

The Edgemont Community Council, Inc.

Founded in 1947 to determine community opinion on civic matters and coordinate community action thereon and to plan and promote the general welfare of the community embraced within Union Free School District #6.

Post Office Box 1161

Scarsdale, New York 10583

Website:

www.edgemontcommunitycouncil.org

Facebook:

www.facebook.com/EdgemontCommunityCouncil

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January 5, 2012 – Public Forum on Cell-Phone Antennas in Residential Neighborhoods

Welcome. I'm Geoff Loftus, and I'm the president of the Edgemont Community Council. Before we get started, I'd like to thank David and Holly Younger who were so instrumental in making this meeting happen, and all the people in Edgemont who helped make tonight's meeting happen by reaching out to me, to other ECC directors, and to Supervisor Paul Feiner. You made it clear you felt strongly about this, and I thank you for all your help.

The main portion of this meeting will be a presentation on the legal issues surrounding NextG's application to install antennas in residential areas, followed by a Question & Answer period.

However, we have some news that developed late this afternoon that may be very good news:

As of Dec. 16, 2011, Crown Castle announced that it had reached agreement to acquire NextG. Crown Castle holds an exclusive license to operate wireless facilities on State property including right-of-way on roads such as Central Avenue, Dobbs Ferry Road and Saw Mill River Road. Crown Castle's purchase of NextG would remove any impediment to NextG's use of the right-of-way, and that was the primary reason for NextG's request for a special permit.

Michelle McNally, a former ECC president and member of the Antenna Board of Review, has written to Greenburgh Town Supervisor Paul Feiner as an individual, urging him to refer NextG's application back to the Review Board, and late this afternoon, Mr. Feiner said he intends to do so.

The long and the short of this is: Since NextG, as a part of Crown Castle, should now be able to provide service without installing residential-area antennas, it is highly unlikely it will be granted a special permit to do so. At least, that's what we think will be the case, but we haven't heard from NextG yet on this new development, so we can't say for sure that will be the case. But we think it will.

Now, if you want to go home and enjoy this news, please feel free to go. If you want to stay and discuss the issues as we were planning to before this good news, I'd like to explain how we got here tonight:

1. The ECC has been following the NextG situation closely since its inception;
2. ECC has provided input to the Town in an effort to protect Edgemont's best interests;
3. We have publicly posted all of our communications with the Town on this, which everyone can view on our FB page and/or ECC website;
4. Despite the ECC's efforts, and largely due to the Town Supervisor's misleading statements regarding federal law, state law, situations on Long Island and the role of the Antenna Review Board, there is a good deal of misinformation floating around the community; and
5. Because of this the ECC felt it important to host this meeting

Town Supervisor Paul Feiner asked the ECC if some of our lawyer members could give him some direction on the issues involved in the NextG application.

The ECC was happy to comply. Our lawyer members felt that there were a few key points:

- Federal law is not at issue in this case. Let me repeat that: Federal law is not controlling in this instance.
- State law is not at issue, either. There has been concern that NextG is a public utility and therefore not subject to local zoning – however the New York State Public Service Commission has not listed NextG as a utility, so it is, in fact, subject to Greenburgh's law. Sorry to be redundant, but let me repeat: State law is not involved here.
- However, Greenburgh's law is controlling in this situation, and it does not allow the installation of cell-phone antennas in residential areas without a special permit. Getting a permit requires the applicant, in this case NextG, to prove that the only way it can deliver service is by installing in residential areas.
- We don't believe there are any residential area cell phone antennas anywhere in the Town at the moment. And the reason for that is that cell phone carriers have so far been able to locate their antennas in the Town's nonresidential areas without limiting their ability to provide good coverage.
- Furthermore, we now believe, as Bob will explain, that there are several good reasons why NextG has not met – and cannot meet – the requirements in Greenburgh for a special permit to locate antennas in our residential areas.

In other words, the town already has adequate legal protection against the installation of residential-area antennas.

Despite the ECC guidance Mr. Feiner asked for and received, he has continued to claim that there are federal and state legal issues. The ECC has repeatedly asked him to follow the Town's own law and to do it in public sessions.

Mr. Feiner has also repeatedly said he prefers informal meetings because they are more productive. We've pointed out that the informal approach wasn't such a good idea in the Fortress Bible case, where a church was told privately it would get approval to build if it would donate a fire truck, which it refused to do, and the Town's since been found guilty by a federal court of violating the First Amendment rights of an African American church – it was certainly not a good idea in the Valhalla case, where residents of the Mayfair Knollwood part of Town were told privately their school district would get millions of dollars in town revenues if they would drop their opposition to continued operation of a homeless shelter on the WCC campus, a deal which was found to be illegal -- and we've strongly urged him not to engage in private deals with anyone here with respect to NextG.

In response to our e-mails, Mr. Feiner has also said, on the record, "I want to make sure that my position on the NextG application is not misrepresented. I do not support the siting of these antennas in residential areas." He also said that the only thing that counts is how he votes on this issue. We replied that all of Edgemont would wait for his vote.

As mentioned before Michelle McNally has written as an individual to the entire Town Board, explaining that she felt the NextG's application should be referred back to the Review Board, and Mr. Feiner has said that is what he intends to do.

The Town Board will have an open meeting on the NextG application on January 25th at Town Hall.

That's the situation report as of the moment. Now I'd like to turn the meeting over to Bob Bernstein, who will give us a deeper look at the legal issues and history involved here.

Bob is a director and former president of the ECC. He is also the former president of the Greenridge Association and was recognized for his service to Edgemont with the Silver Box Award in 2005. Most recently Bob collaborated with Herb Rosenberg of Dobbs Ferry on successfully intervening to defend the Town of Greenburgh against the \$4.6 million lawsuit brought against the Town by the Valhalla School District, and not only succeeded in defeating Valhalla's claims but recovered \$1.8 million for the Town's taxpayers. Bob received his law degree at the University of Virginia School of Law, is a senior litigation partner in the law firm of Vandenberg & Feliu in Manhattan, and is a member of the American Bar Association, the New York State Bar Association and the Bar Association of the City of New York.

Legal Presentation by Bob Bernstein (these are Bob's notes, and not a verbatim quote from what he actually said):

A) History of Application

- a. Who is the applicant? NextG. NextG is a reseller of cell phone antenna systems. They are one of the largest providers of outdoor distributed cell phone antenna systems (DAS) in the U.S. A DAS is a network of cell phone antennas and repeaters connected by fiber to a communications hub designed to facilitate wire communications services for multiple operators.
 - b. What is the proposal? NextG wants to install its antennas on existing telephone poles in a number of residential areas in Edgemont.
 - c. All told, there are 21 separate applications for 21 separate “nodes” to be placed on telephone poles. The locations in Edgemont are 155 Highland Road, corner of Sprain Brook Parkway and Jackson Avenue, 2 Skytop Drive, Ardsley Road (north of Sprain Valley Road), 35 Sprain Valley, 404 Ardsley Road, Clifton Road (east of Central Avenue), 3 Longview Drive, 644 Fort Hill Road, 400 Underhill Road, 37 Sprain Road, corner of Westminster Road and Ardsley road, and 11 Old Army Road. There are also several other locations through the town on Greenburgh.
 - d. NextG originally approached the Town about two years ago with its plan to install its DAS system on telephone poles in these residential neighborhoods. At the time, NextG took the position that, even though it was locating these antennas in residential neighborhoods, because it was locating its antenna system on telephone poles along the Town’s right of way, the Town could enter into a franchise agreement with NextG so that, in exchange for a payment of money by NextG, the Town would grant NextG exclusive rights to use the telephone poles along the Town’s right of way in these residential neighborhoods.
 - e. The Town sat on the proposal for about a year when someone, we don’t know who, notified the Town’s Antenna Review Board that this was an application that, under the Town Code, came under its jurisdiction to review.
- B) What the Greenburgh Town Code provides: In Greenburgh, location of cell phone antennas come under the jurisdiction of the Town’s Zoning Code. The section of the Town Code dealing with cell phone antennas was adopted in 1996 and 1997, and went into effect in 1998. It provides that most cell phone antennas can be located “as of right” in non-residential areas of the Town, and there is a list of them in the Code. Generally, you’ll find them along major roads and highways, like Central Avenue. “As of right” means that as

long as the cell phone company's application is complete, it can get a building permit to install its antenna without having to get any board permission to do so. However, cell phone antennas may also be located in residential areas, but because the Greenburgh Zoning Code prefers to have these antennas located in nonresidential areas, cell phone antennas may only be installed in residential areas by special permit granted by the Town Board. Now, to get a special permit to locate in a residential area, the cell phone company must show that in order to fill in gaps in cell phone service, it must locate antennas in a residential area because it has either exhausted all nonresidential areas in which such antennas could be located, or it would be technical or space limitations prevent location in nonresidential areas. Health risks are not a valid consideration. Indeed, it would be contrary to federal law for a local municipality to deny an application to locate a cell phone antenna on health risk grounds.

- C) Once the Antenna Review Board became aware of NextG's application, it notified the Town Attorney that this was an application that must go before the Antenna Review Board. NextG initially argued, we understand, that it was a utility that had a right to have access to the telephone poles in the Town's right of way, but it turns out that all NextG has from the state Public Service Commission is a "certificate of public convenience and necessity" and by letter from the PSC dated September 22, 2010, the Town was notified that companies with such certificates must still comply with local zoning laws. Accordingly, the NextG application – or rather its 21 applications – were referred to the Antenna Review Board.
- D) What the Antenna Review Board does: The Antenna Review Board consists right now of four individuals whose job it is to determine that the applications are complete. There are a number of requirements that must be met before any application is deemed complete. Among other things, there have to be all sorts of technical specifications provided to ensure compliance with federal health and safety guidelines. And if an application is for a "special permit," the Antenna Review Board first tries to find ways in which the applicant can locate in nonresidential areas and thereby proceed "as of right." Usually applicants appreciate that effort because locating as of right saves time and money in not having to obtain Town Board approval.
- E) What happened here: The Antenna Review Board showed NextG numerous alternate sites along Central Avenue, on towers and on telephone poles, all in nonresidential neighborhoods, but at the end of the day, the Antenna Review Board accepted a written representation by NextG that it could not get permission to locate there, and certified the 12 applications as having been complete. That process took about a year. Unfortunately, there was no substantiation in writing to demonstrate that NextG could not locate in nonresidential areas. That was a mistake.

- F) Once the Antenna Review Board certified the applications as having been complete, the Town Board commenced public hearings on November 30 and again on December 14 on NextG's applications for a special permit to locate its antennas in these residential neighborhoods. The Town Board has adjourned the hearing until January 25, 2011.
- G) After the December 14 hearing, Supervisor Feiner asked the ECC if its lawyer-members could look into the legal issues surrounding the NextG application. In the process of doing that, questions were raised as to whether there was any written substantiation, i.e., evidence to support, NextG's written representation in the applications that it "could not obtain any permission" to locate its antennas on telephone poles in the state's rights of way, which are all located in nonresidential areas. It turned out there was no written substantiation of that representation.
- H) In addition, we and ARB member Michelle McNally learned of a July 18, 2011 filing by NextG with the Federal Communications Commission in Washington which suggested in pertinent part that NextG could obtain access to state rights of way in New York from Crown Castle Co., which had an exclusive right to such access, but only if it paid Crown Castle an access fee. That filing suggested that, contrary to the written representations NextG made in its applications for a special permit in Greenburgh, NextG could obtain the necessary permission to locate in nonresidential areas provided it agreed to pay the access fee.
- I) On top of that, we and ARB member McNally learned that, as of December 16, 2011, Crown Castle had announced that it was acquiring NextG which transaction, once approved, would appear to remove all impediments to locating these antennas in nonresidential areas in Greenburgh.
- J) Based on the lack of substantiation of its representation that it couldn't obtain permission, and the new information about the access fee and acquisition by Crown Castle, ARB member McNally wrote to the Town Board and requested that, instead of taking action on the special permits, NextG's applications instead be referred back to the Antenna Review Board for further consideration. We are hopeful that the Town Board will in fact refer the matter back to the ARB.
- K) We don't know yet what NextG's response will be to these new developments, so we can't so far sure how this matter will be fully and finally resolved.
- L) One thing we can say for sure is that this problem would never have occurred if residents affected by these applications were given written notice when the applications were originally "filed" with the Town instead of when they were deemed "completed." Town Code currently requires written notice to property owners within 250 feet of a proposed antenna only when the applications are deemed completed. Under that process, residents

are deprived of the opportunity to participate in proceedings before the Antenna Review Board to determine whether an application has been properly completed.

- M) In September 2008, the ECC proposed a written amendment to the Town's Antenna Law which would have given residents of unincorporated Greenburgh the right to legal notice whenever a cell phone antenna application is filed within 500 feet of a property owner's home. This would have guaranteed legal notice to residents even for those applications close enough to homes in residential areas that are deemed "as of right" in nonresidential areas. And once residents received such notice, they would know when these applications would be heard by the Antenna Review Board and could participate in the process of making sure these applications are properly vetted. Furthermore, our amendment would have given residents the legal right to challenge any determination as to completeness by the Antenna Review Board. Even though the amendment was proposed in writing and presented to a work session of the Greenburgh Town Board, not one member of the Town Board was willing to introduce it, much less support it. Lawyers representing cell phone antenna companies, who were present for the Town Board's work session, opposed the amendment.
- N) Had this ECC proposed amendment been introduced and become law, residents who are directly affected by the NextG applications would have been given legal notice of these application long ago and could have played an important role before the Antenna Review Board in reviewing these controversial applications.
- O) Residents who support this important reform should contact members of the Town Board and demand that they introduce and support this ECC proposed amendment so that in the future, all residents directly or indirectly impacted by cell phone antennas in their neighborhoods will receive written notice when these applications are filed – not when they are completed.