

**STAR TOWER/T-MOBILE NORTHEAST
PETITION FOR VARIANCE
JANUARY 10, 2011 (Continued Hearing)**

The public hearing continued from October 25, November 1, November 15 and December 6, 2010 was reopened in Stow Town Building at 7:30 p.m. on the petition filed by **Star Tower Co., LLC, 655 Summer Street, Boston and T-Mobile Northeast, LLC, 15 Commerce Way, Norton** for variances under Zoning Bylaw Sections 3.10, 5.3.7.1, 5.3.7.2 and 5.3.8 to allow construction of a wireless service facility at **215 Harvard Road (Wedgewood Pines Country Club)**. The property is shown on Stow Property Map R-4 as Parcel 39A.

Board members present: Edmund Tarnuzzer, Michele Shoemaker, Charles Barney (associate), Andrew DeMore (associate), Ruth Sudduth (associate)

Representing the applicants were Attorney Brian Grossman of Prince Lobel Glovsky & Tye; and Scott Hefferman, Radio Frequency Engineer. Also present were Attorney Barbara Huggins of Huggins & Witten (Town Counsel), Planning Board member Ernest Dodd and David Maxson of Isotrope, LLC, the Board's consultant in this matter.

Attorney Grossman submitted to the Board a letter setting out the applicant's position that the Board does have the authority to grant a use variance in this case. He felt it might be helpful to have this more detailed memo citing several references to case law.

Mr. Tarnuzzer asked if there was a specific section of the Federal Telecommunications Act of 1996 on which to "hang the hat". He cited Section 704, Facilities Siting and the paragraph entitled "Preservation of Local Zoning Authority:....nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities".

Mr. Grossman responded that federal law is the control, however, local government retains control over decisions regarding the placement, construction and modification of wireless service facilities. He cited case law concerning the Town of Lincoln where there was a bylaw and an overlay district in place. In that case and others the federal decisions made clear that while personal wireless services may be provided elsewhere in town, if a carrier can demonstrate it has a significant gap in coverage, it is entitled to provide coverage to that significant gap. The use variances should have been granted as federal law preempted the local authority. He said that this is one of those instances.

The letter noted an alternative put forth by the Isotrope report for a three-site solution, two within the overlay district and one without as a way to provide coverage to close the gap. Mr. Maxson was not entirely in agreement with the statement. He asked the number of customers affected by the reported gap and noted there is no information in that regard. There are no examples of the number of buildings affected. He disputed some of the statements attributed to him in the letter. The larger the area between facilities, the more likely it is there will be pockets with minimal service. He suggested a look into his suggested three-site solution.

Attorney Huggins pointed out there are federal and local issues. It is not so simple that it is required to grant a variance. She suggested written comments from Mr. Maxson in response to the Grossman letter.

Mr. Tarnuzzer noted that the Wireless Service Overlay Districts were created after study of the areas that would better serve the town, and they are spread around the town. Nearly 10% of the total area of the town is within the overlay district. It appeared to him a reasonable approach had been taken to provide reasonable coverage in Stow. The Lincoln case was considered in creating the overlays. Mr. Grossman said that some of the land in the overlay will not be usable, and there will still be gaps in coverage.

It appeared to Ms. Sudduth that no progress will be made between the two parties. Mr. Tarnuzzer suggested that a petition to the Town to create more overlay districts may be in order, perhaps including the Wedgewood property. Ms. Sudduth added that grant of a special permit by the ZBA in this case would set precedent for other carriers, making the bylaw useless. She described the application as an "end run" around the zoning. Planning Board member Ernest Dodd noted that technology has changed since the adoption of the overlay districts, and there are many more types of devices in use now.

Mr. Maxson had questions for the applicant. A comparison of a three-site model with in-building gain and in-vehicle gain with the proposed facility in the gap claimed. Compare the three-site model with the one proposed on roads and in buildings and not in compliance with the zoning bylaw.

At this point, Mr. Tarnuzzer suggested the hearing be continued to January 24th, unless there is an extension from the applicant for decision filing, now set at January 31st. That will allow time for Mr. Maxson and Town Counsel Witten to review and submit their comments to the Grossman letter of this evening.

On motion of Ms. Sudduth, second by Ms. Shoemaker, it was voted unanimously to continue this hearing to Monday, January 24, 2011 at 7:30 p.m.

The hearing was adjourned at 8:30 p.m. to be continued to Monday, January 24, 2011 at 7:30 p.m.

Respectfully submitted,
Catherine A. Desmond
Secretary to the Board