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REPLY TO:

TARRYTOWN OFFICE

December 27, 2017

Honorable Chairman William Rice and
Members of the Zoning Board
Village of Nelsonville
258 Main Street
Nelsonville, NY 10516

RE: Homeland Towers, LLC, New York SMSA Limited Partnership d/b/a Verizon Wireless and New Cingular Wireless PCS LLC d/b/a AT&T, Proposed Public Utility Personal Wireless Communication Facility
15 Rockledge Road, Nelsonville, NY

Dear Hon. Chairman Rice and
Members of the Zoning Board of Appeals:

We are the attorneys for Homeland Towers, LLC ("Homeland Towers") and New York SMSA Limited Partnership d/b/a Verizon Wireless ("Verizon Wireless") in connection with the above referenced matter. New Cingular Wireless PCS LLC ("AT&T") is represented by Daniel Laub, Esq., of Cuddy & Feder LLP.

The applicants propose a public utility personal wireless communication facility ("Facility") consisting of a 110-foot monopole designed to resemble a tree, together with related equipment at the base thereof within a multi-carrier equipment compound.

In response to comments from the Zoning Board, the Planning Board and the public, we respectfully offer the following information and enclose seven (7) copies of the following documents and a disk with all of the enclosed submissions:

1. Tribal Consultation: Submitted herewith is an email from Algonquin Consultants, dated November 28, 2017, confirming that consultation is complete with respect to the Wyandotte Nation.

2. Visual Resource Assessment: Submitted herewith is a response from Saratoga Associates, dated December 19, 2017.

3. Alternative Site Analysis: Submitted herewith is the Fourth Supplement to the Area Analysis, dated December 27, 2017, from Vincent Xavier.

4. Radio Frequency Engineering Report: Submitted herewith is the Supplemental Report Regarding the Philipstown Cell Solutions Group Report, dated December 18, 2017, including, among other things, actual drive test data demonstrating the need for the facility for Verizon Wireless and confirming that the site will provide personal wireless services.

   We note that various commentators have suggested that the applicants must demonstrate that they have a significant gap in service. This is incorrect. The Village Code, Section 188-68.A(1), merely requires "a report providing documentation of an actual need by an actual provider of communications services for the construction of the tower in order to provide communications services." The purpose of the Code provision is clearly intended to prohibit towers built on speculation. The Code does not require that an applicant prove that it provides personal wireless services or has a significant gap. Courts have held that a municipality lacks substantial evidence to support its decision where the municipality imposes a burden not required under state or local law, [*See New York SMSA Ltd. P'ship v. Vill. of Floral Park Bd. of Trustees*, 812 F. Supp. 2d 143, 154 (E.D.N.Y. 2011); *See also Verizon Wireless (VAW) LLC v. Douglas County, Kan. Bd. of County Comm'rs*, 544 F.Supp.2d 1218, 1245 (D.Kan.2008)], and where the municipality relies on an error of law. *See Crown Castle NG E. Inc. v. Town of Greenburgh*, N.Y., 552 F. App'x 47, 50 (2d Cir. 2014); *See also Omnipoint Commc'ns, Inc. v. Vill. of Tarrytown Planning Bd.*, 302 F. Supp. 2d 205, 219 (S.D.N.Y. 2004). Local governments who abuse their discretion by imposing burdensome, unwritten requirements on wireless providers effectively prohibit service. *See Vill. of Floral Park Bd. of Trustees*, at 155 ("[A] local zoning commission, which acts in an administrative capacity when considering an application for a special permit, does not have discretion to deny the permit if the proposal meets the relevant standards enumerated in the regulations."); *See also, TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002) (holding that a provision in a city ordinance that gave the local board the discretion to consider "public interest factors . . . that are deemed pertinent by the City" amounts to an effective prohibition on service); *Qwest Commc'ns Corp. v. City of New York*, 387 F.Supp.2d 191, 193 (E.D.N.Y. 2005) (disapproving city's "unfettered discretion" to approve or disapprove a franchise application); *TC Systems, Inc. v. Town of Colonie*, New York, 263 F.Supp.2d 471, 483 (N.D.N.Y. 2003) (striking down an ordinance that gave a town discretion to impose various requirements on applicants).

   In any event, the administrative record demonstrates that both AT&T and Verizon Wireless have significant gaps in personal wireless services in the Village.

Likewise, there is no legal basis for the Zoning Board to consider whether the service being provided is voice as opposed to broadband data service as both forms of service are telecommunications services protected by both Sections 332(c) and 253 of the Telecommunications Act.

In 2007, the FCC issued a decision in *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 F.C.C.R. 5901 (March 22, 2007) ("the 2007 Declaratory Ruling"), "concluding that wireless broadband Internet access service was an 'information service' because it 'offers a single, integrated service to end users, Internet access, that inextricably combines the transmission of data with computer processing, information provision, and computer interactivity, for the purpose of enabling end users to run a variety of applications' which, 'taken together constitute an information service as defined by the Act.'" 22 F.C.C.R. at 5911, ¶ 26 (footnotes and internal quotation marks omitted). *Clear Wireless LLC v Bldg. Dept. of Vil. of Lynbrook*, 55 Communications Reg. (P&F) 740 (EDNY 2012).

The FCC went on to hold in the 2007 Declaratory Ruling that, although classifying wireless broadband Internet access service as an information service, the limitations in Section 332(c)(7)(B) remained applicable to siting applications if the service was part of the same infrastructure as a personal wireless service. Specifically, the FCC stated:

> ... [W]e find that section 332(c)(7)(B) would continue to apply to wireless broadband Internet access service that is classified as an "information service" where a wireless service provider uses the same infrastructure to provide its "personal wireless services" and wireless broadband Internet access service. We find that classifying wireless broadband Internet access services as "information services" will not exclude these services from the section 332(c)(7) framework when a wireless provider's infrastructure is used to provide such services commingled with "personal wireless service." Commingling services does not change the fact that the facilities are being used for the provisioning of personal wireless services. Therefore, application of section 332(c)(7) should remain unaffected. This interpretation is consistent with the public interest goals of this provision and ensures that wireless broadband Internet access service providers continue to use existing wireless infrastructure to rapidly deploy their services. This result is also consistent with the Commission's commitment to its national broadband policy goals "to promote the deployment of advanced telecommunications capability to all Americans in a reasonable and timely manner."

22 F.C.C.R. at 5923–24, ¶ 65 (footnotes omitted).

The supplemental RF engineering report from PierCon, dated December 18, 2017, confirms that the proposed facility will provide personal wireless services. Accordingly, the limitations of the federal Telecommunications Act of 1996 apply to this application. We wish to note for the record that, upon information and belief, Mr. Comi is not a radio frequency engineer, not a professional planner, not a professional engineer or architect, not a professional appraiser, and not an attorney. Attached please find: (1) News article from the Wireless Estimator; and (2) Court transcript in *MetroPCS New York, LLC v. Mount Vernon.* Accordingly his testimony should be given the requisite weight.

5. Right-of-Way Access: We are in receipt of the November 27, 2017 letter from Mark Blanchard of Blanchard & Wilson LLP, representing the property owners of 16 Rockledge Road, and would like to respond to certain comments made in the letter. The letter references certain cases to make an argument that the Zoning Board cannot grant the approvals requested because it would interfere with the private easement rights between the neighbors. Again, we would like to reiterate that it is well-settled law that the venue for these types of claims is not before this Honorable Board and these issues are not to be included in a decision on whether or not to award a permit. "The issuance of a permit of a use allowed by a zoning ordinance may not be denied because the proposed use would be in violation of a restrictive covenant." *Friends of Shawangunks, Inc. v. Knowlton*, 64 N.Y.2d 387, 392 (1985). In addition, the owners of 16 Rockledge, being represented by counsel, are mistaken in bringing these issues before this Honorable Board as "[the] sole remedy for an alleged violation of the easement is a private action against [the private party] and not the denial of a use allowed by the Zoning Ordinance." *Gersten v. Cullen*, 610 N.Y.S.2d 675, 676 (3d Dep't, 1994). The Zoning Board's own counsel has previously agreed that the applicants have made a *prima facie* showing that they have legal access to the property.

Furthermore the cases that counsel references in his letter are not relevant to the issues they are attempting to bring before this Board. The Court of Appeals' decision in *Lewis v. Young* involved whether or not a landowner could move a right-of-way easement and found that a landowner could move a right of way easement "so long as the landowner bears the expense of the relocation, and so long as the change does not frustrate the parties' intent or object in creating the right of way, does not increase the burden on the easement holder, and does not significantly lessen the utility of the right of way." *Lewis v. Young*, 92 N.Y.2d 443 (1998). The cases that follow, *Mazzaferro v. Association of Owners of Mill Neck Estates, Inc.* and *Guzzone v. Brandariz*, also both only speak to whether or not a landowner may relocate a right-of-way easement, and the limitations that come with such a unilateral relocation by the landowner. These cases are not relevant to the issue that

counsel is again *wrongly* trying to bring before this Honorable Board, which is that the specific easement between these neighbors did not confer the rights to install utilities or improve the access road/private driveway.

In addition to these cases not being directly relevant, these cases do not refute the line of cases that was presented to this Honorable Board in my November 15, 2017 letter, which state that "[i]t is only 'where the easement expressly exists [solely] for the right of ingress and egress' that the rights under that easement do not include the right install underground utility lines..." *Philips v. Iadarola*, 917 N.Y.S.2d 392, 394 (3d Dep't, 2011). Furthermore the holding in the *Philips* case was cited favorably by the Second Circuit of United States Court of Appeals to support a similar finding that a right-of-way easement allowed for the installation and burying of "one-inch pipes under [the plaintiff's] easement to extract water." *See Koep v. Holland*, 593 Fed.Appx. 20, 24 (2d Cir. 2014). Moreover, the Second Department Appellate Division has held that where an easement is granted in general terms "the extent of its use includes any reasonable use necessary and convenient for the purpose for which it is created" *Hoffman v. Delbeau*, 139 A.D.3d 803 (2d Dep't, 2016).

Therefore, the applicants do have the necessary property rights to file the applications that are currently before this Honorable Board and to complete the proposed work that is the subject of the filed applications. In addition, and it should not be understated, any potential dispute between the private property rights of these neighbors should not be included in this Board's zoning decision. Private property right disputes, such as those outlined in the November 27, 2017 letter, should resolved between the parties amicably or in a court of law, and should no longer be included in the review of this zoning application.

6. Site Plan Technical Comments: Submitted herewith is a letter form JMC dated December 19, 2017, a Stormwater Management Memorandum from JMC dated December 19, 2017 and Revised Site Plans. As you are aware, the Village Engineer's memo dated October 30, 2017 includes certain requested technical changes to the Site Plan. Homeland Towers has previously agreed to improve the right-of-way along the area previously documented as providing access to the property. Homeland Towers has also requested numerous times for the Zoning Board and Planning Board to indicate their preference for either the original proposed location of the access drive or the alternative access drive location along the property line as detailed on the Site Plan Sheet SK-1, Schematic Alternative Access Sketch, previously submitted for discussion based on the site visit comments related to potentially altering the proposed access drive. Since the Zoning Board and Planning Board have not indicated preference, and given the 50-foot buffer set forth in Section 188-71.C.6.a of the Village Code, the Site Plan and Stormwater Management practices have been finalized based on the original access drive location.

We look forward to the January 4th Zoning Board and Planning Board continued joint public hearing. As previously mutually agreed, the FCC Shot-Clock has been extended to January 8, 2018. We respectfully request approval of the project.

If you have any questions or require additional information, please do not hesitate to call me at (914) 333-0700.

Respectfully submitted,
SNYDER & SNYDER, LLP

By:_____
Robert D. Gaudioso

Enclosures
RDG:dac
cc: Planning Board (7 copies)
Ron Gainer (1 copy)
Ron Graiff (1 copy)
Daniel Laub, Esq.
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