tyler asked if this is a Letter of Intent or a Contract, and Mr. Burtner stated it is a Lease, but he is not sure of the exact details. Mr. Lemanowicz stated this is not something that Mr. Burtner testified to, but he will make a representation on behalf of his client that there is binding Lease Agreement between T-Mobile and Liberty Towers for use of this tower. Ms. Tyler called for the production of this document, but Mr. Lemanowicz would not agree to the production of the document. Ms. Tyler stated Liberty Towers is making an Application based upon T-Mobile's alleged gap in coverage, and she is inquiring as to whether there is an agreement between Liberty Towers and T-Mobile.

Ms. Tyler asked if there is a written agreement between Liberty Towers and Sprint, and Mr. Lemanowicz stated he would make a representation on behalf of his client that there is a binding Agreement but would not agree to the production of that document as it is privileged information. He stated he is affirming that there are binding Agreements.

Ms. Tyler stated she feels it is part of their Application that they are trying to demonstrate that there is a gap in coverage by the respective carriers, and she feels the information of the respective carriers is highly relevant. Ms. Tyler requested the Agreements between Liberty Towers and the two cell phone companies. She stated Liberty Towers is making this Application under the guise of the Tele-Communication Act, and the Tele-Communication Act applies to Sprint and T-Mobile, and the Agreements between Liberty Towers and Sprint are relevant to whether they are going to be able to establish this gap in coverage and whether the Agreements actually exist.

Mr. Smith stated Mr. Lemanowicz has represented that the Agreements exist and has asserted business privilege.

Mr. Gruen stated they were also advised that there will be an expert testifying as to the gap in service

Mr. Malinowski asked if there was anyone else present who requested Party Status who wished to cross examine Mr. Burtner, but there were none.

Mr. Gruen stated when they discussed nine antennas, he assumes they were discussing the panels surrounding the monopole which are on each platform; and Mr. Burtner stated each panel is an antenna, and each set of antennas is an array. Mr. Gruen stated T-Mobile is proposing one array and Sprint will have a second array; and Mr. Burtner agreed that there will be one array for each company. Mr. Gruen stated there will possibly be a total of six platforms/arrays on the monopole, and Mr. Burtner agreed. He added that when Liberty Towers does the design of the monopole, the design will assume six arrays on the tower, and they will use that loading to design the thickness of the steel, foundation, etc.

Ms. DosSantos asked if the arrays get mounted but not used, and Mr. Burtner stated they will not be mounted until there is a user.

Mr. Gruen stated he did go see the balloon and stood on Lenape Lane and there were two houses straddled on the balloon. He asked if they have a picture of this, and Mr. Lemanowicz stated he feels the next Witness does have a picture of what Mr. Gruen is referring to.

Mr. Brian Seidel was called and sworn in. He stated he is a registered landscape architect and certified planner by the American Institute of Certified Planners in the State of Pennsylvania. He also holds registrations in Delaware and New Jersey.

Mr. Seidel stated he conducted the balloon test at 499 Stony Hill Road on this past Saturday (October 31) from 10:00 a.m. to 1:00 p.m. and Friday (October 23) between 7:00 a.m. and 10:00 a.m.

Exhibit A-15 was marked which is a series of six photographs on three sheets of paper

Mr. Lemanowicz asked what he did at the balloon test. Mr. Seidel stated he went to 499 Stony Hill Road on the two dates testified to, inflated a balloon to a diameter of four feet, and floated the balloon to an elevation of 150'. He used the drawings marked as Exhibit A-13 as a guide as to where the tower would be located on the property.

Mr. Seidel stated there are two stakes at the rear of the property marking the rear corners of the proposed equipment compound; and based on that location and the location of other existing features on the site, they were able to easily determine the location of the proposed tower. Mr. Seidel stated the string was measured at 146' in length, and the balloon had a four feet diameter, so the top of the balloon would be at 150'.

Mr. Lemanowicz asked about the string, and Mr. Seidel stated it is heavy gauge nylon, and he measured the line. He attached the balloon to the end of the line. Mr. Lemanowicz asked how the balloon was inflated, and Mr. Seidel stated they brought a helium tank to the site and inflated the balloon with helium. The balloon was clamped to the line and let go into the air and he extended it the full length of the line. Mr. Seidel stated the balloon was up for the entire duration of the tests.

Mr. Lemanowicz asked Mr. Seidel if he remained with the balloon while it was airborne, and Mr. Seidel stated on Friday when the test was performed he remained at the site the entire time. On Saturday he had someone remain at the site to make sure that if there were any problems with wind or the balloon in the trees that someone would be there to watch the equipment, and Mr. Seidel stated he himself left the site to drive the surrounding area to take photographs and determine the impacts of the views from neighboring properties.

Mr. Lemanowicz asked about the weather conditions on the first day the test was conducted, and Mr. Seidel stated at 6:30 a.m. to 7:00 a.m. the winds were calm and it was slightly overcast. He stated at around 9:00 a.m. on that day, the wind did pick up and it became more overcast. He stated the second day when they conducted the test on Saturday, the conditions were not ideal and it was overcast and raining at various points and there was a slight wind. The balloon was airborne the entire length of the 146' line and remained airborne for the entire length of the test.

Mr. Seidel stated that the 146' line was accurate both Friday and Saturday. He stated he was in the location where the tower is proposed. Mr. Lemanowicz asked if the same line was used on both occasions, and Mr. Seidel stated it was. He stated they used a different balloon on Saturday, but it was the same type that was used in Friday. He stated they use a single-use balloon. He stated when the balloons were removed at the end of the tests, they were measured again to see if they changed in size, and they were still 4' in diameter.

Exhibit A-15 was noted which were the photographs taken on 10/31 which Mr. Seidel stated he took with his camera. He stated the photographs were not altered in any way. The top picture on Sheet #1 was noted, and Mr. Seidel stated this is similar to View 1 on the CMX Aerial (Exhibit A-10) and is a picture from the parking area adjacent to Stony Hill road in front of the Brookside Swim Club and the balloon can be seen. The structure in the forefront of the picture is the Swim Club Building. The red dot seen is the balloon which is between two trees.

Mr. Lemanowicz asked him the type of camera he used, and Mr. Seidel stated it was a digital camera – Canon A650, and this is a standard issue camera with a standard issue lens. No alterations were made to the first picture.

Mr. Lemanowicz asked about the second picture on the first page, and Mr. Seidel stated this picture is not consistent with any of the photographs on the CMX Exhibit. He stated this is a picture of the view from Lenape Lane toward the proposed site. He stated when he took the picture he was standing at street level, and the camera was at eye level. The red dot approximately 30' above the tree line is the balloon that was floated. The picture was not altered.

Mr. Toadvine stated they would assume that the same criteria applies for all the pictures taken in that they were taken standing at street level, with the camera at eye level, and no alterations were made; and Mr. Seidel agreed. He stated all pictures were taken by him using the same camera, all at street level, and depict the balloon, and no alterations were made to the pictures.

Mr. Toadvine asked about the times the pictures were taken, and Mr. Seidel stated they sent the balloon up at 10:00 a.m.; and based on the weather, he determined that it was best to go out and take the pictures so that if they needed to cancel the testing, they would have the pictures. He estimated that he took the pictures between 10:15 a.m. and 10:45 a.m.

Mr. Lemanowicz asked Mr. Seidel if it is his testimony that the balloon depicted in all the photographs is a fair and accurate representation of the height of the proposed tower as it would be viewed from the locations where he took photographs, and Mr. Seidel agreed.

Mr. Lemanowicz asked Mr. Seidel, in his opinion, how much of the proposed tower would be visible from these locations; and Mr. Seidel stated the view from Stony Hill Road would be the most revealing over top of the Swim Club as it is basically unobstructed by the trees; and you would see approximately half the height of the tower. He stated some of the other photographs which were taken from the neighborhoods looking over and between dwellings or over the tree line, he would estimate that you would be able to see between 20' and 40' depending on the picture.

Mr. Lemanowicz asked if he feels there were consistent findings with what is depicted in the photo simulations shown in Exhibit A-10, and Mr. Seidel agreed they are very consistent. He stated he did go to each of the locations where the photo simulations were prepared and were mapped on the aerial exhibit for the location, and the balloon test they prepared was consistent with the balloon test run by CMX.

Mr. DosSantos asked how the line was anchored, and Mr. Seidel stated they used a small hose reel that was reeled up to the height and it was anchored with a thirty pound dumbbell. Mr. DosSantos asked if the anchoring of the line impacted the length, and Mr. Seidel stated it did not and they did not use any of the 146'. The line was measured out in 10' increments as well so they also took a measurement from the ground to the first 10' elevation, and they were consistent with the height. Mr. DosSantos stated the day they took the photographs, Mr. Seidel indicated it was somewhat windy; and Mr. DosSantos asked if the wind would impact visually the height of the balloon in the photographs. Mr. Seidel stated the wind would impact the height of the balloon, and at times when there were wind gusts which came in, the balloon would go down, and it did not represent the 150' height. He stated when he went to some of the locations noted in the neighborhoods, you could see the balloon moving so he waited until the balloon was at the top of the crest of the arc before taking the pictures. All photographs of the balloon were taken at the apex of its height.

Mr. Gruen noted one of the photos which he felt was taken from Lenape Lane and stated it does not depict what he saw when he was on Lenape Lane as he saw the balloon between two houses. Mr. Seidel stated the photo Mr. Gruen is indicating was not from Lenape Lane but was from Andrea Place. Mr. Seidel stated the second photo on Page 1 was taken from Lenape Lane taken from the curve in the road toward the site looking down the cul-de-sac. He stated on Page 2 the photo at the top is a picture from the actual cul-de-sac bulb of Lenape Lane. He stated this second photograph would be closer to the site.

Mr. Gruen asked how wide of a lens he used, how many millimeters; and Mr. Seidel stated while he does not know, it is a standard issue lens. Mr. Gruen stated from the pictures it seems that for some pictures he was using a zoom lens and others a panoramic or a wide angle lens. He stated he does not feel the pictures reflect what the eye sees so it is not a correct representation of what he would see when he looked at the balloon.

Mr. Lemanowicz stated they are submitting the photographs for the purpose of verifying that they did conduct a balloon test. Mr. Gruen stated the picture does not represent what the tower is going to look like. He stated with a wide angle lens it looks like it is miles away, but in essence you are right next to it.

Mr. Seidel stated the red dot seen is still a 4' diameter ball. Mr. Gruen stated depending on the lens, you can make it look big or small.

Mr. Malinowski stated the purpose was only to show that they took photographs when the balloon was flown and the purpose was not to represent what it will look like.

Mr. Donaghy asked that they identify the other locations where pictures were taken. Mr. Seidel stated the second photo on the second page was taken from the same general location as view #2 on the CMX aerial Exhibit and was on Hidden Pond Drive. The third page, top picture is consistent with the location shown on the CMX aerial Exhibit from the cul-de-sac at Jenny Drive.

Mr. Donaghy asked if Mr. Seidel did any calculations or determinations as to distances from locations where the photographs were taken to the location of the balloon; and Mr. Seidel stated they did not take those calculations, but based on aerial photography and general mapping, they could come up with general distances.

Mr. Donaghy asked if all the photographs were taken on October 31, and Mr. Seidel agreed they were.

Mr. Edelstein noted the second picture on the second page and two pictures on the third page. He asked based on the height of the balloon above the tree line, would Mr. Seidel agree that the antenna array on the monopole will be visible from each of these vantage points, and Mr. Seidel agreed that they would be visible.

Ms. Tyler noted the fourth photograph submitted this evening in Exhibit A-15 in comparison to the prior photograph submitted as Exhibit A-10 of the same location, she asked Mr. Seidel if the balloon depicted in Exhibit A-15 is higher, lower, or the same level as the Photoshop cell tower depicted in Exhibit A-10 (Hidden Ponds). Mr. Seidel stated he feels they are fairly consistent and the photos which were submitted from 10/31 where actually taken a little bit closer to the tower based on the fact that in the previous photo by CMX he can see more of the existing dwelling on the left hand side; but feels overall it is very consistent with the height.

Ms. Tyler noted Page 3 of Exhibit A-10, the fifth paragraph compared to Exhibit A-15, and she asked Mr. Seidel if the balloon shown in the photos he took is at the same level, a higher level, or a lower level than the Photoshop cell tower that is shown in Exhibit A-10. Mr. Seidel stated based on these views, the view that was taken by himself is a closer version of the house and CMX's looks as though it were taken from the opposite side of the cul-de-sac. He stated the balloon in the photograph taken on 10/31 in his Exhibit appears slightly higher. Mr. Gruen stated it seems as if it were taken by a taller person. Mr. Seidel stated he agrees that it is a slightly different perspective; and as he indicated when he took the picture, he was closer to the dwelling than the photographer was in the CMX photo which would give a perceived difference.

Mr. Smith stated these are only being offered to show that the balloon was floated and not to show the height and distance; and Mr. Lemanowicz stated these were offered only for the limited purpose of indicating that this balloon test was done and that the balloon was floated to a height of 150' and they are showing the height but not the visual impact or the aesthetics.

Ms. Tyler asked if Mr. Seidel took the photographs in Exhibit A-10, and Mr. Seidel stated those were prepared by CMX, and he did not take those photographs. Ms. Tyler asked if he knows who did take them, and Mr. Seidel stated he assumes they were taken by someone from CMX Engineering. Ms. Tyler asked if he knows the distances from the proposed site the photographs in Exhibit A-10 were taken, and Mr. Seidel stated he does not, and the only thing he could go by was what he saw and the general location shown on the aerial. Ms. Tyler asked Mr. Seidel if he has any knowledge as to the Photoshopping of the proposed tower in the photographs in Exhibit A-10; and Mr. Seidel stated he does not and does not know what programs CMX used.

Ms. Tyler stated she objects to the photographs in Exhibit A-10 being placed in evidence. She stated no foundation has been laid for them coming into evidence. Mr. Toadvine stated they have not been moved into evidence. Ms. Tyler stated she is stating her objection as he did state when questioned by counsel that he believed there were a fair representation, and she would assume counsel will try to place them into evidence. Mr. Smith stated the objection is untimely.

Ms. Tyler asked if they will have a Witness to testify to the photographs in Exhibit A-10, and Mr. Toadvine indicated they will have Mr. Ritter attend the next meeting with his camera.

Ms. Tyler stated she would like to mark a photograph taken on October 31.

Mr. Malinowski stated Ms. Tyler is cross examining Mr. Seidel, and he did not testify as to the photograph she is presenting. Mr. Toadvine asked if she is going to show Mr. Seidel this photograph and ask him questions about it, and Ms. Tyler stated she is going to ask him if it is a fair and accurate representation of the balloon. Mr. Toadvine stated he does not feel it needs to be marked as she is not offering it into evidence. He stated if Ms. Tyler wants to show this to Mr. Seidel, she should show it to his counsel first. Mr. Lemanowicz was shown the picture being offered by Ms. Tyler. Mr. DosSantos stated since Mr. Seidel was at the site, he can testify as to what he sees in the photograph but could not testify as to the authenticity as he did not take the picture.

Ms. Tyler showed the photograph to Mr. Seidel and asked him if this is a fair and accurate representation of the balloon that was flown on October 31 in the court of Jenny Drive; and Mr. Seidel stated he cannot state whether this was taken on that date or on the date the balloon was flown previously, but stated the photograph is fairly consistent with the photograph he took on Saturday, October 31 marked as Exhibit A-15 on the third page.

Ms. Tyler noted the weather conditions on 10/31/09 and asked if any calculations were taken as to wind speeds; and Mr. Seidel stated while he did not take any calculations, he did check the weather in the morning and they were predicting winds of approximately twelve miles an hour. Ms. Tyler asked during the Saturday flight, how much of the time did Mr. Seidel observe the balloon; and Mr. Seidel stated he was either at the site or was driving around the site for the entire three hours. Ms. Tyler asked if the wind moved the balloon on that day, and Mr. Tyler agreed it did.

Ms. Tyler asked under what conditions would they cancel a balloon flight, and Mr. Seidel stated for the purpose of preparing a photo simulation similar to the CMX simulations, you would wait for ideal conditions which would be little to no wind and a very clear day. Ms. Tyler asked if there was little to no wind on October 31, and Mr. Seidel stated there was wind and it was rainy and not clear. Ms. Tyler asked if any calculations have been made as to how much lower the balloon would have appeared in the sky due to those wind conditions; and Mr. Seidel stated they did not prepare any calculations or account for that other than noting that the balloon did move in both directions. He stated when he took his photographs he based it on what appeared to be the crest of the balloon during the wind gusts. Ms. Tyler asked if any pictures were taken when the balloon was straight up in the air at a height of 150', and Mr. Malinowski stated he has already testified to this. Ms. Tyler stated Saturday's winds were gusting the entire day.

Ms. Tyler asked under what conditions would Mr. Seidel cancel a test, and Mr. Seidel stated for their purposes since it was advertised through public notice that there were going to be balloon tests, they proceeded. He stated under ideal situations, they would be able to go out on a moments' notice when there were ideal weather conditions; however, in this circumstance it did not allow for this since they had to notify residents ten days beforehand when they were going to go out.

Ms. Tyler stated the Notice that was sent to the residents was "weather permitting," and she asked what wind speed would have forced them to cancel. Mr. Seidel stated if it were ideal wind conditions, which would be no wind, you could set the test up and drive away from the site and you would not have any problems with the balloon moving. Ms. Tyler stated her point is that this was not the case.

Mr. Smith stated these photos were entered as Exhibits for a limited purpose, and it does not need mean that they will give them any weight. He stated he feels they have heard sufficient testimony as to what conditions the pictures were taken, how far away they were, the lenses, how tall, from where, how short, etc. He stated he does not personally feel the pictures mean anything.

Ms. Tyler stated her point is that with regard to the Saturday flight when they had residents attempting to take photographs from the interior of their homes, the wind was such that the balloon was not at its pinnacle; and it took her an hour and a half to take eight photographs. Mr. Smith stated he has already indicated that he does not feel the photos mean anything, and he will not be giving them any weight. Ms. Tyler stated she is indicating that the purpose of the test is to give the residents an opportunity to document from where in their home they will be impacted.

Mr. Toadvine stated the balloon test was an accommodation for the residents. He stated it is not required by Ordinance. He stated the balloon test was suggested by the Zoning Hearing Board so that the residents and the Board could get an idea – not a final determination - of how the tower would look.

Ms. Tyler stated the test needs to be redone since because of the wind on Saturday, they could not get all the data and information they wanted because the balloon was not at its full height. Mr. Toadvine stated if they want to have a balloon test, the residents will have to hire someone and have their own balloon test. Ms. Tyler disagreed.

After discussion, Mr. Smith moved, Mr. Bamburak seconded and it was unanimously carried to continue the matter to December 1, 2009.

November 2, 2009

Zoning Hearing Board – page 25 of 25

OTHER BUSINESS

Appeal #09-1507 – Edward and Virginia Kowzun Request for Extension

Mr. Smith moved, Mr. DosSantos seconded and it was unanimously carried to grant a six month extension to Edward and Virginia Kowzun.

There being no further business, Mr. DosSantos moved, Mr. Smith seconded and it was unanimously carried to adjourn the meeting at 10:10 p.m.

Respectfully Submitted,

Gregory J. Smith, Secretary