

**PLANNING BOARD and ZONING BOARD OF APPEALS of the TOWN OF WALLKILL
ORANGE COUNTY, NEW YORK**

In the Matter of the Application of

**VERIZON WIRELESS OF THE EAST LP
d/b/a Verizon Wireless**

Premises: (No number) Route 302
Town of Wallkill, Orange County, New York 10919
Section 7, Block 2, Lot 21.31

**STATEMENT OF INTENT
APPLICATION FOR SITE PLAN REVIEW, SPECIAL USE PERMIT AND
AREA VARIANCES**

I. Introduction

VERIZON WIRELESS OF THE EAST LP d/b/a Verizon Wireless (“Verizon Wireless” or the “Applicant”) proposes the installation of a wireless communications facility on the property owned by the Pine Bush Central School District located at Route 302 in the Town of Wallkill, Orange County, New York (Tax Map Parcel No. 7-2-21.31). The property is located entirely within the R-2 Suburban Residential Zoning District. The proposed facility includes a new 62.3-foot utility pole, three communications antennas and related equipment, all located within a fenced sixteen (16)-foot by twenty-two and one half (21.5)-foot area on the property. The improvements are depicted on the site plans provided in Exhibit 1 attached hereto.

Verizon Wireless is considered a public utility under New York decisional law (*Cellular Telephone Company v. Rosenberg*, 82 N.Y.2d 364 (1993)) [Exhibit 2], and a provider of “personal wireless services” under the federal Telecommunications Act of 1996 (the “TCA”) [Exhibit 3]. Verizon Wireless’ equipment will be in operation twenty-four (24) hours a day, seven (7) days a week, three hundred sixty-five (365) days a year. Copies of the applicable Verizon Wireless FCC licenses are included herewith [Exhibit 4].

Pursuant to Chapter 221 of the Wallkill Town Code (known as the “Zoning Regulations”), the proposed communications facility is subject to Site Plan Review and Special Use Permit from the Town of Wallkill Planning Board. Because of its proposed location on the property, the facility will also need certain area variances from the set back requirements.

II. Purpose of Verizon Wireless’ “Circleville” Communications Facility

The purpose of the proposed facility (referred to internally as the “Circleville” communications facility) is to provide additional wireless network bandwidth (i.e. service) and improved performance to the area in and immediately surrounding. Due to heavy customer usage on Verizon Wireless’ 4th Generation LTE network generated from within this area, Verizon Wireless’ existing surrounding sites are not able to adequately satisfy the existing and emerging usage demand in this area. The RF need for this site is discussed in detail in Exhibit 5.

Specifically, the need for this site originates from a written request from Tim O. Mains, Superintendent of Schools, dated February 16, 2018, in which Mr. Mains identifies a very specific need for cellular coverage in the Circleville area, including the existing nearby public schools. Mr. Mains' letter is attached to the Site Selection Analysis prepared by Bryan Tempio and included in **Exhibit 6**.

The data and analyses, including detailed RF propagation maps and network capacity data, provided in the RF Analysis provided in Exhibit 5 are legally acceptable means by which a carrier can demonstrate proof of need for a new wireless facility. *See, New York SMSA L.P. v. Oyster Bay Zoning Bd. Of Appeals*, No. 08-CV-4833, 2010 WL 3937277 (E.D.N.Y. Sept. 30, 2010) (holding that the testimony of Verizon Wireless' RF expert, affidavits, and propagation maps satisfied applicant's burden of demonstrating coverage gap); *Nextel Partners, Inc. v. Town of Amherst, NY*, 251 F. Supp. 2d 1187, 1196 (W.D.N.Y. 2003) (which confirmed that use of RF propagations maps is an acceptable form of proof to demonstrate the need for a new site); *MetroPCS N.Y. LLC v Vill. Of East Hills*, 764 FSupp2d 441, 454 [EDNY 2011] ("[t]he failure...to introduce its customers' testimony of poor...coverage in the areas...is not fatal to the application given the evidence of a gap"); *New York SMSA Ltd. P'ship v Village of Floral Park Bd. of Trustees*, 812 FSupp2d 143, 161 [EDNY 2011] (rejecting contention that carrier must show dropped/missed calls where carrier's scientific proof of gap was unrefuted).

Note that while Verizon Wireless has provided sufficient and unrefuted evidence to establish the existence of a significant coverage gap in this case, the FCC recently confirmed that the existence of a coverage gap is not the only way to establish the need for a new site. *See, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment ("Accelerating Wireless")*, FCC 18-133, 85 FR 51867, at ¶ 37 (October 15, 2018). Paragraph 37 of Accelerating Wireless confirms that methods other than showing a significant gap in service exist to justify need for a new facility, including proof that the new facility will effectively result: (i) in the densification of a wireless network (i.e. capacity relief); (ii) in the introduction of new services; (iii) or otherwise improve service capabilities. *Id.* The RF analysis provided in the application conclusively demonstrates that the new facility is needed not only to resolve significant existing coverage gaps but also to remedy substantial capacity network issues that will lead to improved wireless service capabilities in the Town of Wallkill.

III. Description of Land Use

Verizon Wireless' proposed new communications facility will consist of the components described above, and access to the communications facility will be by the existing entrances into the premises from NYS Route 302 [see, **Zoning Drawings, sheet AD-1, Exhibit 1**].

As shown on the enclosed site plans, the total project area is a minimal portion (i.e., approx. 360 square feet) of the larger parcel [see, **Zoning Drawings C-1 and C-2, Exhibit 1**]. These drawings also show the size and location of the associated equipment.

The proposed communications facility will be unmanned, and will be visited for routine maintenance purposes approximately 1 - 3 times per year (only as needed). Subsequent to installation of the pole, specialized vehicles will not be required for routine maintenance. As such, the project will not have any impact on existing water and sewage services. In addition, neither pedestrian nor vehicular access to the premises will be impacted [see, **Zoning Drawings at Exhibit**

1]. Subsequent to installation of the pole, specialized vehicles will not be required for routine maintenance.

IV. Compliance with Special Use Permit and Site Plan Review Requirements in Town Zoning Ordinance

The inclusion of a special permitted use (also known as a special exception or conditional use permit) in a local zoning ordinance is tantamount to a legislative finding that the use is in harmony with the general zoning plan and will not adversely affect the neighborhood in which the special use is proposed to be located. *Matter of North Shore Steak House v. Board of Appeals of the Incorporated Village of Thomaston*, 30 N.Y.2d at 243 [1972], citing 2 Rathkopf, *Law of Zoning and Planning*, Ch. 54, pp. 54-3 - 54-4; *Matter of Reed v. Board of Standards and Appeals*, 255 N.Y. 126; *Matter of Syosset Holding Corp. v. Schlimm*, 4 A.D.2d 766; *Matter of Bard Harbour Shopping Center v. Andrews*, 23 Misc.2d 894; see also, *Robert E. Lee Realty Co. v Village Spring Valley*, 61 NY2d 892, 893, 474 NYS2d 475 [1984]. In other words, by determining that wireless communications facilities, such as that proposed, are allowed upon issuance of a special use permit, the Town of Wallkill Town Board made an express finding that a new wireless communications tower located in the existing zoning district is in accord with the general zoning plan for the town.

Except as noted below, Verizon Wireless' proposed communications facility complies in all material respects with the Special Use Permit and Site Plan Review requirements in Chapter 221 of the Town of Wallkill Zoning Ordinance.

- A. **Completed Town application form for site plan review and special use permit:** A complete Planning Board application, as provided by the Town, is completed and attached in front of this Statement of Intent.
- B. **Intent of Owner:** An authorized employee/officer of the Pine Bush Central School District has completed the Owner's Endorsement, advising the board Applicant's permission to seek approval for Special Use Permit and Site Plan Review. [See Application, *supra*]. (§ 221-6(C)(6)).
- C. **Site Plan:** A site plan prepared by a New York State Licensed Professional Engineer and showing all existing and proposed structures and improvements, details about the proposed small cell, location of fencing, as well as property boundaries is included at **Exhibit 1**. (§ 221-6(C)).
- E. **Non-Interference:** While a matter of federal jurisdiction, the Applicant has submitted a report certifying that the proposed facility will not interfere with communications devices operating in the surrounding vicinity. See, **Exhibit 7** (§ 221-6(G)).
- F. **Full EAF:** In accordance with the applicable provisions of the State Environmental Quality Review Act ("SEQRA"), the Applicant's consultant engineers have also provided a full environmental assessment form ("EAF") [**Exhibit 8**].
- G. **FCC Licenses:** The Applicant's FCC licenses for the Orange County area are provided at **Exhibit 4**. (§ 221-5(B)).

- H. **Signs:** Only warning/safety signs as required by our FCC licenses will be placed on site. (§ 221-7(D)(1)).
- I. **Visual Impact:** There will be no requirement for FAA marking and/or lighting as a result of this project. In addition to the visual EAF Addendum the Applicant has included a visual analysis with photo simulations to demonstrate that the proposed facility will not result in any significant visual impacts. *See, Exhibit 9.*
- J. **Access:** the existing access drive and parking area will be used, with no modifications proposed. As noted, the facility will be unmanned and visited for routine maintenance purposes approximately 1 -3 times per year or as otherwise needed. Accordingly, no pedestrian, vehicular access or parking issues exist. (§ 221-7(E)).
- K. **Removal:** The applicant agrees to remove the antenna if the communications facility ceases to be used for its intended purpose for six consecutive months. *See, Exhibit 10.*

V. **Required Variances**

This project as currently designed requires an area variance from two (2) setback requirements. The Zoning Law requires new towers to be set back from existing property lines a distance equal to the height of the tower (62.5 feet) plus fifty (50) feet. In this case, a 112.5-foot setback is required. A 58' rear setback and 80' side setback is proposed. The second variance required relates to the need for each new tower to be set back a distance equal to 1,000 feet from an existing dwelling. There one (1) dwelling within 1,000 feet of the proposed tower. *See, Exhibit 1, Sheet SB-1, which confirms that the proposed structure is located within 776' of the closest residence. The tower regulations prohibit new towers from being located within 1,000' of existing dwellings. A variance will be required.*

Rosenberg Standard

In *Rosenberg*, the New York Court of Appeals determined that cellular telephone companies are public utilities for purposes of zoning. The Court held that proposed cellular telephone installations are subject to the traditional standard afforded to public utilities, rather than the standards generally required for non-public utility uses:

It has long been held that a zoning board may not exclude a utility from a community where the utility has shown a need for its facilities. There can be no question of [the carrier's] need to erect the cell site to eliminate service gaps in its cellular telephone service area. The proposed cell site will also improve the transmission and reception of existing service. Application of our holding in *Matter of Consolidated Edison* to sitings of cellular telephone companies, such as [the applicant], permits those companies to construct structures necessary for their operation which are prohibited because of existing zoning laws and to provide the desired services to the surrounding community. . . . Moreover, the record supports the conclusion that [the applicant]

sustained its burden of proving the requisite public necessity. [The applicant] established that the erection of the cell site would enable it to remedy gaps in its service area that currently prevent it from providing adequate service to its customers in the . . . area.

Id. at 372-74 (citing *Consolidated Edison Co. v. Hoffman*, 43 N.Y.2d 598 (1978)).

This special treatment for public utilities arises from the essential nature of the service provided, and the fact that a public utility transmitting facility must be located in a particular area in order to provide service to such area. For instance, water towers, electric switching stations, water pumping stations and telephone poles must be in particular locations (including within residential districts) in order to provide the utility to a specific area:

[Public] utility services are needed in all districts; the service can be provided only if certain facilities (for example, substations) can be located in commercial and even in residential districts. To exclude such use would result in an impairment of an essential service.

Anderson, New York Zoning Law Practice, 3d ed., p. 411 (1984) (hereafter "*Anderson*"). *See also*, *Cellular Tel. Co. v. Rosenberg*, 82 N.Y.2d 364 (1993); *Payne v. Taylor*, 178 A.D.2d 979 (4th Dep't 1991).

Accordingly, a municipality may not prohibit facilities, including towers, from any portion or area in the municipality if location of the facility is determined to be necessary for the transmission of public utility services. In *Rosenberg*, 82 N.Y.2d at 371, the court found that "the construction of an antenna tower... to facilitate the supply of cellular telephone service is a 'public utility building' within the meaning of a zoning ordinance." *See also Long Island Lighting Co. v. Griffin*, 272 A.D. 551 (2d Dep't 1947) (a municipal corporation may not prohibit the expansion of a public utility where such expansion is necessary to the maintenance of essential services).

VI. Public Necessity

As noted above and in Exhibits 2 and 3, Verizon Wireless is recognized as a public utility under New York law and a provider of personal wireless services under the federal Telecommunications Act of 1996. This project is a public necessity in that it is required to render adequate and safe 4G hand-held telephone service (mobile and in-building) to a portion of the Town of Wallkill.

Location of a new facility at the proposed location will enable Verizon Wireless to address a significant gap in wireless services in the immediate, high-traffic area, thereby enhancing the public health, safety, welfare and convenience by providing businesses and individuals with efficient, state-of-the-art 4G communications services police, fire and other emergency or non-emergency use. This, combined with the federal mandate to expeditiously deploy advanced 4G wireless services across the nation and Verizon Wireless' FCC licenses to provide such services in the Town of Wallkill, demonstrates that Verizon Wireless' facility is a public necessity. Without the construction of the communications facility proposed, the public would be deprived of an essential means of communication, which, in turn, would jeopardize the safety and welfare of the community and traveling public. Locating the proposed facility adjacent to a public school is critical to providing for the safety and welfare.

VII. Compelling Reasons for Approval

As discussed in the Applicant's Radio Frequency Analysis, the Verizon Wireless network (mobile and in-building communications) in this portion of the Town of Wallkill reached maximum a few years ago. The Applicant's Radio Frequency (RF) Design Engineer has demonstrated that by locating the facility on the property at the height proposed, Verizon Wireless can maintain an adequate and safe level of service to this area.

As noted above, the Applicant has proposed a facility that will enable Verizon Wireless to provide adequate and safe coverage to an important area of the Town of Wallkill, in accordance with its FCC licenses. By limiting the proposed facility to less than 65' the Application is able to minimize potential visual impacts to the greatest extent practicable.

In sum, approval of the Circleville communications facility will enable Verizon Wireless to provide an adequate and safe level of hand-held 4G wireless telephone service to the immediately surrounding area of the Town of Wallkill, within the confines of applicable technological limitations and all or substantially all land use requirements. The communications facility will benefit, and will not be detrimental to, the public health, safety, morals and welfare. Given the small degree of potential visual impact and site-specific design measures discussed above, this project will not be injurious to the use and enjoyment of other property in the immediate vicinity.

VIII. Federal Communications Commission Shot Clock Requirement

The proposed application is subject to the mandatory review time frames established by the Federal Communications Commission ("FCC") Declaratory Ruling dated November 18, 2009 (WT Docket No. 08-165, 24 F.C.C.R. 13994). This is known within the industry as the "Shot Clock" rule.

The Shot Clock requires that all necessary approvals for the proposed project (including any variances, site plan approval and the building permit) must be acted upon within 150 days of receipt by the local municipality.

For the town's convenience, a summary of the FCC Shot Clock requirements as they relate to the proposed application is provided in **Exhibit 11**, attached hereto and made part hereof.

IX. Conclusion

Approval of this project is in the public interest in that it will allow Verizon Wireless to comply with its obligation to build out its wireless network and provide local businesses, residents and public service entities with safe and reliable wireless communications services. For the reasons set forth herein, Verizon Wireless respectfully requests the ZBA to issue the required variances. Upon issuance of such variances, the Applicant respectfully requests the Planning Board to grant the requested Site Plan Approval and Special Use Permit.

Attached to this Application and Statement of Intent are the following:

1. Zoning Site Plan prepared by Tectonic Engineering;
2. Documentation of Public Utility Status and Overview of the *Rosenberg* Decision;

3. Overview of Telecommunications Act of 1996;
4. Copies of Verizon Wireless' FCC Licenses for the Orange County area;
5. Radio Frequency Analysis;
6. Site Selection Analysis prepared by Network Building & Consulting;
7. Non-Interference letter prepared by the Verizon Wireless RF Engineer;
8. Full Environmental Assessment Form ("EAF") prepared by Tectonic Engineering;
9. Visual Analysis prepared by Tectonic Engineering;
10. Removal letter prepared by the Verizon Wireless Engineer;
11. FCC Show Clock Summary;
12. Removal Bond;
13. Proof of Insurance; and
14. Proof of Compliance with FCC Emissions Requirements.

Kindly place this matter on the agenda for discussion at the next meetings of the Town of Wallkill Planning Board and Zoning Board of Appeals. In the meantime, if you should have any questions or require any additional information, I can be reached at (518) 438-9907.

Thank you for your consideration.

Respectfully submitted,
VERIZON WIRELESS OF THE EAST LP
d/b/a Verizon Wireless



Scott P. Olson, Esq.
Regional Local Counsel

Dated: March 4, 2021