Recd 12/1/11
PB/ZBA meeting
(SM)

December 1, 2011

Dear Members of the Planning Board and ZBA,

Thank you for allowing my to speak to you tonight. To be certain there is an accurate record, I have prepared for each of you a copy of my remarks and the documents to which I refer.

In raising issues here, I do not wish to be critical in any way of the current members of the ZBA. No member of the current board was a member of the ZBA a decade ago. And none of you was involved in the issuance of the bogus building permit.

On reading the minutes of the joint ZBA/Planning Board minutes of October 19th, I see that the board's counsel, Mr. Hayes has advised you that if would be inappropriate for you to consider an issue he knows I am here to raise, which is that the building permit for the Tower was granted illegally after the Variance and Special Use Permit had expired.

That is bad legal advice which I believe will have consequences for the town if followed and is contrary to Federal court decisions directing me to bring that very issue before you. The Federal Court of Appeals says I must; Mr. Hayes says I can't. I'll go with the court.

Mr. Hayes knew on Oct. 19th that I was going to raise the issue of the bogus building permit, because it is contained in my letter to Mr. Eschbach of Sept. 29th which according to the stamped copy in the Planning Board file, was sent to Mr. Hayes one week before the meeting. Yes nowhere in the minutes if there an indication of why I contend the Building permit was illegal and void, just an indication that I should not be allowed to raise it and what the legal ramifcations of my argument might be.

In the minutes of that October meeting, Mr. Mandelbaum cites the fact that the permit and variance were issued on January 14th, 2002. What he doesn't mention is that the building permit — if in fact there is a genuine building permit

— was not issued until June 24th, 2003, 17 months later.

> Amenia Zoning Law 121-33 (4) then in effect states:
> "**Expiration of Appeal Decision**. Unless otherwise specified by the (ZBA) a decision on any appeal of request for a variance will expire if the applicant fails toto obtain the necessary building permit...within six months of the determination thereof."

Seventeen months is not six months. The law in New York , most recently quoted by the Appellate Division, 2nd Department in Village of Wappingers Falls vs. Tomlins, is that "a building permit which is issued in contravention of the zoning laws is never valid...Where a building permit is issued either due to a misrepresentation by the applicant or due to an error by the municipality, it can be revoked, even though the consequences to the property owner may be harsh." I have attached a copy of that decision to my package to you for your convenience. The Federal court decisions say the same thing. Ellentuck vs. Klein, 570 F. 2d 414.

I raised this issue previously in Federal Court, asserting that the building of a cell tower without a valid permit or a re-hearing when the old one expired was a violation of my right to due process, as no one will argue that a cell tower between my property and the view down DeLaVergne hill which the town uses on its web page reduces the value of that property.

The town's attorney in that action, Terry Rice, did not refute the dates but but merely argued that I had not "exhausted my state remedies" by appealing the building permit issuance to the ZBA.

On May 16th, 2007 that issue came before the U.S. Court of Appeals for the Second Circuit. In that proceeding, the Court of Appeals held that while it "thought" I had stated a cause of action, I had "not exhausted my state claims" and required me to "pursue additional administrative remedies such as appealing to the Zoning Board of Appeals." A copy of that Order is attached to your package.

Following this, I brought the same issues to Nancy Brusie, and when she

ignored me, brought a further Federal action. Again the same result in 2010—bringing it to Ms. Brusie was not enough, I am required to bring these issues to the ZBA. And here I am.

Now Mr. Hayes is telling you that I cannot bring these issues before you. At a minimum, this would be contrary to District Court and Court of Appeals direction, and if you do not consider them, this would only open the door to my return to Federal court. This time having appealed to the ZBA.

But the issue of the Building permit is more serious than a mere oversight. The building permit which the applicants rely upon bears an indecipherable signature. In a deposition before the Federal court, Donald Smith, the Code Enforcement Officer says it is not his signature and he did not sign it.

If the building permit was forged, that is a crime.

You might say, "Oh well, it would have been a waste of time and money in 2003 to review the application which would just have come to the same result." Again, that is wrong.

Between 2002 and 2003, and between 2002 and today, the law and Nextel's need for the tower have changed.

First, Amenia zoning law now requires that before granting a cell tower permit, the applicant must show that it cannot co-locate on existing towers, such as the town's tower. I get very good Verizon coverage on at my house, which is the far side of the so-called Nextel tower, and no evidence had been presented why Nextel can't locate on the existing town tower. Which by the way, would bring rent to the town's treasury.

According to the October minutes, Mr. Mandelbaum was to get an affidavit to this effect from Nextel's expert, Mr. Bertona. There is no affidavit in the file as of this morning subsequent to October 19th. There is a vague affidavit from Mr. Bertona dated October 11th, in which he says "there is a strong need" for the tower at this sight. That is a self-serving affidavit; if the Nextel antenna is relocated to the town tower, then Towerco would lost the income it is generating from Nextel to maintain this one.

In another affidavit in the file, Mr. Bertona refers to a series of color documents supposedly showing cell tower signal strength. His affidavit there doesn't say when those studies were made nor does it identify the frequencies.

This is particularly important because starting in 2004 Nextel has changed its radio frequencies to avoid interfering with emergency radio communications. and so data from 2002 tests would be useless.

There is another important change. Since 2002, the town has created its "scenic overlay district" and the cell tower is in the heart of it. I find is rather frustrating that I cannot cut trees or build a house on that part of my land overlooking DeLaVergne Hill and yet the biggest eyesore in town sits 100 feet from my property line.

Mr. Hayes, no doubt knowing the issue was also raised — and by the way, again uncontradicted in Federal court — that based on the "site plan" the tower is 152 feet from my property line and since the tower is 130 feet, that provides a safe "fall zone." I have examined the site plan on which Mr. Hayes bases that claim. It is not a survey, and the scale is 1"=100 feet. A defy anyone to calculate precisely 152 feet from that scale.

The reason that Nextel and Towerco do not wish you to see a survey, which would perhaps be more exact, is that in Federal court is was shown to be erroneous, and for example, relied on a "stone wall" marking my property where there is no stone wall. An affidavit was submitted in Federal court, and undisputed, that an "eyeball to eyeball" reading of the distance between my property line and the tower measured by a calibrated rangefinder is less than 120 feet and so there is no a safe fall zone. I challenged Nextel to produce the "survey" and show you where the stone wall is.

The final issue, which Mr. Hayes says I can raise, is whether there is shrubbery screening between the tower and my property. I have previously submitted pictures to this court showing that the promised "shrubbery" in the direction of the road and the Murphy project is a joke, and there is ABSOLUTELY NO screening between the tower station and my property line.

I believe the solution for this is to recognize that under New York law the

building for the tower is a nullity, and to require Nextel or Towerco to relocate with the other cell companies on the town tower. It will cost Nextel nothing, Towerco some rent, and make a lot of people in Amenia happy.

While this may be a problem, Nextel has revenues of $8.3 billion in the first quarter of 2011, and Towerco's revenues for 2010 were $124.9 million, so this tower is of relatively little economic significance.

I would respectfully ask that if Messrs. Mandelbaum or Hayes wish to make arguments of law in opposition to the questions I raised here, that they do so in writing so we have a full record.

Thank you,

Don Rosendale