

Milton Town Council Meeting
Thursday, July 22, 2021, at 6:30 pm
Milton Public Library, 121 Union St., Milton, DE

Appeal filed by Mr. Barry Goodinson pursuant to Chapter 220, Zoning Section 220-36(A) concerning the Planning & Zoning Commission's approval of a special permitted use to allow Cellco Partnership to erect a communications tower at 210 Front Street, further identified by Sussex County Tax Map and Parcel ID# 235-20.08-32.00.

Town Council Attendees:
Larry Savage, Councilman
James "Sam" Garde, Vice-Mayor
Theodore "Ted" Kanakos, Mayor
Richard Baty, Treasurer
Randi Meredith, Councilwoman
John Collier, Councilman

Mayor Kanakos -

Please turn off all cellphones. This appeal, we don't have very many of them, first one in many, many years. I would like to make a couple of opening remarks and then we can get into the individual's comments.

Good Evening and thank you all for attending. This evening the Town Council will hear an appeal of the decision of Milton Planning and Zoning Commission. That decision granted approval of a special permitted use of the Cellco Partnership doing business as Verizon Wireless. The special permitted use approval was for the construction of a 145' tall tower cellular communications monopole located at 210 Front St. Councilwoman Lee Revis-Plank has recused herself participating in this evening's hearing.

Appeals of the Planning & Zoning Commission are taken under Town Code 220-36A. That code section states: The applicant or any interested person may appeal the decision of the Planning and Zoning Commission. That appeal is made to the Mayor and Town Council and shall be filed within 60 days from the Planning and Zoning Commission's decision.

The appeal was filed by Mr. Barry Goodinson through a letter dated February 20, 2021. Therefore, was filed within the 60-day time period required under the code. In a moment I will outline some of the rules of procedure that will be followed this evening.

But first I want to describe some of my expectations for the proceeding. We are fortunate to live in a wonderful town where the people are passionate and opinionated about our town's growth opportunity, the preservation of our scenic fields and open spaces and our historic treasures. Naturally, there is going to be disagreements from time to time over how best to address what is facing our town. And that is what brings us here this evening. Circumstances such as these do not have to be confrontational, antagonistic, or combative. The Town Council and I are dedicated to listen to all points of view that will

be expressed. Totally considering each of these views against the legal framework we have been provided and then making the best possible decision we can. But that will only be possible if everyone participating this evening maintains a level of decorum that is respectful of all participants. Every person is entitled to their point of view and the Town Council wants everyone to have an opportunity to speak without unnecessary interruptions. So, please, be mindful of my request that we proceed with an orderly hearing.

Note in the moment that the applicant who filed the appeal is Mr. Barry Goodinson and he is present this evening. The appellee that is the entity whose decision is being appealed is the Town's Planning and Zoning Commission. Our Town Solicitor, Mr. Seth Thompson, will be representing Planning and Zoning Commission this evening because he represented the Commission during its review of Verizon's application. The applicant for the special use permit is Verizon who will be represented this evening by Mr. John Tracy. The Mayor and Council is sitting as an adjudicatory body to hear and decide the appeal. We are represented by Mr. Glenn Mandalas who is the Town's Special Counsel for these appeals proceedings.

Notices for this hearing were provided to the appellant, the applicant and the appellee. Notice of the hearing was also posted on the Town's website on July 15, 2021. The rules of procedure adopted by the Council on June 12, 2021, provide that the hearing will be initiated by the Town's Project Coordinator, Mr. Tom Quass who will provide some background relating to this appeal.

Next, we will hear from the appellant, Mr. Goodinson, he comes first. Then, the Planning and Zoning Commission, Mr. Thompson and Verizon, Mr. Tracy. The parties will each have an hour to present their cases from start to finish. After the Town Council has heard from each of the parties and asked questions of each of them, any person here this evening who desires to address the Town Council will be provided an opportunity to do so. In the interest of time, I ask that your statements not be repetitive.

After hearing statements from the public, the parties will have an opportunity to respond to the statements. And finally the parties will make their closing arguments. After that the case will have been fully submitted to the Mayor and Town Council for its consideration and decision. The rules require that a decision be made, and written decision be issued within 60 days of this evening's appeal hearing.

Section 3, Part 1 of the rules provides a legal standard that the Mayor and Town Council to utilize when making their decision. This section provides: The Mayor and Town Council shall review the record of the matter before the Planning and Zoning Commission, consider the arguments on appeal, and make a determination as to whether the decision was based on an orderly and logical review of the evidence and involved interpretation and application of Chapter 220. The appellant shall bear the burden of persuasion.

Finally, before we get started, I note for the record that there is a binder of materials that the Town prepared and provided for parties. Those materials were before the Planning and Zoning Commission when it approved the special use, and they are hereby incorporated into the record of this proceeding.

Are there any questions?

Mr. Quass, please proceed by providing the Town Council with the background related to this appeal.

Mr. Tom Quass, Project Coordinator, Town of Milton

On the 27th of December Cellco Partnership D/B/A Verizon Wireless submitted an application to place a cellphone tower on town property located, as stated, at 210 Front St. In your binders Tabs A-I, Tab A is actually a piece of paper the actual application and the rest of the tabs are backup documents for things like has to do with the FAA and frequency analysis and things like that.

On February 5 the supposed location of the tower on the parcel was adjusted to not interfere with archaeological finds. There appeared to be an old button depository of the fragments and stuff that were used and so they moved the site on a more northerly, north of their original location and that was to satisfy the archaeological site.

A special use public hearing was scheduled for December 15, 2020, and notice was in the Cape Gazette November 27, but it was canceled by the applicant. So, then a special use public hearing scheduled January 19, 2021, which was in the Cape Gazette January 4. The applicant sent notice that the property 200' on December 3, 2020. Receipts of the mailing were sent by applicant from January 5, 2021. Copies of the return receipt towards PS Form 3811 received by the applicant were sent to me on January 15, 2021.

P&Z Commission held a public hearing as scheduled on January 19, 2021. The record was held open to receive data on design for catastrophic events and non-objection from Delaware Historic Preservation Office. That is Tab N, J and Q in your binder.

P&Z Commission meeting of February 16, 2021, the vote was 5-2 in favor granting the special use permit and that is Tab O the minutes.

February 20, 2021, Mayor and Town Council received a letter from Mr. Goodinson requesting to overturn the P&Z Commission decision that is all part of Tab R which is in the back which is also the Tab that has the public comments.

P&Z Commission meeting of March 16, 2021, the members approved the language of the decision on the special permitted use application that is Tab P.

P&Z Commissioner signed the decision March 18, 2021, Tab L.

Ms. Meredith:

I am wondering regarding 220-34 special use. A property owner or his agent may initiate a request for a special use or modifications of a special use. So the Town is the property owner. Right? When was the applicant designated as the agent of the Town to file that application?

Mayor Kanakos:

Repeat that.

Councilwoman Meredith:

It says a property owner or his agent may initiate a request for a special use or medication of a special use by filing an application which includes a legal description of the property. So the Town is the property owner or his agent. Is Verizon the Town's agent for this application? Is that right?

Town Manager Rogers:

I believe that at the time the Town Council granted the land lease agreement with Cellco provided those statements.

Councilwoman Meredith:

Okay.

Mayor Kanakos:

Mr. Goodinson, would you like to begin.

Mr. Barry Goodinson:

Lives at 315 Mill St. and is also a Verizon customer and like other Verizon customers in Town I am very frustrated with the poor service that I have. So I welcome an improvement to the service in Town, so I really want this to happen. I am not here advocating against improvements to cellphone infrastructure. I am also someone who is here to protect the view from my property. The cell tower will be to the back and to the right of my property. But this is the view from my property (presented a slide). As you can see, I willingly purchased my home 17 years ago with this view of the Public Works yard and the Wastewater Treatment Plant beyond. I am not here as someone trying to prevent something happening in my backyard. Because this is what is happening in my backyard (Slide) already. I am somebody who cares very deeply about this town. I served for several years on the Planning and Zoning Commission, was Chair of the Commission when it developed the Comprehensive Plan that is supposed to be guiding the planning decisions that the town is making between now and 2028.

I was very proud of the work that the Planning and Zoning Commission did on the Comp Plan and the people of Milton who really rolled up their sleeves and did lots of hard work. We had, in addition to the regular sessions that the Planning and Zoning Commission has, we had 15 issue-specific community meetings. We talked about downtown development, historic preservation, sea levels, flooding, transportation, the core values of the Town. They were led by issue-specific experts who came in and

walked us through each one of these topics. I was criticized a great deal the then Mayor that we were making too much of this. It was too much of a big deal. Why don't we just write the plan. And I could have sat down and wrote Barry Goodinson's plan for the Town of Milton, but that was not what we were supposed to be doing. It was the Town of Milton who was writing this plan.

One of the things that was most exciting about this process was we all drive or walk around Town, and we look at things and we think, "Gee, wouldn't it be great if X, Y, Z happened there or A, B, C happened there?" And when we started bringing people together, we realized that everyone had the same ideas. We all had the same visions and hopes for the Town and it all gelled and that is what is in the Comprehensive Plan. This is not a plan that should be put on the shelf. This is something that should really be guiding the decisions of the Planning and Zoning Commission is making.

As you can see, we even got an editorial cartoon in the Cape Gazette. As you may know, generally the Cape Gazette editorial cartoons make fun of things. Here they praised the work that we were doing. The State Planning Office said that the way that we did our Comp Plan should be a model for every other town and municipality in the State of Delaware.

In the Comp Plan we came up with several goals for the Broadkill River area, so I won't walk you through the entire Comp Plan, but I do want to talk about the goals for the Broadkill River. These goals were based on a meeting we had with sea level experts come and show us maps of the expected flooding in Milton in the coming years. They showed us the frequency and intensity and duration of the flooding. It was a real eye-opener because what it showed us, what we learned was that Milton is kind of in a perfect storm location. We have the Wagamon's Pond watershed to the west, so there is a lot of water that drains from surrounding areas down towards Wagamon's. The runoff is going to increase as time goes by because there is going to be lots of development and more impervious surface. So there will be less water percolating down into the ground, more water coming across into Wagamon's so the demands on the holding capacity of Wagamon's is going to increase and then we will have more water coming down that way.

We have increase in sea level and we have more severe storm surges coming from the Atlantic Ocean through the Delaware Bay and up the Broadkill River. So we have lots of water coming from the west. We have lots of water coming from the east and while all of that is happening, the entire Delmarva Peninsula is sinking. Flooding is a real challenge for Milton. It was something that was really front and center when we worked on the Comp Plan.

The goals for the Comprehensive Plan for the Broadkill River are to investigate opportunities to mitigate and accommodate the expected increase flooding for the Broadkill. Investigate strategies to minimize the amount of impervious surface near the river. Identify opportunities and strategies to work with property owners to increase visual and physical access to the river, work with relevant Sussex County and relevant

State Agencies to enhance the natural environment along the Broadkill River. Those were the larger goals.

When we wrote the Comp Plan, we also included possible strategies to achieve those goals. As we were having these meetings with folks, people kept on bringing up lots of really good ideas and we didn't want to lose those ideas, so we collected them, and we put them into the Comp Plan as possible strategies. The possible strategies to achieve the goals around the river are to investigate the possibility to create new waterfront district between Federal and Collins Sts. along Front St. and along the southside of Magnolia St.: to highlight the Broadkill River in Milton's Town Center: to minimize property damage from expected increased flooding; to create opportunities for outdoor active and passive recreation; and to promote improved water quality through the creation of vegetarian buffers. We also wanted to undertake a public process to envision a new Front St. gateway to Milton.

These are things that the people in Milton wanted to see in the waterfront. At no time did anyone say, "Gee, wouldn't it be great if we had a 145' cellphone tower here?" No one said, "Gee, once we take the wastewater treatment plant off of the riverfront, why don't we bring in some other type of industrial-looking thing?" What we wanted, the people of Milton wanted, was access to the river and to highlight the river and to make the town less prone to flooding.

This might be a good time to stop and just kind of look at what the purpose of Planning and Zoning is and what the role of the Planning and Zoning Commission is. The purpose of zoning laws is to distribute the various elements of activities of a community in orderly ways to create efficiency, promote safety, protect the environment, enhance the quality of life and preserve the character and history of the town's neighborhoods. What that means that every town needs schools, they need grocery stores, they need residential areas, they need industrial areas, and we tried to separate all of that out. But the zoning code tries to distribute all of that in ways that make the town work efficiently, creates a good quality of life, to keep people safe. We don't put large industrial operations next to playgrounds. We don't put bars next to schools. We try to sort all of that stuff and distribute it appropriately. The role of the Planning and Zoning Commission is to take those rules and then when people come to the Planning and Zoning Commission and say that they have an idea for something, they look to see is your idea appropriate for the particular location that we are discussing. And that is their primary role.

The Planning and Zoning Commission was asked to consider a special use permit for 210 Front St. to put this big tower in a place that normally it would not make sense. The purpose and intent of special uses is to allow the proper integration into the community of uses which may be suitable only under certain conditions and at appropriate locations because of their unusual characteristics or the special characteristics of the area in which they are to be located. Special uses require special consideration so they may be properly located with respect to the objective of this chapter and the effect on nearby properties.

The Planning and Zoning Commission had lots of guidance in the Town Code in order to figure out if 145' cellphone tower made sense in this particular location. If you look at Tab L in your book, page 3, Planning and Zoning Commission's decision, they listed several ways that the application complied with Section 220 of the Town Code. I have to tell you that I was at that meeting. They did not look into these things.

A special use shall comply with the standards of the district in which it is located in approving such uses. The Planning and Zoning Commission shall take into consideration the public health, safety and welfare and comfort and convenience of the public in general and of the residents of the immediate neighborhood in general. It shall to the maximum extent possible further the express intent of this chapter.

So, basically, they are supposed to look at whether this makes sense. And it does not make sense. There are several objectives, several guidelines that are given to help them figure this out. In order to grant a special use, the Planning and Zoning Commission shall find that the establishment or operation of the use applied for under the circumstances of the particular case will not be detrimental to the health, safety or general welfare of persons residing or working in the neighborhood of such proposed use or will not be detrimental or injurious to the property or improvements to the neighborhood or to the general welfare of the Town. And, I believe, putting the tower there would be injurious to the Town. It would stop the development of that area. The southside of Front St. we extended the commercial part of downtown beyond the fire department all the way down to Walnut St. in order to have more room for the Town to spread out and it would look at the river as an amenity. People would want to come to Milton and have businesses on that southside looking at the river. But if we junk it out with this tower, it would be less desirable and it would be an impediment to commercial development.

The proposal will not result in the destruction, loss, or damage of any natural scenic or significant historical resource. The proposal will not create excessive additional requirements for public cost for public facilities and will not be detrimental to the economic welfare of the community. In both cases, putting that tower there would be injurious to the scenery, to the historic resource. It would be detrimental to the economic welfare of the community because it would suppress economic development.

The proposal will be served adequately by essential public facilities, such as highways, streets, police and fire protection, stormwater drainage, water and sewer, schools, or that the applicant for the proposed special use shall provide that these services be adequately obtained. This is Front St. (Slide) The photo was not taken after some catastrophic event. We haven't had catastrophic storm since this cockamamie idea. This is after a regular, run-of-the mill rainstorm that closes Front St. Imagine what it will be like if we real and inevitable natural disaster. A natural disaster where we will be most in need of cellphones. The location will not be available to repair crews to make sure we have the phone service we need.

The Planning and Zoning Commission needed to determine that the proposal consensually conforms with the Comprehensive Plan. I want to jump back here for a

minute. We know all the work the people of Milton had done to articulate their wishes for the river. They wrote out the four goals for the Broadkill River. These four goals here. (Slide) And then they laid out these possible strategies. We put these in because we wanted to make sure we could collect all of this information, all of these ideas, so as we move forward if there funding opportunities available to the Town, we could break off one of these projects and present it to the funder, primarily it would be government funding. One of the first questions a funder will ask when a town is asking for funding for a particular project, they will ask is this in the Comprehensive Plan. And if it is not in the Comprehensive Plan, then the chances of getting that funded are minimal. However, if it is in the Comprehensive Plan, then it increases the chances of getting funding to support that project. So, we wanted to collect all these projects and put them into the Comprehensive Plan so we could say yes to that question when it was inevitably asked.

However, putting them into the Comprehensive Plan, they had to be sort of a footnote that said these are ideas, these are not mandates, these are not funding obligations of the town, because if we put them in the Comprehensive Plan, someone would come to the town and say, "What a second. You didn't do what you were supposed to be doing. I am holding you responsible. I'm going to sue you for not doing what you said you were going to be doing." There is a disclaimer that said that these are not mandates or funding obligations.

When the Planning and Zoning Commission sent their decision over to you all, they read into their decision, the Chair of the Planning and Zoning Commission, wrote into the decision that disclaimer. He applied that by reading into the report he kind of implied that we don't have to do anything in this Comprehensive Plan. But that is not true. That disclaimer only refers to the specific implementation strategies. It does not let the Town off of the hook for the goals. There have been cases where towns have tried to dismiss this. You cannot nullify the Comprehensive Plan by using these disclaimers. The Planning and Zoning Commission doesn't have the power to nullify it nor does the Town Council. The Town Council accepted and approved this Comprehensive Plan, so you're stuck with it. You can't just use a disclaimer to nullify it.

One of the other criteria, all proposed structures or materials shall be readily accessible for fire and police protection. This again, this is Front St. This is not a site that is easily going to be accessed if there is a natural disaster. I contacted Town Hall and asked them how often Front St. floods and had to be closed. I learned that the Town Hall does not have that information. They don't keep information about street closures because of flooding and things like that. We know that Front St. closes a lot and Magnolia St. closes a lot. We really need to be keeping track of that because, again, if there's grant money available and we have the opportunity to go after money to fix this and to fix the flooding over on Magnolia St., one of the questions we are going to be asked is how often does this happen, what is the impact that it as on the town and we don't have that information. Now you are being asked to put a public utility here and we don't know how often we are not going to be able to get to it. And that is not good sense. It would be irresponsible to move forward without that information.

The proposed use shall be of such location, size, and character that, in general, it will be in harmony with the appropriate and orderly development of the district in which it is proposed to be situated and shall not be detrimental to the orderly development of adjacent properties, in accordance with the zoning classification of such properties. A 145' tower adjacent to the river, adjacent to a residential historic district is not in harmony with the appropriate and orderly development of that district.

In addition to all of the standards that the Planning and Zoning Commission ignored, however, in their decision that was sent over to you, they told you that they had considered all of that. And they clearly did not. I was at the meeting. They did not. They made the decision. They voted on it without considering all these things. At the subsequent meeting when they put together this decision, they basically said, "Oh, yea, we took care of that last time." They did not.

Even with all of that the other guidance that they have is 125-20. It says, "No public or private utility system shall be constructed within any special flood hazard area." Seeing this the whole process should have stopped. I don't understand why it didn't stop and why it moved forward. Because see that little red dot there (Slide), that is 210 Front St., and this is a FEMA map showing a flood hazard area. The tower that you have been asked to approve sits right in the middle of this FEMA flood hazard area. It's clearly irresponsible to place it there.

None of this should have been news to the Town. This is the Ordinance that was passed on May 2016. Signed by the current Mayor. This Administration and folks in this room have been aware of the fact that the Town made the decision, not that many years ago, to say we are not going to put any utilities in a floodplain. And, then when they had the first opportunity, they had to use this ordinance, they abandoned it.

This is the application that the Town received for the project. (Slide) I want you to pay attention to two things. First, the application specifically says as a public utility. That is important. They stated in the application that this is a public utility. And, as we have seen, no public utilities are allowed in a floodplain. The other thing I want you to pay attention to they are also requesting special use permit in site plan approval. Site plan approval has all sorts of requirements, lots of details that have to be checked in terms of hydrological things, FAA, State Historical Preservation Office, lots of things that need to be checked in order to pass this.

Town Code 125-D says, "Have electrical systems, equipment and components, and heating, ventilating, air conditioning, and plumbing appliances, plumbing fixtures, duct systems, and other service equipment located at or above the base flood elevation plus 1.5 feet." So what does this mean? Some have estimated that this would mean we would have to lift all of that equipment as high as 11 ½ feet above the ground in order to get it out of the flood area. I don't know, I was looking at the drawings and I didn't see any elevations of the height of the platform. There was one that showed it flush with ground level. I don't believe that that would be adequate. Then there was maybe a 3' high platform on which all of this equipment would be placed. I don't know if the Town has

determined whether or not that is adequate. Planning and Zoning approved this without knowing how high up in the air all of that stuff is going to be.

Also what would the placement of this massive footing have an effect on the hydrology of this area. How much water will be displaced? This is, as you can see, (Slide) that is the beautiful view from my back yard, that is the Public Works Yard off to the left, and then to the right of it, it is very wet. You can't see that from Front St., but it is very wet. When they start digging to put a footer in for the tower, how much water is going to be displaced and then in the future where is that water going to go. Have those studies been conducted?

It's a mystery to me how this got this far, and I don't really understand how the Town has found itself in this position. Clearly, we need improved cell coverage. We should be working with Verizon to figure that out. Every other community in this area has chosen to deal with this by using the resources that they already have. They have been putting them on their water towers. Yes, they are not great looking, but some people would say that water towers aren't great looking. We have just gotten used to looking at them. So, we decided that they are iconic because we are so used to looking at them.

It is also an opportunity for the Town to get some income. \$27,000 per year is a nice chunk of change so we should be going after that. But there are other ways of doing that. Why do we not go with the tower which is the decision that every other town. Lewes and Milford have done it. Dover Air Force Base as cell panels on their water tower. But according to the minutes of the March 4, 2019, Town Council meeting, Mayor Kanakos stated that they have been requesting the Town's water tower for cellphone tower but thought that the water tower is beautiful and did not want to mar it with this type of thing. That was one explanation that we have been given. That we want to protect the beauty of the water tower.

At the February 16 P&Z meeting, representatives of Cellco Partners said they were in favor of using the water tower at Chandler St. and Behringer, but the Town was concerned about the security of the water tower. So now we have two explanations. We have concerns about the beauty of the water tower and now we have a second report about the concerns about the security.

In an April 23, 2021, article in the Cape Gazette, "Mayor Ted Kanakos said that Verizon tested locations prior to applying for the special permitted use and found that the Front St. location provided the best coverage." He said that the question of whether the Town's water tower would be a suitable location was examined. But Verizon determined that the Town's water towers were not high enough. So, now we have a third explanation that the tower was not high enough.

I submitted a Freedom of Information Act request to the Town of Milton asking for correspondence between representatives of the Town and representatives of Verizon Cellco Partners. Among the documents I received was this letter or this email dated December 4, 2017. The woman from Verizon, Sue Manchel?, I believe that the water

tank good for them from a technological standpoint. This is at Behringer and Chandler St. the tower close to the downtown park. According to Verizon, that would work perfectly fine. Also in the FOIA documents was this email message from Kristy to Sue Manchel, the Verizon representative (Slide) basically responding saying that the water tank on Mulberry St. could be a possibility. This is Sue Manchel saying they would be interested in looking at that and then Kristy said I prefer not to consider the Chandler St. parcel as an option since it is located in our downtown area. This is, I think, the main reason why we moved forward with the Front St.

Fast forward to February 16th, this is an email from Thomas Quass (Slide) that says that the Mulberry St. tower was no longer an option, and the Town was hell bent on making sure the Front St. site would be an option. They had to work pretty hard to make it work on Front St. First of all, they have to decide whether this is a public or private system. If it is a public system, the barriers were lower. So, they wanted it to be a public system. But then he says he has to determine if this is a system, note quotation marks, then I believe that the only portion of the plan that would have to be above the floodplain is the tank. Here we are parsing the meaning of the word system in order to make it legal for this tower to be placed in a floodplain. And, then on May 2021 Mr. Quass writes to Cellco Partners and tells them the good news that the proposed tower is not a system. It is unclear how he made that determination, what the criteria he used were to make that determination. But the other thing to look at that is important here, look at the date, May 13, 2021. That determination took place after the Planning and Zoning Commission approved the tower. This is basically going back and making legal what the Planning and Zoning Commission had already done. The Planning Commission did not have this information that Mr. Quass had determined that this is not a system. I don't think they even knew what the importance of being a system was. I don't think the Planning and Zoning Commission knew what the criteria was. They just moved it ahead because, as they explained when they made the decision, they wanted to make sure that children had access to the internet which is really not the main function of a cellphone tower. They were trying to fix the problem with service in Town, but they were not answering the question. They were not doing their job. Is this the right place to be doing it?

Here's the bottom line. The people in Milton have been very clear about their vision for the Broadkill waterfront and the character of the Town. We have seen that in the Comprehensive Plan. The water tower is not in a flood hazard area but meets the needs of Verizon's Cellco partners. In fact, we probably would have better cellphone coverage and those panels could have been up by now had we not gone down this rabbit hole by putting something on Front St. and having jump through all of these impossible hoops to make it happen on Front St. The Mayor & Town Manager have chosen to ignore the wishes of the community as expressed in the Comp Plan and Town Code and have pressed to have the tower built in the flood hazard area. The legality of this move hinges upon the meaning of the word system as determined by an employee who answers to the Mayor and the Town Manager. The question is are we willing to scuttle the goals of the Comprehensive Plan, hamper the positive development along the river, risk worsening an already bad flooding situation by displacing even more water, and make our cell service

vulnerable when we need it the most based on the narrow definition of the word system when we already have a structure built on a location that is not in a flood hazard area.

There is one other thing, I am apprehensive about mentioning, but I think it is an important conversation for us to have. I didn't get these FOIA documents until yesterday and I was up last night looking at them. I was looking at this map and you can clearly see where the tower is going to be built. (Slide) See Front St. sort of running at a diagonal and then there is Collins St. going off to the left. And that little road thing you see and the square that is the tower. So it is pushed up against a home, I am apprehensive about talking about this, but the last Town Council meeting, there was a lot of discussion about diversity and race issues here in Town and there is a racial imbalance and there is a dot that is forming. This is what is happening here, I think. There is an African American family that lives in that house, there is an African American church here. For whatever reason we decided that the unsightliness of putting something on the water tower on the other side of the river, not okay on the other side of the river, but suddenly it is okay here? I am not saying that this is an overtly racist move, but this is the impact that it is going to have. I am really concerned about that. My primary concern that leads to this was about the floodplain and about the Comprehensive Plan. Those are two major issues. But when I looked at this last night, I don't think we can ignore this. Those are the reasons why I am opposing this, and I really hope that you will as well. Thank you.

Applause from audience.

Mayor Kanakos asked if it was appropriate to ask questions and Glenn Mandalas replied that it was appropriate.

Councilman Sam Garde:

I have one question here and I'm not quite sure how I want to phrase it because it does matter, but you are implying that the Planning and Zoning Commission has approved this special permitted use in a flood zone. How do you account for the condition....Let me back up a little bit....the Planning and Zoning Commission has approved this special permitted use with conditions. One of the conditions is the use must meet and receive all applicable approvals under the Town's Floodplain Management Regulations including Section 125-20 which is the one you quoted. Why do you conclude that Planning and Zoning approved it in that location when one of the conditions is that the entirety of 125B complied with?

Mr. Goodinson:

I don't think it has been.

Councilman Garde:

Chapter 125 has not been heard. The condition of the approval is that it be heard. There is not a question. I am trying to keep this to a question. The question is why do you conclude that Planning and Zoning has approved this location with respect to compliance with the floodplain ordinance?

Mr. Goodinson:

From what I saw in the letter from Mr. Quass said basically he makes it compliant with that determination that it is not a system. My point is that this is a bad idea for a whole lot of reasons, and I think I laid those out. The process that the Town goes through to come to acceptance that it is a bad idea that's up to you. I think it needs to stop. The sooner it stops and the sooner the Town goes in a different direction that is much more positive and we can actually get the cell ray put up some place where they are going to work. We could have better cell coverage by now. But I don't know why. Some people don't want to go outside and look up at that tower and see a cell ray up there. It seems to be the only reason we are looking at Front St. Front St. is problematic in so many ways. I just don't understand why we got this far. Maybe my concern is not about the result, it is about the process. How could this have gone so wrong in so many ways. You have an opportunity to fix it when you consider the conditions so then re-receive my statement as a request that you kill it then when it comes to the 125.

Councilman Garde:

This an appropriate place for me not to be making statements. Just to be asking questions. You didn't answer the question.

Mr. Goodinson:

I didn't really understand the question.

Councilman Garde:

The question is why do you conclude that the Planning and Zoning Commission approved this location when one of their conditions said specifically that location needs to go through the Code 125 process and has clearly not gone through the Code 125 process? But you concluded that it has violated the 125 process that I guess I am asking what gave you, what made you conclude, that Planning and Zoning by virtue of the condition they put on it that said the use must meet all applicable approvals under the Town's Floodplain Management. Has that been done yet?

Mr. Goodinson:

No it has not been done.

Councilman Garde:

Okay. Thank you.

Councilwoman Meredith:

Can I ask a different question? You are saying 125-20 would not apply because it is classified as not a system?

Mr. Goodinson:

That is what I read. The other thing is it is not just 125, it is the Comp Plan, there are many other reasons as to why this problematic. I think it is injurious to the Town in all sorts of ways. It is going to be obstruction of the development along the river which I

think is problematic. It stands in opposition to the goals of the Comprehensive Plan which why did we do a Comprehensive Plan if we are not going to be following it.

Mayor Kanakos:

Any other questions? Up next Mr. Seth Thompson, representing Planning and Zoning.

Mr. Thompson:

Thank you, Mayor and Council. Seth Thompson from Parkowski, Guerke and Swayze, representing Planning and Zoning tonight. Mr. Quass covered much of the background, but I do think it is important to keep in mind Council's role tonight that I think that the Mayor mentioned it in his opening remarks, you know, the Council wears many hats. Sometimes acting in your legislative capacity and in that scenario, you get a lot of discretion. And so you can factor in a bunch of things and make a decision. So tonight we should be talking about wearing robes because basically you are an appellate body reviewing a decision that was made below. I am a little bit of concern that a lot of Mr. Goodinson's remarks really don't relate anything in the record that was before the Planning and Zoning Commission. That is challenging. The reason that we have a record is so that the body below can make a decision based on that record and then you can review that record to see if their decision was part of an orderly and logical process based on that record or if they misinterpreted any of your codes. But obviously your codes stand alone. Those continue to exist every day. They don't have to be part of a particular factual record. I do think it is important to keep that in mind. I do think that Council probably understands its role. Maybe that comment is also meant for members of the public so that they understand where we are. This isn't a legislative capacity. This is really reviewing the record and making two findings: whether or not Planning and Zoning engaged in an orderly and logical process in reaching its decision and whether if they misinterpreted any of the Town Codes. In reality it is really your zoning ordinance, it is Chapter 220.

Let me walk through a little bit. I think the answer to those two questions whether Planning and Zoning went through an orderly and logical process and whether they correctly applied the codes and interpreted the codes. I think the answers to those questions is going to be yes. We can go through some details, but I am confident that in the end that the answer to those two questions is going to be yes.

I thought we had a little bit more agreement based on Mr. Goodinson's notice of appeal and based on his comments in front of the Commission below. It sounds like we have more disagreement than I think I thought. At least we seemed to agree on it. I try and talk about what we agree on because we do tend focus these days on how much we disagree. And, in reality, lots of time we agree on 80% of the items but we focus 80% of our attention on 20% of those items that we disagree. I do agree with Mr. Goodinson Section 220-34 of the code that walks through the special permitted use process. It seemed to me, and I think we still have an agreement here, that you know the question of need is agreed upon by everybody. The Town needs better cellphone service, right? One of the elements with respect to special permitted uses is it complies with your supplementary regulations and one of those is Section 220-52 that talks about antennas

and towers being approved based on an as-needed basis. It seems like we agree on that one. So, that is good.

The two items that, in reality too, it seems like based on the record below there wasn't much of an issue with respect to health risks, right? You know the applicant presented information with respect cell towers not posing direct health risks. I think that the applicant also presented to the Planning and Zoning Commission with respect to property values. I don't think that the record below indicates that those items were necessarily challenged. I did hear a little bit about property values tonight which was surprising because, again, there is a certain element of unfairness to when the Planning and Zoning Commission is asked to make a decision and they make the decision based on the information that presented to them and any arguments that are presented to them and then new information and new arguments are made at the appellate level. And that is why the standard of review is what it is. We don't want to incentivize people to hold back arguments and withhold information from Planning and Zoning that might otherwise lead to a different decision with the hopes of then filing a successful appeal.

The two issues that seem to me to be the big issues based on the record and based on the notice of appeal were the Comprehensive Plan, or whether the approval violated the Comprehensive Plan, that is, and whether the approval resulted in the destruction or loss or damage of any natural, scenic, significant or historic resource. And that is some language from 220-34. We can work those two issues within the context of 220-34. The third issue is Chapter 125. Councilman Garde's question, I think, was an important one and I will go into this in more detail. But I do think it is important that the Planning and Zoning Commission wanted to stay in their lane on that. When we look at Chapter 125, there are a number of public bodies or public officials that have a role in that decision. You have the Project Coordinator that named as the Floodplain Administrator and there are certain duties in that role. So that is Mr. Quass. He has to make those determinations. You also have in Chapter 125 the ability for the Board of Adjustments to grant variances. Somebody could apply to the Board of Adjustments for variances from the floodplain regulations. Then we also have in Subsection C of the section Mr. Goodinson pointed out in 125-20, you actually have Council's role identified in terms of reviewing and approving any systems within the floodplain. Noticeably absent from that list is Planning and Zoning. (Chuckle) Planning and Zoning stayed in their lane. What they did do was put the applicant on direct notice, express notice, put it in the decision that you need to comply with this stuff. But, by saying that, they are acknowledging that is not our role, but you need to do this.

I do think it is important, too, to think about how this process would play out going forward. The special permitted use is really the use of the land. That the person is allowed to use that land for that use. If that is approved, they don't go through the site plan process. The application for the special permitted use called for at least a preliminary site plan, but to get into the nitty-gritty in terms of above floor and all of that we typically do that in the site plan process. It is kind of putting the cart before the horse to say we really need to look at your elevations in considering whether or not the land is

appropriate for that particular use. I do think it is important to understand how that process would play out if the special permitted use is ultimately approved.

I want to walk through the legal framework that we really need to deal with. That first question is the orderly and logical review. When you look at the decision, I think it is clear Planning and Zoning went through an orderly and logical review of the evidence that was presented. You can see that the Commission held duly notice public hearing reflected on Page 1. They receive a number of written comments. They received oral comments. Planning and Zoning did not make a decision that night. They weren't going to rush anything. They left the record open to actually receive additional information that they specifically requested from the applicant. In my mind, that is circumstantial evidence, and nobody is rubberstamping anything. The applicant then provided that information. It was specifically in respect to the monopole's design because there was a concern about safety. The submission in respect to SHPO, the State Historic Preservation Office. Again, when you look at what Planning and Zoning did, this wasn't something where they were champing at the bit to grant approval. They received that information and then had a meeting with much discussion. I recognize that Mr. Goodinson doesn't recall a discussion but if you look at the minutes, look Item O, you will see that the Council and it is disappointing that the transcript isn't more complete, but you will see on Page 7 walks through the factors in 220-34. It is difficult because sections are missing, but you can see references to safety, you can see references to the welfare, to the comfort, convenient to the public and that is broken down into the public in general. Again, Planning and Zoning did its homework here. It went through a thoughtful process.

Another element to understand that really reflects that thoughtful process in the decision itself are the conditions. This wasn't something that was a one-page decision that said okay great everything the applicant said was great – Approved. There were a number of thoughtful conditions that the Planning and Zoning Commission put on the approval including Chapter 125 compliance.

The second question that Council really has to address tonight is whether the Commission properly interpreted and applied the zoning ordinance. If you look through the record, I don't see any issue raised at all that somehow this doesn't meet with the standards with the R-1 District dimensional requirements and the decision notes that right away. The decision also notes that approximately one-third of Milton residents as well as visitors use Verizon cellphone service, and the Town is largely in a smooth ?avent? network. I don't think that is in dispute. But the cellular phone use has vastly increased particularly with children learning remotely and people working remotely during the current pandemic. This use in turn shrinks the footprint of the existing infrastructure. That is a direct quote from the decision. The Commission was thinking and applying the factors from 220-34.

The Commission went through the decision applied the intent behind Chapter 220 and focused on facilitating community economic development in terms of job development, retention and investment. The Commission then indicated that the application was in compliance with the general purpose of 220 taking into account the size of the use, the

nature and intensity of the operations involved and conducted in connection with use. Here, again, it seems the issue below was the location. It wasn't the use itself but whether that parcel was appropriate for the particular use. The Commission looked at the establishment, maintenance and operation of the use and that it wouldn't be at the detrimental to health or safety of persons residing in the area and the decision expressly notes that evidence presented alleviated concerns regarding any health affects even when using maximum assumptions.

Again, there was some thought put into the facts that were presented and how the decision was rendered. The decision also notes that study and articles submitted by the applicant alleviated concerns regarding a potential negative effect on property values. At the lower level, the Commission is presented information from the applicant saying look doesn't have an affect on negative property values. There isn't information going the other way but then we hear tonight that there may be a negative effect on property values.

The Commission saw that the proposal would not create additional requirements of public cost of facilities or services and would not be detrimental to the economic welfare of the community specifically there wouldn't be additional requirements in comparison to the property being developed as additional homes. Better cellphone service would promote the economic welfare of the community.

The Commission looked at the fact that the proposal served adequately by essential public facilities including highways, police, fire protection. And that all structures, equipment and material would be readily accessible for fire and police protection.

You know it is difficult Anybody who has been in Milton knows that there is periodic flooding. If we were to determine that any parcel that experienced periodic flooding couldn't be used, your downtown wouldn't be usable. (Laugh) I mean I think that is too extreme and I also think you should think about in conjunction what the use is. The applicant made clear that this was an unmanned cell tower. This isn't something where people would be going there every day for work.

The Commission made the finding that the monopole proposed would be the least noticeable and would be partially shielded from the view by existing trees. Again, the discussion below was what type of structure would make the most sense there. If my recollection is correct, I don't think anybody was arguing for the fake tree. Because it is adjacent to a residential area, there needed to be a finding with respect to pedestrian traffic again it is an unmanned facility. The Commission then went in and made reference to the wet condition of the area and in fact, factored in its wet condition, when it created the condition.

So now we come to the issues based on 220-34 which I have been using to guide the discussion, that seem to be the subject of the discussion below. One factor is that the proposal will not result in the destruction, loss of any natural, scenic or significant historical resource. The Commission considered that and in fact left the record open to make sure they had the most up-to-date information from the State Historic Preservation

Office. The decision then notes EBI consultants prepared an environmental review for the property as part of its regulatory review by the FCC. The review focused on the National Environmental Policy Act compliance and included in the evaluation whether historic properties or archaeological sites may be affected by the proposed telecommunications facility under Section 106 of the NHPA. The decision then noted that Verizon moved from the initially proposed site within the property due to the discovery due to potentially historically significant buttons. The submission to SHPO reflected no direct affect on historic properties in the area or potential affects and no adverse visual affect on the same. I think it is important that the decision also noted that SHPO continued to concur in that conclusion even after it was asked to review it. Again, at least with this issue it is nice it was squarely in front of the Planning and Zoning Commission. They took the information and they made findings and they felt the information related to SHPO was convincing enough that there wasn't going to be that detrimental effect.

And that leads us to the final element which is a little bit larger. The essential conformity with the Comprehensive Plan. I tend to quote from judges because they are a lot smarter than me, and they also have the ability to create guiding precedent. Chancellor Court has indicated that Comprehensive Plans are large scale and long-term planning documents. Therefore, they cannot serve unyieldingly as guides to detailed questions of zone designation. There are going to be instances when a Comprehensive Plan is sufficiently unambiguous and specific with respect to a particular matter that it can be critically employed in a judicial review, which is somewhat what you are doing tonight. The question here is whether the Comprehensive Plan is sufficiently ambiguous to basically say Planning and Zoning got it wrong here. I think it is important to note that goals and comprehensive plans are going to conflict. That is just natural. There are a lot of goals. The easiest example is there are a lot of comprehensive plans boiling things down might say we really want to promote economic development and then that same document might say we want to preserve open space. The question is how do you reconcile those two things when they applied to any one parcel. Do we read it as open space or do we promote economic development? That is just a very succinct way of thinking about how challenging these goals can be and how conflicting they can be when you try to think about them in terms of one parcel.

I think it is helpful to look at the exact language that Mr. Goodinson referenced. While restorative, these strategies should not be construed as directives nor as funding mandates. I understand that the cynical view might that language is in there so that somebody can't sue the Town and that those goals are included in there, or I'm sorry, those strategies are included in there for purposes of getting grants and funding that sort of thing. I think on a more basic level these implementation strategies are things legislative bodies have to consider and decide which ones are more important, which ones will we probably work on. You are not going to be able to do them all. It is the same things with the goals. In reality we were just talking about goals, Page 80 of your Comprehensive Plan, "In light of the opportunities and challenges noted above the goal of the utility section of the Comprehensive Plan is to sustain and where necessary improve the quality of the utility services by meeting the requirements of public safety

and environmental standard.” In theory, that goal can say, “Look, we don’t really need any additional utilities here.” But that is why it is a goal. It’s not going to be dispositive on a particular land use application. It is just not that specific.

It is important, too, when you talk about the goals with respect to the Broadkill River, the courts have to talk about the Comprehensive Plan as needing to be unambiguous. The reality of the goals is that they are directives really to the Town. Investigate opportunities to mitigate. I think that should be interpreted to mean you are not allowed to build XYZ on your property. It is a directive to the Town. Same thing with #2. Investigate strategies to minimize the amount of impervious surface near the river. It is a directive to the Town. It is not a prohibition on a property owner’s use of their property. Identify opportunities and strategies to work with property owners. This is interesting, too. This is talking about working with property owners. A more collaborative process. Identify opportunities and strategies to work with property owners to increase visual and physical access to the river while complying with buffers in order to maximize the river’s benefit to the people of the Town of Milton. There is an argument to having a cell tower there increasing cell service might be beneficial to bringing more people to the river in Milton. It almost doesn’t matter because the interpretation issue is whether or not this unambiguously prohibiting somebody from putting a cell tower by the river. And it is easy to say we can’t have it on one side of the river but can’t have it on the other.

The implementation strategies are largely the same here. Investigate the possibility of creating a new waterfront district. Individuals can’t create waterfront districts. That is a function of the Town passing a zoning ordinance to create the new district. Undertaking public process to envision a new Front St. gateway to Milton. I can see where someone could read that and say that is a long-term goal. Front St. gateway to Milton. That is a few steps away from undertake a public process to envision a new Front St. gateway to Milton. Same thing as identify methods to improve physical or visual access to the Broadkill River.

I want to circle back to what I think is the last question about being whether the Planning and Zoning Commission violated Section 125-20-A providing no new public or private utility system shall be constructed within any flood zone or special flood hazard area. As I mentioned the Commission’s decision specifically acknowledged that, I want to note too that we are getting into the interpretation of codes, and mind you, I don’t think you have to do that because it wasn’t Planning and Zoning’s job to interpret that. They didn’t do that. They said you need to comply with that. You need to go see the people that make those decisions. It is the same thing as if the occupant had to go to Sussex Conservation District for its water issues. But anyway, I do think it is important to not say 125-20-A is this blanket, unconditional prohibition. Because I think it is misinterpreting that statute. It is effectively reading out the rest of that same Section B&C discuss utilities going in in flood areas. Subsection A was the only section that is easily an interpretative issue but say that you can’t have public utility systems in flood hazard, you have effectively rendered a nullity of Sections B&C. But again, I do think we reached that decision. Planning and Zoning didn’t because they knew it wasn’t their role.

Councilwoman Meredith, you asked about Verizon being the agent of the property owner. I would concur from the Planning and Zoning's perspective that the lease between the property owner and Verizon created that agency relationship. I would want to note that the lease made sure it was going to be subject to all of the necessary approvals. That is why we are here tonight.

Just to circle back, I do want to thank Mr. Goodinson for his service on the Planning and Zoning Commission. I do appreciate the fact that he is taking the time to do this, and you can tell he cares. There is no question about that. I think it is also that when Town people are involved it tends to be a better process. I do think it is important though, and I am a process person and you guys have heard me say that before, I do think that it is important that we are operating in the compounds of 220-34. And then, what the Planning and Zoning Commission had in front of them, how they made that decision, and then it is your turn to figure out whether or not their decision was the product of an orderly and logical review, and whether or not they misinterpreted Chapter 220. I think the answer to those questions, the second answer is no, and the first one answer is yes.

I would be happy to answer any questions. No questions asked.

Mayor Kanakos:

John Tracy representing the applicant which is Verizon.

John Tracy:

I don't know if the effective litigation term would be "Ditto", but I do agree with Mr. Thompson's reports. I will try not to reiterate them because we are both defending same decision but from different perspectives. Again, for the record, my name is John Tracy, I am an attorney with Young, Connelly & Stargatt & Taylor up in Wilmington here on behalf of Cellco Partnership. Council has been repeatedly reminded of what its role is this evening, sitting in a quasi-judicial capacity, evaluating the decision of the Planning Commission to approve a special permitted use for this particular use on the property of the Public Works Maintenance Yard in the Town of Milton.

As Mr. Goodinson actually indicated this site was not new when I brought it to the Planning Commission. It was actually something that had been discussed with the Town for several years dating back to the 2019 meeting that Mr. Goodinson referenced when the lease was considered by Council prior to even heading down the road that we headed on. As the Mayor and Mr. Thompson noted, the review that you have before you is whether the Planning Commission considered everything and did an orderly and logical review of the evidence and employed the proper interpretation of Chapter 220. This is not a re-litigation of the matter that was considered and approved by the Planning Commission. Instead it is a review of that decision to make sure that those tenants were complied with when the Planning Commission acted. The burden of persuasion is on the petitioner to overturn that decision and I would argue that decision should not be overturned simply because of different view of the same evidence could be taken by this Council again who is a court advisory in these types of appeals. It is the Planning Commission that evaluated the evidence that was before it. It is this Council's role to

make sure that evaluation was done properly in accordance with the appropriate rules of procedure.

I am going to highlight more generally the topics that were talked about because I know that Mr. Thompson went into greater detail on the decision itself, so I don't need to rehash those items. But in terms of demonstrating that this matter was a product of an orderly and logical review of the evidence, the Planning Commission held its hearing on January 19, accommodating me. I had to move the December hearing because Covid. It was scheduled. So it was actually noticed twice. I sent the notices out for the meeting that was originally to be in December. I sent the second notice out for the same meeting that was going to be held in January. At that meeting, the testimony was taken from the applicant as well my witnesses. As the record you have before indicates in addition to the application and the site plan itself, our radio frequency engineer provided four reports to the Planning Commission dealing with the design of the facility and the problem before and after with this tower being constructed with the emissions that are going to come off of the tower which is something that the FCC regulate. We have to demonstrate compliance with the FCC's requirements for emissions. That report noted we are less than 2% of the allowable levels of emissions assuming worse case scenarios implications on that tower. Everything turned on, everything pointed at you, full loaded, 24/7, yada, yada, yada. We also submitted a report demonstrating there wouldn't be any interference with any other frequencies and if there were, it is Verizon's obligation to correct those. And, lastly, that we comply with all FAA requirements, and, in fact, something noted at the hearing is that this tower would not need to be lighted in order to be in compliance with the FAA so there would be no light on the top of the tower.

As Mr. Thompson acknowledged, I also submitted two reports, one an article and one a report regarding impacting or lack thereof of these facilities on neighboring properties. Copies of that, I don't know why they are not in the record. They were submitted and referenced in the opinion itself. Basically, they are showing that there was no negative impact on property values. In addition, a structural engineer's letter was submitted as part of that record. All three of my witnesses also testified to their various levels of expertise and were submitted to questioning by the Planning Commission. So Mr. Peterson, the RF engineer, testified to the topics that his reports covered and answered questions from the members of the Commission. Mr. Gravert, a civil engineer on the project, testified with regard to the tower itself and some of the structural issues and Ms. Manchel whose name was referenced in some of emails that Mr. Goodinson placed before you this evening, testified as to the site selection process. There were three members of the public who testified to oppose. One arguably neutral but we can classify him as opposed if you would like. His information is in the record. There were also roughly nine letters that were submitted to the Planning Commission that were also considered. Two of those by those who testified, Mr. Wells and Mr. Goodinson. One of those letters, at least as I read it, was also positive.

After that testimony, there was substantial rebuttal testimony taken from the applicant and its witnesses. As has been alluded to, several additional pieces of information were requested. So, the public hearing was closed at that point except for the receipt of these

two pieces of information. One was a supplemental structural engineer's letter from Saber Technology about the tower and the second what has been alluded to the 185-page report that is in the record from our environmental consultant dealing with the interplay with SHPO regarding the impact, or lack thereof, on the historic district. Following that the public hearing was closed, and that information was submitted to the Planning Commission prior to its next meeting in February.

In between there, one or more neighbors contacted SHPO to raise additional issues requesting SHPO regarding its no adverse impact or not adverse visual impact on the historic district. As was referenced, a second letter was submitted that was addressing the concerns that were raised and, again, resulting in no change of the finding of no adverse visual impact.

As has been alluded to, at the following meeting in February, the Planning Commission devoted its entire meeting to the consideration of this evidence and a discussion, a spirited discussion, regarding whether or not to approve this application against the standards that it has to consider it. The members walked through each of the individual criteria that were placed in front of it. Of the nine criteria that are contained in 220-34 D which is the general permitted use criteria, I would say many of which are not applicable when you take a look again, this is the section designed for every possible permitted use, not just this one. So, there are certain things that has been referenced, like pedestrian traffic is not really relevant in consideration of this, but it is one of the criteria that is in that section. But there was a long debate over these topics. And, at the end, the majority of the members concluded that this use would not generate noise, or light, as I mentioned, it is not required to be lighted by the FAA, does not tax sewer or water systems in the Town, generates traffic which has been a topic, this generates about one vehicle trip every 4-6 weeks in and out from the site for purposes of a monthly maintenance check. Doesn't generate any traffic, doesn't obviously tax schools. Was appropriate for this area. While folks may disagree with that decision, I don't think it is fair to say it was not the product of an orderly and logical review of the evidence which is the standard that this Council must apply.

There was some discussion about the special flood hazard district and, I think, it is important to know a couple of things about that. First and foremost, I concur with Mr. Thompson, and, I think it goes somewhat to Mr. Garde your questions, this is part of the site plan review process. When you design your site plan and you design your construction drawings for the facility, that is when it is evaluated against Section 125-20. I can tell you, and this is in the record, the December 20 review letter from Penonni which is the Town's review engineer, there's no mention of the special flood hazard district being a potential issue for this property. It was not something that was discussed before the Planning Commission at the public hearing under 220-34 in January. It was a topic that was first broached after the public hearing had been closed and discussed among the Planning Commission members. The applicant never had the chance, even if it were appropriate to participate in that discussion. But, I think, all of this lends itself back to the conclusion that the Planning Commission did what Mr. Thompson indicated was its role. It is not the evaluator at this stage of the compliance with 125-20 but it

made it a condition that to the extent Sections of 125-20 apply to this application, they will need to be dealt with, concurred with, handled.

There has been some discussion about Mr. Quass' letter dated May 13. Again, that was not in front of the Planning Commission when the Planning Commission made its decision. I'm sure it will be a topic of discussion later on in this process. But it was not something that was in front of the Commission at the time. So, again, I think the evidence that was in front of the Planning Commission which I have gone through in terms of the reports, the documents, the testimony, including the testimony from the three people that spoke that night that were not part of the applicant and the letters that were submitted in, that all of this taken into totality was sufficient evidence upon which the Planning Commission could conclude the way it did. That this did not violate Section 220 and, therefore, I believe that that decision should be upheld.

The other issue that I wanted to get into a little bit is the Town's Comprehensive Plan. I agree with the statement that the Planning Commission stated in its report which was there is nothing in the Comprehensive Plan that prohibits the placement of the tower on this property. It is not in compliance with the zoning. R-1 permits this type of facility to be in the R-1 zoning district subject to getting the special permitted use approval. There is a mechanism that is in the Zoning Code. The Zoning Code dovetails off of the Comprehensive Plan for such a facility to be approved. In my opinion, that alone should end the discussion, but I recognize that it won't. I wanted to talk briefly about the Comprehensive Plan and the Comprehensive Planning process. Mr. Thompson referenced this a bit. I will go a little bit further so that Mr. Mandalas doesn't have to go and look it up later, but I believe he was also citing from a case called O'Neill vs. Town of Middletown 2006 WL 205071. There are a fair number of cases about the interpretation about the interplay of Comprehensive Development Plans in land use matters. I will tell you that the vast majority deal with County Comprehensive Plans which are interpreted somewhat differently than Municipal Plans which is why I went to O'Neill vs. Town of Middletown because it was dealing with the Town of Middletown's Comprehensive Plan for the quotation, I am going to provide you some of which Mr. Thompson provided in his statement. "Comprehensive Plans are intended as large scale and long-term planning documents and, therefore, cannot serve unyieldingly as guides to detailed questions of zoned designations. A Comprehensive Plan necessarily addresses many issues of land use that inevitably involve tension among inconsistent, though desirable, goals, and thus lead to conflict. It is further recognized that trade-offs between the various goals and managing development are contemplated by and therefore consistent with the Plan. As a result, challenges to zoning decision that are not consistent with the Comprehensive Plan, must be reviewed with an eye toward flexibility." That is a very broad way of summarizing what Mr. Thompson said earlier which is these are very large documents which have state required sections and chapters you have to include and some that are specific to the individual municipality. There are often several hundred pages and in those several hundred pages as Mr. Thompson illustrated may look in one section and see a provision for open space and then a second provision dealing with economic development. You have to rationalize those two.

I will tell you again, and this goes back to the fact that special permitted uses for R-1, included utility towers such as this, which is most of these cases if you want to bore yourself and go in West Law and type in Comprehensive Plan in municipality or county, most if not all of these cases are challenging or supporting the actions of municipal government with regard to request to rezone a piece of property or to annex a piece of property. Neither of which is occurring in this instance. This is development of a piece of property consistent with what the zoning allows you to pursue a particular mechanism of relief and then simply put, did the Planning Commission make the correct job. But that is not really a Comprehensive Plan decision. Even moving forward onto the Comp Plan provision cited by Mr. Goodinson and others opposed to this application, the unmistakable conclusion is that the elements are, at best, goals stated to desire to be achieved in the Comprehensive Plan but not specific recommendations that are bound by law. Indeed, the Comprehensive Plan goes to much detail to highlight that a lot of what falls into the plan and a lot of which was presented to you as arguments against approval of this are under the category of possible implementation strategies. That is the term that is in the Comprehensive Plan. The Plan notes, that has been mentioned, they are not to be construed as directives or funding mandates. Thus, for instance, while there has been frequent mention of a desire to form a Front St. gateway that could potentially run at or near this property, which I am not going to tell you is not a laudable goal. It was listed as a possible implementation strategy. Otherwise, not mandated in the Comprehensive Plan.

The same which was not discussed tonight but which was discussed in front of the Planning Commission was the relocation of the wastewater facility treatment plant which is across the street from this property. One section of the Comprehensive Plan talks about in the possible implementation strategy, another part talks about it in the goals, but even as expressed as a goal, it is not definitive. And otherwise to work with DNREC, Tidewater and concerned citizens to develop a plan to move the wastewater treatment plant from the Broadkill River. And otherwise not a concrete mandate to do this but instead let's get the discussion groups together to start figuring out if we can and how we can do it. But even that this tower wouldn't hinder any of that. That wastewater treatment plant is on the opposite side of Front St. from this property. Nothing that happens on this property would have any adverse impact on the ability to relocate that wastewater plant if that would come to fruition.

Lastly, while folks suggested that the facility would have a negative impact on the Town's historic district, this matter was specifically vetted by SHPO on several occasions. Not only through documents that were submitted to SHPO which as you heard resulted in the shifting of the location of the tower on the property due to the discovery of the old buttons. But also in terms of the visual impact of the facility on the historic district as well as several identified in the reports a particular property that were on the National Register. There were a variety of photographs that were taken that were submitted to SHPO and those are in the record. After reviewing those, SHPO concluded that there was no adverse visual impact the historic district from the placement of this facility. You will see if you take a look at the report particularly the second report that was done in response to the concerns expressed to SHPO earlier this year, it goes into detail of what that means. What the adverse impact visual means and how it is

interpreted. At the end the conclusion was that there was no adverse impact on the historic district.

I guess what I am saying is that the Comprehensive Plan contains a number of aspirational goals and ideas. When you look at the litigation or the cases involving Comprehensive Plans where you see it really comes to fruition, is whether something is being done that is consistent or inconsistent with the future land use plan that is in the code. It is not something impacted here because what's being proposed is permitted with a special permitted use approval from the Planning Commission.

What I will tell you is that there was a long discussion and review of the evidence. There was a full and frank opportunity to discuss matters with the witnesses who before the Planning Commission with regard to this particular facility. Following that there was a second subsequent hearing where afterwards they needed additional information. The Planning Commission had a long, spirited discussion about whether or not to approve this application. A majority of the members decided that it was appropriate to approve the application and it include a number of conditions that either addressed concerns or added additional requirements to this particular approval, but they reached that conclusion following an orderly and logical review of the evidence. They reached that conclusion properly applying Section 220.

I will note just because I wouldn't be doing my job as a lawyer if I didn't that there were several documents that were placed in front of you this evening that were not things that the Planning Commission had available to it for its consideration. Those probably should not be part of your record. Because again, you are reviewing the record of what the Planning Commission had in front of you. I will leave it to your counsel to advise you of that, but I wanted to make that statement.

The last statement I wanted to make is, I noted that Mr. Goodinson was hesitant in terms of bringing it up, the last comments that he made, I simply am going to leave it on the record, but I think those were inappropriate. I don't think this decision one way or the other had anything to do with the issue that he was raising. I do recognize that there all people of all races who live around this facility. So, I just want to simply say on the record that I disagree with that assertion that was raised by Mr. Goodinson. Also an assertion that was not raised in front of the Planning Commission below. With that because my lips are drying out, I will be happy to answer questions or step aside for others to speak.

Mayor Kanakos:

Any questions from the audience?

Mr. Mandalas:

Mr. Mayor, no public statements to you as the decision maker. Not an option for the public to ask questions of the attorneys. There will be an opportunity for the attorneys to address the statements made by the public. Now is the time for public statements.

Mr. Allen Benson, 201 Collins St.:

I know that everybody has been saying that all of the evidence was heard by the Planning Commission, but in the process of discussing the flooding, nobody really got into the impact of the flooding on Front St. With a 50x50 pad and an access road going in, that can only have more negative impact on the frequency of that flooding. And that was never discussed in total. And the problem with that is so when Front St. gets closed with flooding, everybody knows where that traffic goes. It comes up Collins St. going to use Coulter or Mill Sts. None of the three of those streets are designed to handle that kind of traffic. Particularly when there are cars parked along the road. At best, maybe, enough room for two cars to pass one another. If that isn't enough, you get the semis, the large trucks that end up getting detoured up Collins St. They can't make the turn on Mill St. They can't make the turn on Coulter. So, guess what they do? They go down and try to make the turn around this small little circle in that development. In the three years we have lived there, I probably witnessed that little circle being destroyed at least seven times and having to be rebuilt. That brings us to 220-34. Section B. Where it states that the Planning and Zoning Commission shall take into consideration the public health, safety and welfare and comfort and convenience of the public in general and the residents of the immediate neighborhood in general. That's us. This was not discussed. And, the historic district, and I don't care what anybody argues, the tower sitting up there is detrimental to the historic district. That is all I am going to say about that because that is not what I am up here for right now. My concern is that even though I am not officially part of Mr. Goodinson's appeal, I wanted to be, but I got into it too late. Because the Planning Commission did not consider this traffic issue and the impact on the neighborhood, this really needs to be reconsidered. The cars coming up our street. It is not just the traffic, they are speeding, they are a danger to the residents of the community, the children, the pets. Putting this pad down there is going to cause more problems for our neighborhood and that's what 220-34 says that you cannot do. Special use permit cannot be approved if that's the impact. Therefore, I agree with Mr. Goodinson. This should never have come to this point. Thank you very much for hearing me out.

Ms. Barbara Wagner, 409 Federal St.:

I have been a member of the Milton Historical Preservation Commission since 2014 but today I am talking as a private citizen, and I hear all of what has been said about the State Historic Preservation Office review. I am a walker, and I walked the streets. I didn't just take pictures. I walked the streets. When you come to the edge of the new historic district because we have been amended, revised and the final decision has been made within the State. The State Historic Preservation Office approved it and then the Delaware Advisory Board approved it and it is now in Washington, D.C. waiting for approval by the National Park Service. As a certified local government, the Town of Milton works with the State Historic Preservation Office to manage the Milton Historic District because we are National Registered District. When the National Park Service approved the amended historic district, the 200-300 block of Walnut St. will be the new boundary of the historic district. When you are walking east on Front St. or driving, you are going to be coming to the historic district and you will see a giant cell tower 145' tall. And other parts of the historic district are going to see that cell tower. It doesn't have

anything to do with the characteristics of the historic district. It is an intrusion, and it is really a blight to the environmental setting of the historic district. So, then I went to, remember when we talked about changes to 220-21, and I remembered 220-21 E, #7 and I will read it:

Antennas, towers, microwave dishes and satellite dishes. Any antenna, tower, microwave dish or satellite dish for residences within this district or included on or eligible for inclusion on the National Register of Historic Places, shall only be located in rear yards or, if not visible from the street level along the entirety of the front lot line, inside yards. All reasonable efforts shall be made to limit or eliminate the visual impact on the adjoining properties, such as screening by landscaping. Notwithstanding Article IX of this chapter, all properties subject to this subsection shall come into compliance within 18 months of the date of this subsection's passage.

Not only is it in a flood zone, but it also violates the Historic Preservation Code for the Town's National Register Historic District. I, too, think it really needs to go back and be fully reconsidered. This isn't something that can be done through pictures by the State Historic Preservation Office. They need to come and walk it and just visualize themselves what's going to be on that environmental skyline of the historic district. Thank you.

Mr. Allen Sangree:

One of the things that builders fear the most is the Town's Comprehensive Plan. Our Town has three core documents that provide governance for the Town. You have the Town Charter, the Code, and the Comprehensive Plan. Each one is distinct and different in and of itself. Each one plays a uniquely and important role, standalone important role, in the governance of our Town. We just heard from the attorney from Verizon and his last statement was about the Comprehensive Plan. That is because the Comprehensive Plan has the ability to stop this project. In our Town Code 220-2 authority of our Town Code. What gives that Town Code authority? 220-2 Authority. Zoning regulations in districts in this chapter have been made in accordance with the Comprehensive Plan as required by the State of Delaware. What gives the Code strength? What does the Code say? The Comprehensive Plan. The Comprehensive Plan lays out the goals, plans and direction for the Town. All zoning regulations, codes must be in accordance with the Comprehensive Plan. I see it as the Town's Codes are the path to the destination. The destination is the goals, the aspirations, the desires of the Town. The Code is what gets us there. The Charter is the administrative ferment that holds it all together. In our Town's Comprehensive Plan book, Page 7, interpreting our Comprehensive Plan. Section 702, Title 22 of the Delaware Code, quantifies the legal requirement that the Town of Milton prepare a Comprehensive Development Plan. By law, you didn't hear this tonight, but you heard it in some other case law brought up, but this is by law the Milton Comprehensive Plan 2008, "Shall be the basis for the development, the Comprehensive Plan, the goals, the aspirations, shall be the basis of zoning regulations and has the force of law such that no development shall be permitted except as consistent with the Comprehensive Plan." This is an important document. I believe someone on the Planning and Zoning did not give this document the proper respect that it is due. We

heard a lot about this section, every section in this Comprehensive Plan book, from historic preservation, waterfront district, town center, lists the goals, the aspirations put together by the Town of Milton, the residents of Milton. At the end of every chapter, there is something called possible implementation strategies. It doesn't say laws, that is the code. It doesn't say mandates. It says possible implementation strategies. The Chairman of Planning and Zoning took this section recorded and read into the public record what precedes these possible implementation strategies. And what follows every single one of the chapters different giving different aspects of our Town, the goals, the aspirations of the residents, are these possible implementation strategies, not defined as mandates, they are not laws. But this what was read into the record. Not that the fact that the Comprehensive Plan carries the force of law. This was what was read into the public record. This what was read to the members of Planning and Zoning. The following possible implementation strategies were identified from suggestions made by the community members as possible ways to advance the Comprehensive Plan. These strategies should not be construed directives nor as funding mandates. That was what was read to Planning and Zoning. I think it is a real distortion and it is a real distraction to the importance of this document. This document carries the force of law. Let's go to Code 202-4, I have a handout, but I don't think I am allowed to hand them out to you. Am I? I have all of this written out.

Mr. Mandalas:

The rules of evidence in hearing like this are relaxed. However, you are compiling a record of what was before the Planning Commission below and I don't think this was before the Planning Commission below.

Mr. Allen Sangree:

But it has to do with the Comprehensive Plan and the role that it played in the decision making.

Mr. Mandalas:

As I have said, the rules are relaxed, and I am fine with you accepting them in whatever way.

Mr. Allen Sangree: (Handed out information)

202-4 Purpose Article B: All such zoning regulations and maps shall be enacted for the purpose of and there are four points under that, I am on the local level, page 2: Preserving and promoting the health, safety, and welfare of the citizens of the Town of Milton.

#2: Protecting and preserving the architectural and historical character of Milton's built environment and extending this character as growth occurs within the Town or through annexation.

#3: Guiding the future growth and development of the Town of Milton in accordance with the Town of Milton's Comprehensive Plan in a manner which results in a positive and beneficial land use relationships among residential, non-residential, and public areas. Providing the orderly growth and development of the Town.

I think #3 is significant here that talks about guiding the future growth and development of the Town of Milton in accordance with the Town of Milton's Comprehensive Plan. And then #2 protecting and preserving the architectural and historic character of Milton's built environment and extending its character as growth occurs.

I am just going to skip here and just go down to what does that Comprehensive Plan say about this project. What does our Plan say? It gives strength to the aspirations, goals, dreams, and desires of the people in the Town of Milton to keep the Town of Milton special. Again, this is the like the heart, the frame, the Code is like the (bad illustration). This is the heart of the Town right here. And this carries the force of law. What does the Comprehensive Plan have to say about this project? Page 3, Paragraph 2, the Comprehensive Plan says, "This Plan reflects the dreams, concerns, ideas and aspirations of the people of Milton that it is serving."

Page 7, Paragraph 2: "This Plan strives to not only meet the requirements established by the State of Delaware but also it sees those requirements as a guiding source document for the Town's decision making over the next ten years." This gets revised in the next couple of years. The next revision, I think, is in two years something like that. So this guiding source document is what guides the Town in decision-making process.

And then finally, Page 7, Paragraph 4: "By law Milton Comprehensive Plan 2018 shall be the basis of zoning regulation and has the force of law such that no development shall be permitted such as that which is consistent with the Plan."

This particular project, if what that says is correct and we go through the process, this is going to have to be a foot and a half above the floodplain level. The floodplain level down there is 10'. You are looking at an 11' concrete structure. This ceiling is probably 10'. An 11' concrete structure, 50'x50' before they even start talking about the 145' tower. If it happens to the way the code is written right now and the way I understand it. 50'x50'x 11 ½ 'concrete block down there on Front St.

This project is located where four unique identified districts in the Milton Comprehensive Plan will converge. We have our Town Center. We have the historic district. We have a marine resource district which is the most exciting one to me out of all of them. We have an R-1 residential district. Four key districts that make Milton what it is. The historical aspects of the Town, the exciting marine district town center and R-1 district will all converge where they are proposing this tower. I agree we need better Verizon cellphone service. This is not cellphone service for the Town. This is only for Verizon customers which could be as low as 23% according to some or as high as 33%. So, 33%. One in three people are going to benefit from this tower.

I don't want to talk about the water tower or the new 350' tower that is going up, the AT&T tower out on Sam Lucas, all great locations. AT&T customers aren't complaining. It is just the Verizon customers. There are many other places to put this cell tower, but I don't think that the location proposed is the best. The historic district, I don't want to take up too much time, but in the packet, I've got all four districts and just

little snippets from the Comprehensive Plan that talk about how important the historic district is, the marine resource district, the Town center and, of course, the R-1. Just real quick Page 10, Comprehensive Plan, Paragraph 3, under Historic Preservation: “We value protecting the buildings, and Town character that tell the stories of our past.” This book is loaded with information relating to the unique character of the historic district and how this down there bordering the historic district is going to distract from that.

The marine resource district, Page 33, Paragraph 3, the Comprehensive Plan, “The Broadkill River was judged to be the Town’s greatest asset by most of the survey’s respondents.” Town Center, Page 98, Paragraph 2, “This article requires that special uses must fit within surrounding context of the site.” Page 95, Paragraph 5, Town Center Use District, “The intent of the Town Center’s Use District is to delineate the Town Center area which is historic and pedestrian in scale.”

So these four districts meet at this particular location where this tower sits. Again, this all is to give credence to the Comprehensive Plan which I don’t think was given its just due. Three core documents carry the force of law, but the force of law was not mentioned when talking about the Comprehensive Plan and not what it has to say about the uniqueness of Milton and what this unnecessary tower will do to these four districts.

Page 1, just real quick, I just want to reference this, under Federal Law. Federal Law there is a Telecommunication Act of 1996 a piece of legislation that governs the application process for cell towers. It is US 47, Chapter 5, Subchapter 3 on and on. It talks about preserving of local zoning authority. A) except as provided in this paragraph, nothing, zero, nothing in this chapter shall limit or affect the authority of state and local government over decisions regarding the placement, construction, or modifications of a personal wireless service. All authority rests with the local government. Five provisions that limit this authority. #1 local jurisdictions are not allowed to discriminate among providers. So, if you give a site to AT&T, you have to give a site to Verizon. If you give a site to Verizon, you have to give a site to T-Mobile. So you are not allowed to discriminate. What you do for one, you have to do for all. #2 talks about you shall opt on a quick and reasonable time period. You can’t sit on these things to try to delay the inevitable building of these towers. So you can’t delay it. #3 now this an important one. Any decision by a state or local government or instrumentality thereof to deny a request to place, construct or modify personal wireless service facilities, and this is it, shall be in writing and supported by substantial evidence contained in a written record. I don’t, and that is very important, supported and sustained by evidence contained in a written record I don’t have a copy of the written record of the Planning and Zoning. I think you guys do. I did a word count on that. Do you know how many words support written record? I think it is 2800. How many words speak to the opposing side? It is like 280. If this gets appealed to the Superior Court, the document is a joke in my opinion. That is something to think about.

Article 4 says you are not allowed to discriminate on the basis of environmental affects of radio frequency. That was the only one that was quoted to the Planning and Zoning. And, then you have 30 days to act on a decision that you don’t like.

I have a page here, there is a mountain of substantial evidence which is what the Federal Court calls for, to prove that this special use proposed location is not in conforming with our Town's Comprehensive Plan, is not in the overall best interest of the citizens of our Town and will negatively affect the use of adjoining properties. I did this actually last night; I have ten here but will just mention one or two just for the sake of time.

#1) The proposed tower is contrary to the goals, heart, spirit of our certified Comprehensive Plan in zoning ordinance. The Comprehensive Plan stated purpose is to preserve the unique natural beauty and historic integrity of our Town. The proposed tower is a direct assault on these aspirations and objectives.

#2) The proposed tower does not strength the architectural, cultural heritage, economic character, and well-being of our Town. It actually does the opposite by building a commercial structure in the heart of our Town that is not keeping with the scale, design, and heritage of our Town.

Just two more. The proposed tower would have a substantial negative effect on use of properties in the districts throughout the Town. Negative scenic and visual impact. Downgrade the historical nature of the Town that we are trying so hard to preserve and what makes our Town so special.

C)? Interfere with the use and enjoyment of the Broadkill River and the Memorial Park. What do you think people go kayaking in the river for? It is so beautiful. Ospreys, fish, trees, birds, nature, paddling down there and coming up to Milton, what do you see? A mile away. A cell tower. That will affect the use of the Broadkill River. The newly created marine resource district will be permanently and negatively impacted due to the tower's unsightly commercial presence. Again, the marine resource district is the most exciting thing we've got going on in our Town, I believe. There are things going on in the Town Center that are great. But the marine resource district, just imagine what could happen down there. In the background, I see as you pull into the parking lot as you come up you know through the east entrance to the Town, you look at the river and you look at the landscape and what do you see? A cell tower. A 50x50x 11 ½' high concrete base with a cell tower on top.

#4) Would be visible for several miles as one navigates the scenic Broadkill River creating a visible and emotional stress due to the imposing structure. One possible negative consequence would be less use by the residents due to the scenic pollution.

I could go on and on. I think I made my point. The Comprehensive Plan was not given its due weight. I think the Comprehensive Plan, a builder's nightmare, is what was not adequately considered during the Planning and Zoning meeting.

Can I have one more minute? Okay. At the meeting Planning and Zoning was handed two cases that dealt, unpublished cases by the way, citing a reversal of our Town's decision ban a cell tower. And that was Sussex County vs. AT&T. If you go down to Bethany Beach, just as you are entering into town, they wanted to build cell tower there

and so the Sussex County Board of Adjustments denied them that. Two times they tried and twice they failed. This was what the Planning and Zoning Commission was given as a reference document to judge what was going to be happening here in Milton. I read this case law and I'm not sure if anyone on Planning and Zoning did, but I read this case law. There's really no comparison between what's happening in Milton and what happened down in Bethany Beach. What happened in Bethany Beach, I am reading from the takeoff, property currently contains, zoned commercial, the property where they wanted to put the cell tower contained an Arby's fast-food restaurant, a gas station, a huge water retention pond, adjacent to the property was an undeveloped parcel, a furniture store, to the south was Sea Pines Community, a smelly chicken shack or something, crab thing, whatever. We are comparing apples to oranges when you compare these two cases. They failed, the Board lost, because as it says up in the introduction and opinion, it says the court held an office conference with the parties to discuss the court's concerns about the inadequacies of the Board's written decision. The Board had some good argument but again like our written decision from Planning and Zoning one contains over 2,000 words and one contains 200, they said that the inadequacy of the Board's written decision. That is why the project was allowed to go through. You can deny a project based upon mistakes. Remember, I read you those five things, five reasons why you cannot allow a cell tower? Aesthetics is not one of those five things. I've got a handout which I didn't copy because I ran out of ink, but I've got 50 cases of case law, federal case law that went to the district court. I got it here if you guys want it. I did print out. These are going to the second court of appeals. A lot of these are court appeals. That is one level below the Supreme Court. Each one of these talk about aesthetics being the reason to deny a cell tower construction. Again, I think that the way Planning and Zoning was thinking and some of them were talking, you can't consider aesthetics. You can consider aesthetics. It is very important to consider aesthetics because what makes our Town our Town? Is it because it is commercial? What makes our Town special is the feel you get, the character, the heart of the Town. I believe that this tower will destroy a part of that. That's it.

Mayor Kanakos:

Distribute what you have. Mr. Sangree indicated that he has a hundred more cases. Do we have anyone else?

Ms. Jillian Benson, 201 Collins St.

I will make this brief. Tonight we heard a lot about adverse effects on our environment, on the historic district, pros, and cons. I am very curious to know why there is not adverse effect for putting those transmitters and receivers on the water tower. It just seems like such a natural thing to do. It is already there. It really isn't that beautiful. The Town could control how many and where those receives go and the Town would make money on it. It would be a cash cow. It just seems like a simple solution. That is all I have to say.

Mayor Kanakos:

Thank you. Do we have anyone else who would like to come forward? Now is the time. (discussion in the background) What would you like to do? You have to come up to the mike so we can hear you.

Ms. Beth Martin Dangler, 120 Federal St., also owns a property on Chestnut St
I am wondering about the statement that there would be no negative impact on our property values and how was that determined?

Mr. Mandalas:
This is not the time to be asking questions.

Mayor Kanakos:
Here just to make a statement.

Ms. Dangler:
Okay. My statement is I am concerned about the investments we have made in our homes here and that such a tower so close to the historic district would very much impact our living here and the investment we have made for us and for everyone else who lives in town.

Mayor Kanakos:
Thank you. Time for rebuttals now?

Mr. Mandalas:
Now is an opportunity for the parties to respond and we will start with Mr. Goodinson

Mr. Goodinson:
I don't have a real closing statement or response. Just a couple of random thoughts. One is I was interested to hear so much emphasis being placed on the report from SHPO. What you saw from the Historic Preservation, and we work with SHPO's all the time and we place a lot of importance in the reports and the opinions of the SHPO. However, when I got the FOIA documents and started looking in the binder and started going through, I was concerned to see just in regard to my own property the number of mistakes made in describing the property. My house is kind of weird. It is two little houses that the original one on the side was built in 1730 and another house built in 1830 and it was moved to the site and connected to it. According to the SHPO's report, the house was built in 1880. The 1730 house was built in 1880. So that was the first piece of wrong information. There is an addition off to the back that was built in the 1990's. The SHPO's report indicates that it was built in 1910. It also said that there would be no adverse effects of the tower because my lot is heavily wooded. I have three crepe myrtles in my backyard. I don't know where they came up with this. There is a sycamore tree on my next-door neighbor's yard, but that does not mean three crepe myrtles and an adjacent sycamore do not a wooded lot make. My concern is placing a lot of credence in SHPO's report, but this cursory look at my one property is ripe with errors, it makes me worried about what else is in that SHPO report that is incorrect. I can't check because I don't know the details of those other properties. That is just that one random thing.

My closing thing is we are looking at two ways to approach this issue, this discussion. One is looking some very, very specific decisions, what happened, what was the process that Planning and Zoning went through and did they do very specific things. What is the definition a system? You all are being asked to kind of adjudicate those very, very specific things. What I am hearing from people here, and what I am feeling, and what is in the Comprehensive Plan, is all about the character of the Town. And how do we preserve the character of the Town, how do we preserve all of the things that drew us here in the first place, or for people who grew up here, kept them here, and loving this place. It is the character, it is the history, it is the feel, how are we going to preserve that? That is another way of answering. You all have a choice to make. How do you want to approach this? Are you going to approach it by looking what is the definition of a system? Or are we going sort of as a community work together to preserve the character and the history, and the feel and the sense of place in this Town. That's my request to you. To remember why you came here and remember why you stay here and make your decision accordingly. Thank you.

Mayor Kanakos:

Mr. Thompson.

Mr. Thompson:

I will just be very brief. I do want to thank the members of the public again. It is really nice to see a Town where people are engaged. I certainly understand Mr. Benson's concern about the flooding and the traffic. The difficulty in my mind is if in the R-1 district somebody can build a house, single family home, can have any number of people living in it. That is going to add to traffic. Here we are talking about an unmanned tower. I understand that the traffic is a concern. Planning and Zoning factored in the lack of traffic being created by this particular application. That is not to diminish his concern over traffic. It is just that Planning and Zoning looked at that issue and said the lack of people going to this site is actually a reason to grant the application vs. whatever use may be granted without anybody permission.

Ms. Wagner referenced 220-21 E and certainly the Town has a lovely historic district, I think that the section she read refers to the properties within the district. That is not a bar in terms of what happened and what Planning and Zoning decided to do.

Mr. Sangree, you know it is interesting, he and I tend to agree on kind of the formulation and the Comprehensive Plan, I tend to think of it as the skeleton and Zoning Code puts the meat on the bones, so to speak. It is important to understand that the details are in the Zoning Code. Here Planning and Zoning wasn't doing something on a whim. They received an application for a special permitted use in the R-1 District because the Zoning Code allows for a special permitted use and public utilities are essential uses in the R-1 District. I think viewing the application as violative of the Comprehensive Plan, ignores the fact the Comprehensive Plan was used to create your Zoning Code which allows for the special permitted use to be considered which is what Planning and Zoning did. They applied your Zoning Code.

There was some discussion with respect to the purposes of the zoning ordinance talking about and facilitating things where they need to be in their best location. I think that is the wrong way to think about it. Ideally, everything ends up in its best location, but we deal with the Code as it is written now. If everything was in its best location, you would make all of your nonconforming uses phase out in X number of years. Because seeing it as a nonconforming use because it is no longer appropriate in that zone? But that is not what you do. I think it is not the right framework as well the use has to go in the best possible location. I think you have to think about it the way Planning and Zoning did which was can this use be permitted specially with conditions that make it appropriate for that particular parcel. The question isn't if this is the best place if I look at a map of Milton. Is the exact best place and it is better than all of the others. I don't think that is the approach and not the way your Code is set up.

There was some discussion about federal law. Obviously, federal law is involved with any sort of decision here but really the issue for tonight is how we have applied your Town ordinances. Certainly federal law can be interesting to read. The issue for Council tonight is whether or not Planning and Zoning applied Chapter 220 correctly.

I guess to save Mr. Mandalas a minute or two research, the two cases that Mr. Sangree referenced, one was *Sussex vs. AT&T* 2015 WL 1975629 and the NCCO case was *Antietam vs. NCCO Board of Adjustments* 2019 WL 2635714, when it comes to land use applications, land is unique, that is one of the basic concepts of property law, land is unique. You are never going to have a case that is exactly the same. The idea coming out of those cases was not that all of the facts are exactly the same and then point to the exact right decision, it is the process you go through. It's can't use unspecified aesthetic concerns as a basis of denying an application. This just points to the fact that our Planning and Zoning Commission, when faced with information that it received, went through an orderly and logical process, and came to a decision.

Ms. Benson mentioned adverse effects on the water tower. Again, we are not in a position to just order somebody to provide the perfect and best use. I might want to live closer to the ocean, but I can't force somebody to sell me their house. The analysis has to be in the context of 220-34.

The property value issues that Ms. Martin indicated that was one of the documents that Mr. Tracy's client gave to the Planning and Zoning Commission, a study that property values were not adversely affected by cell phone tower.

Just to Mr. Goodinson's last point. I enjoy theoretical discussion in terms of how we preserve and what is the best strategy and this kind of dovetails with the whole concept of the Comprehensive Plan. I like those ideas; I like policy discussions. When it comes to a particular land use application, we apply the law. The law as it stands. I think that was what Planning and Zoning did here. Thank you.

Mayor Kanakos:

Thank you, Mr. Thompson. Mr. Tracy.

Mr. Tracy:

Commented on grunts and groans and the commercial about becoming your parents, starting to make those groaning noises your parents make. I am going to hit on a couple of points. Mr. Thompson covered a few. Just so the record is clear with regard to the property values, and I have one copy of each of the stuff that I gave the Planning Commission which I can hand to Mr. Mandalas. One was an appraisal report, a comparison of before and after property values before a cell tower was constructed and after a cell tower was constructed. These are residential properties which determined that there was no adverse impact on property values. The second was a report from the ABA's Probate and Personal Property Journal which compiled the results from a number of other studies including the one study that I referenced citing a similar conclusion with regard to property values.

I think I will do is focus most on what Mr. Sangree, although not to criticize him for the cartoon he drew of me on Facebook actually it was kind of flattering. The discussion we had on this topic, I think, just illustrated that issue that was in front of the Planning Commission. You heard Mr. Sangree passionately talk about what he believes what the Comprehensive Plan says and what force of law that has. You heard other discussion, although we didn't hear those discussions in front of the Planning Commission, about different interpretations of these same provisions and what I think you see all of these interpretations of the Comprehensive Plan, it just lends to that quotation that I read to you earlier, but what I actually want to do is quote from the same page of the Comprehensive Plan that Mr. Sangree was doing which was the phrase interpreting this Plan.

“Section 702-22 of the Delaware Code codifies the legal requirement that the Town of Milton prepare a Comprehensive Development Plan and by law, that Plan shall be the basis for zoning regulations and that has the force of law such that no development shall be permitted except as consistent with the Plan.”

As you recall, when I was before you previously this evening, you see this mostly come up in the context of rezoning and annexation decisions where people attempting to do something that may or may not be in conflict with the Comprehensive Plan. But the same Section goes further, quoting another case, not the one I gave you, but *Donnelly vs. the City of Dover*. But I think what you will hear that what is in your Comprehensive Plan is almost identical to what I read to you.

“A City's Comprehensive Plan is intended to serve as a large-scale, long-term plan document. It cannot serve unyieldingly as guides to detailed questions of zone designations. A Comprehensive Plan necessarily addresses many issues of land use which inevitably involves tension among inconsistent, but desirable goals. Thus leads to conflict. As a result challenges to zone decisions not consistent with the Comprehensive Plan must be reviewed with an eye toward flexibility but not so flexible to render such plans nullity.” Again, I quoted from *O'Neill vs. The Town of Middletown*. I think that *Donnelly vs The City of Dover* was quoting from *O'Neill* when a lot of this was included.

Lastly, your Comprehensive Plan notes with this in mind the Town of Milton has crafted this Comprehensive Plan with care to identify the goals in the Plan that the Town is legally bound to pursue because the Plan has the force and affect of law. All other items not specifically directing affirmative action to its specified goals are expressly intended to be optional and of a suggestive nature. So, I think when you go through your Comprehensive Plan what you find are a lot of these aspirational goals all of which again as I said before, I think are laudable. But what you do not find are mandates that would tell you either the direction it has to go or that this particular facility is prohibited. There is none of that in the Comprehensive Plan.

Just a couple of other cleanups that I feel that I have to make only because they were raised at various points. We have no evidence in the record before the Planning Commission that there is going to be an 11 ½' tall concrete pad on this site before the tower is built. However the site is ultimately designed will be part of the site plan process which gets reviewed again. That is when it will be when it is fully designed. That's when we will see what will be involved and that is when tweaks can be made address particular issues. But there is nothing in the record suggesting that there was going to be an 11 ½' tall, 2500 sq. ft. concrete structure.

A ton of substantial evidence was raised to you by Mr. Sangree from the cases that he found. This is sometimes the hazard of non-lawyers interpreting case law. Substantial evidence is a term of art when it comes to a Council such as this or a court reviewing the decision of a lower board. While I don't have the citation with me because I didn't anticipate having to do this tonight, what I can tell you for purposes of reviewing decisions such as this, substantial evidence means more than a scintilla but less than a preponderance of the evidence. So, it is less than a 50% standard that's in the code. There are number of cases that cite that I can give to Mr. Mandalas but, I have to confess, I don't have that at the tip of my tongue. Since I had an oral argument on Monday in front the court on a Board of Adjustment matter, it was something that I wasn't prepared to discuss.

Additionally, Mr. Sangree was talking about the negative impacts for people wanting to enjoy downtown Milton or to use the Broadkill River for purposes of kayaking. I would hope that a cell tower that is typically at its base is about 45" in diameter and its top about 25" in diameter is not going to deter people from using the Broadkill River and all that it has to offer.

Also just a point again for education that I am sure Mr. Mandalas will tell you, almost all cases in Delaware are unpublished. They don't go into the Atlantic Second which is the reporter that covers this area. But they are all available in West Law these days and they are all available on the internet as well. But the vast majority of opinions are unpublished. I can tell you this because I went to Law School at the University of Maryland back in the Dark Ages when you were given the Blue Book. We were told you can never rely on unpublished decisions. And the first time I tried to tell an attorney at the first firm I worked for when I was summer associate and he was an attorney at the firm, I corrected him that you can't use this because it is unpublished. He said almost all

cases in Delaware are unpublished. That is just how it works. This was prior to West Law where it is certainly easier to find.

I know Mr. Thompson had mentioned the Antietam Case. It is kind of a direct opposite to what Mr. Sangree talked about in the Bethany Beach case and I was involved in neither one of these cases although I do often speak at seminars about cell tower approvals and so I am versed in both. Antietam was the exact opposite. It was a tower going in the middle of church property that a bunch of the neighbors objected to it and the Board of Adjustment turned it down basically including in essence that believed that the foremost authority on aesthetics that showed up in opposition to the facility and it was about 50 people or so in opposition. Nobody testified in favor. When that decision I also think it did not misapply the law of Chapter 220 as it applies to this application.

Thank you for your attention. It was a long hearing. I don't think anybody speaks after me, but we do appreciate your attention and listening to all sides with regard to this application.

Mr. Mandalas:

Mr. Mayor, I will address Mr. Tracy's last comment because the rules do allow for closing arguments after these responses. It sounds like we got the closing arguments but if any party wants to have one last shot, it is under the rules and allowable.

Mr. Thompson:

You have more than patient. I won't hold you any longer. I do want to extend my gratitude to you guys for listening to us tonight and considering the appeal. These are difficult things. I often think to myself reasonable minds can differ. That is an important thing. We shouldn't impugn each other simply because somebody has a different view on something. Two members of the Planning and Zoning Commission came to a different conclusion. That doesn't mean they were being unreasonable. Again, reasonable minds can differ. But the reality is the Council is in an appellate process where it needs to figure out if that conclusion by the majority was the product of an orderly and logical process. If they correctly interpreted Chapter 220. Again, I think the answer is yes. Thank you.

Mayor Kanakos:

Thank you, Seth. Allen?

Mr. Mandalas:

He is not a party, and the rules don't provide for but at your discretion if you want to hear from him, you can.

Mr. Allen Sangree:

The New Castle case that was just referenced against Antietam Wireless. I kind of disagree that these two are not dissimilar. The subject property, this is Page 2, #2.1, the subject is 12 acres in an area, heavily forested and surrounded by forested properties. It sounds like it is in a church parking lot, in the middle of a commercial district or

something. No, we are talking about a church on 12 acres, heavily wooded, surrounded by heavily wooded properties. So there is no comparison between a cell tower on Front St. where four districts converge compared this property which is 12 acres in an area that is heavily forested and surrounded by forested property. The reason this was overturned was because again I am not a professional, I'm not an attorney, I can't argue like these guys. I can speak with passion and limited intelligence on these things. The decision was overturned because they did not provide professional, adequate, again the Federal Code says, I have too many papers here. It did not provide substantial evidence. So the Bethany Case, the Antietam Case, both cases the people did not provide adequate evidence. If this goes to Superior Court, they are going to look at our decision and say you have 225 words talking about why you should deny this thing when you got pages of testimony why we should allow it. Again, the similarity between these two cases is not talking about similar properties. One is commercial property with an Arby's, gas station, ones a forested area with 12 acres. It is a great place for a cell tower in my opinion. Property values if you have a lot behind your house would you want a cell tower there. Do you think it would affect your property values? When you like a cell tower at the entrance to Chestnut Acres. Would affect your property? Would it affect your property values? The people that they bring in will give you a certain opinion. They are not going to bring someone in that is going to give you an opinion you don't want. Just ask yourself. If a cell tower was erected in your backyard, like it is going to be in Barry's and several others, would it affect their property values? I know it would mine.

Mayor Kanakos:

Thanks, Allen

Mr. Mandalas:

With that, Mr. Mayor, the case at this point is submitted to Council. Under the rules the Town Council has 60 days to render a final decision. It will have to be in the form of a written decision. You have options to deliberate tonight or to take in the evidence, adjourn and come back together at another time to make a decision.

Mayor Kanakos:

I doubt if anyone could come to a decision right now with all the information. I will say we go with the 60 days so that we have reasonable time to discuss it, think about it. Review the handouts that we haven't seen before and be able to read everything else and the transcript. Do I hear a motion or conversation?

Mr. Collier:

I will go ahead and make a motion to see if it gets a second, and then have conversation. I would like to move that we reconvene at a date to be set within the next 25 days, seems reasonable, because we have to arrange for a room, to deliberate after everyone has sufficient opportunity to review all the information. I took two pages of notes, I have four handouts and to ask me to decide based on what I heard tonight, I am not prepared to make a decision.

Mayor Kanakos:

We have a motion. Any more discussion? Mr. Sam Garde, seconded.

Roll Call Vote:

John Collier, approved

Rich Baty, approved

Larry Savage, yes

Sam Garde, approved the motion

Ted Kanakos, yes

Randi Meredith, yes

Mr. Mandalas:

The Council will reconvene within 25 days to deliberate and decide the matter.

Motion to adjourn and second. All in favor.



Town of Milton

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The Executive Session of the Mayor and Town Council (MTC) meeting was called to order in the Milton Library at approximately 5:30 pm on July 22, 2021. Those present were:

Theodore Kanakos, Mayor
James "Sam" Garde, Vice Mayor
Richard Baty, Treasurer
John Collier, Councilman
Randi Meredith, Councilwoman
Larry Savage, Councilman

Kristy Rogers, Town Manager
Glenn Mandalas, Attorney for the Appeal Hearing

These Preliminary Minutes:

These minutes cover only the high points of the Executive Session and will become the only minutes after review, comment and approval by the Mayor and Town Council (M&TC). The discussions were not recorded.

Discussion Items:

The following are topics discussed:

- Mr. Mandalas reviewed the Rules of Procedure July 2021 final document and gave an overview of the conduct and order of the appeal meeting.
- Mayor provided an overview of his opening statements.
- Mr. Mandalas discussed his Confidential Memo to Town Council related to the appeal hearing.

Executive Session ended at approximately 6:10pm.