

VILLAGE OF NELSONVILLE
STATE OF NEW YORK

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In the Matter of the Application of

**Homeland Towers, LLC, New York SMSA Limited
Partnership d/b/a Verizon Wireless and New Cingular
Wireless PCS LLC b/b/a AT&T**
for a Special Use Permit

Premises: 15 Rockledge Road
Nelsonville, NY 10516

**MEMORANDUM
IN OPPOSITION**

Special Use Permit

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MEMORANDUM IN OPPOSITION

Respectfully Submitted,

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Preliminary Statement

This memorandum is being submitted by, and on behalf of, multiple homeowners whose homes are situated in close proximity to the tower installation proposed for construction at 15 Rockledge Road, Nelsonville, NY 10516.

The applicant, *Homeland Towers, LLC, New York SMSA Limited Partnership b/b/a Verizon Wireless and New Cingular Wireless PCS LLC d/b/a AT&T*, (hereinafter "*Homeland*"), seeks to install a one hundred ten (110) foot cell tower in close proximity to a beautiful residential neighborhood, in a location where no existing structure currently stands taller than three (3) stories in height. *Homeland* seeks to use the proposed structure to provide *Verizon* and *AT&T* wireless telecommunications services.

As the evidence submitted herewith makes indisputable, the current application should be denied because: (a) the tower is wholly unnecessary for the applicant (*Homeland*) to provide personal wireless services within the Village, (b) the proposed tower would violate the Zoning Law of the Village of Nelsonville (hereinafter "*ZLVN*") and (c) the erection of a one hundred ten (110) foot tower would inflict upon the surrounding homes and residential neighborhood the very adverse impacts for which those provisions of the *ZLVN* were specifically enacted to prevent.

Finally, even if this wholly unnecessary tower was actually deemed necessary, there are several alternative locations where such a tower could be built and inflict less severe adverse impacts upon the community.

As such, the residential homeowners, on whose behalf this Memorandum is submitted, respectfully argue that the application should be denied, and they seek to ensure that it is denied in a manner which does not conflict with the Telecommunications Act of 1996.

Statement of Facts

Homeland seeks to construct an eleven (11) story communications tower on a parcel of property located in a beautiful residential neighborhood at 15 Rockledge Road, Nelsonville, NY 10516 at which it seeks to provide both *Verizon* and *AT&T* personal wireless services.¹

Verizon and *AT&T* are engaged in the business of providing cellular phone service in the Village of Nelsonville, and it is beyond argument that *Verizon* and *AT&T* do not need this tower to provide personal wireless services within the Village of Nelsonville because both *Verizon* and *AT&T* have already saturated the area with wireless coverage.

Homeland has presumably obtained an option to lease a small section of the property located at 15 Rockledge Road, Nelsonville, NY 10516 upon which it seeks to construct an eleven (11) story tall wireless telecommunications facility in close proximity to roughly thirty (30) homes, in a residential area where no other structure stands more than three (3) stories in height.

Development and use of the small 3,250 square foot leased parcel will include the construction of a 60 foot x 60 foot x 38 foot x 38 foot x 12 foot five sided compound enclosed within an 8 foot tall chain link fence, within which would be built: (a) a one hundred ten (110) foot tall monopole cell tower (designed to purportedly resemble a "tree"), (b) one 11'6" x 20' *Verizon* steel equipment platform with canopy, (c) one 11'-5" x 12' *AT&T* equipment shelter with integrated generator patio, (d) one cable bridge, (e) twelve *Verizon* wireless antennas, (f) six remote radio heads, and (g) two diplexers, all of which would be accessible via a 20 foot wide gravel driveway on the property at 15 Rockledge Road, Nelsonville, NY 10516.²

¹ See Exhibit "A," *Homeland's application* and July 19, 2017 letter to the Village of Nelsonville Zoning Board.

² See Exhibit "B," *Homeland's site plans*.

As discussed herein below, *Homeland's* application for a special use permit should be denied because the proposed cell tower is not necessary for *Homeland's* providers, *Verizon* and *AT&T*, to provide personal wireless services within the Village of Nelsonville, and construction of the one hundred ten (110) foot cell tower would not only violate the Zoning Law of the Village of Nelsonville, but would inflict upon the nearby homes the very adverse impacts which the Zoning Law was enacted to prevent.

Point I

It is Beyond Dispute That the Proposed One Hundred Ten (110) Foot Cell Tower is Not Necessary for the Applicant (*Homeland*) to Provide Personal Wireless Services Within the Village of Nelsonville.

Under the Telecommunications Act of 1996, a local government cannot deny an application for the installation of a cell tower, if the denial of such an application would "*prohibit*" the applicant from providing personal wireless service in the area where it proposes to install the new tower.³

To establish that a denial would "prohibit" it from providing wireless services, an applicant must prove both parts of a two (2) part test.

First, it must prove that it suffers from "a significant gap" in its personal wireless services. Second, it must establish that the proposed installation is the "least intrusive means" of remedying such gap, meaning that there are no less intrusive alternative locations. *See T-Mobile Central LLC v. Charter Township of West Bloomfield*, 691 F3d 794 (6th Cir. 2012).

The sole purpose for which *Homeland* seeks to erect this eleven (11) story cell tower in the midst of a residential neighborhood is in pursuit of the profits it will reap from not having to lease space on other carriers' towers. Neither of *Homeland's* providers, *Verizon* and *AT&T*, have

³ See 47 U.S.C.A. §332(c)(7)(B)(i)(II).

adequately demonstrated that they suffer from any significant gap in wireless services whatsoever in the Village of Nelsonville.

First, although *Verizon's* "so-called" August 30, 2017 PierCon Radio Frequency Report⁴ claims that *Verizon* suffers from a "significant gap" in coverage, this Radio Frequency Report provides no detailed analysis whatsoever whether this supposed "significant gap" in coverage even exists. *Verizon's* PierCon Radio Frequency Report states that:

Additional capacity is needed in areas like residential neighborhoods, schools, businesses, and anywhere high speed data is used. Reviewing Exhibits A-3 and B-3, the entire gap in coverage for Verizon Wireless includes a very large area. Due to the topography in the gap area, the gap is not to be resolved utilizing a single facility. The objective for the Nelsonville project at AWS?PCS frequency band is to alleviate gaps in coverage along Route 9D, Route 301, and the homes and businesses in the Villages of Nelsonville and Cold Spring.

See Exhibit "C."

It is respectfully submitted that the proffered language is not merely hollow, but does not, and cannot, satisfy *Verizon's* burden of establishing that, in reality, there is a significant gap in coverage, as *Verizon* should be required to establish.

Further, *Verizon*, with its PierCon Radio Frequency Report, provides purported propagation maps that supposedly show that there are gaps of service within the Village of Nelsonville (*see Exhibit "C"*). These purported coverage maps utterly fail to show that *Verizon* suffers from any significant gap in coverage. Not only does the author of the maps fail to describe his/her methodology in coming up with these maps, but he/she also fails to explain what these maps purportedly show. The introduction of these maps is merely a game of smoke and mirrors to try to imply that there are gaps in coverage within the Village of Nelsonville when in fact no valid evidence has been introduced to show that there is any gap in service whatsoever.

⁴ *See Exhibit "C," Verizon's August 30, 2017 PierCon Radio Frequency Report.*

It is respectfully submitted that the proffered "propagation maps" are not merely hollow, but do not, and cannot, satisfy *Verizon's* burden of establishing that, in reality, there is a significant gap in coverage, as *Verizon* should be required to establish.

Next, although Daniel Penesso's Comprehensive Radio Frequency Report,⁵ submitted on behalf of *AT&T*, claims that *AT&T* suffers from significant gaps in reliable service in the Village of Nelsonville, Mr. Penesso's Report provides no detailed analysis whatsoever whether this supposed "significant gap" in coverage even exists within the Village of Nelsonville.

Daniel Penesso's Comprehensive Radio Frequency Report states that:

AT&T's existing wireless network without the Hospital Facility is not adequate to properly service its customers who live in and travel through portions of the Village of Nelsonville and the surrounding areas. AT&T is seeking to collocate on the proposed 15 Rockledge Road Facility to address this significant gap in service, particularly in the areas located near and around Route 301, and Route 9, and the surrounding local roads ("Target Area). The gap in service is not limited to roads. Residences and businesses in and around these areas will experience this significant gap in service. In order to provide reliable wireless service in the Target Area of the Village of Nelsonville and surrounding communities, and thereby meet FCC obligations and the demands of its customers, AT&T is seeking to collocate its antennas and equipment at a centerline height of 96 feet on the 15 Rockledge Road Facility.

See Exhibit "D."

It is further respectfully submitted that the proffered language is not merely hollow, but does not, and cannot, satisfy *AT&T's* burden of establishing that, in reality, there is a significant gap in coverage, as *AT&T* should be required to establish.

Further, Daniel Penesso's Radio Frequency Report provides purported propagation maps that supposedly show that *AT&T* suffers from gaps of service within the Village of Nelsonville (*see Exhibit "D"*). These purported coverage maps utterly fail to show that *AT&T* suffers from

⁵ *See Exhibit "D," Daniel Penesso's June 9, 2017 Comprehensive Radio Frequency Report, submitted on behalf of AT&T.*

any significant gap in coverage. Not only does the author of the maps fail to describe his/her methodology in coming up with these maps, but he/she also fails to explain what these maps purportedly show. The introduction of these maps is merely another game of smoke and mirrors to try to imply that there are gaps in coverage within the Village of Nelsonville when in fact no valid evidence has been introduced to show that there is any gap in service whatsoever.

It is respectfully submitted that the proffered "propagation maps" are not merely hollow, but do not, and cannot, satisfy *AT&T's* burden of establishing that, in reality, there is significant gap in coverage, as *AT&T* should be required to establish.

Further, when a wireless provider suffers from *an actual* gap in its wireless service, providing evidence of such gap is both simple, and extremely inexpensive.

Typically, the wireless provider will produce evidence of its gap by either performing a simple drive test, or, by simply providing a dropped call log.

A drive test is remarkably simple.

The tester takes an ordinary cell phone, and attaches a recording device, which records the wireless signal strength which the phone is receiving.

The paired devices are then temporarily attached to the dashboard of a car, which then drives through the area within which the provider believes a gap to exist. Since the recording device records the signal strength every few milliseconds or so, on a one hour drive the device can record as many as several hundred thousand readings, which provide a crystal clear picture of whether or not a gap in service exists, as well as the actual location of any such gap.

There is nothing estimated, surmised, or projected in this test.

Only the actual, real, existing signal strengths are recorded, and only *actual gaps* in wireless service are shown.

Even less burdensome, is the printing-out of a dropped call log.

Modern wireless carriers' computer systems maintain continuous records of dropped calls on their systems. With the input of a few keystrokes, providers can print out actual call logs which show the exact number of dropped calls in any location or area, for any chosen period of time.

Not surprisingly, given the ease and lack of expense involved in producing such proof to local zoning authorities, when applicants seeking permission to install a new tower suffer from an actual gap in their wireless service, these are two types of evidence which they will typically provide.

As the record clearly reflects, *Homeland* (nor *Verizon* and *AT&T*) has produced no such proof in connection with its current application, and proffers no excuse for having failed to do so.

By contrast, where an applicant does *not* suffer from any *actual gap* in service, but seeks construction of a new facility to meet future capacity needs, or to derive the financial benefit from leasing space upon such facility to its competitors, it will create the specter of a non-existent gap by engaging in a charade called "computer modeling."

In conducting computer modeling, the provider employs computer modeling software, and "introduces variables" to obtain a pre-desired resultant report.

"Introducing variables," means that the provider enters wholly arbitrary numbers and/or data into the software, to cause the software to print out a "coverage map" depicting anything the provider wants it to depict, irrespective of what the provider's *actual* coverage is, in the area depicted in the map.

Despite its submission of such "computer modeling" (*see* Exhibits "C" and "D") in support of its current application, *Homeland's* providers have no actual gaps in their coverage in the area which is the subject of the current application.

New York SMSA Limited Partnership v. Town of Oyster Bay Zoning Board of Appeal,

2010 WL 3937277 (E.D.NY 2010) provides that "a coverage gap exists when a remote user of

those services is unable to either connect with the land-based national telephone network, or to maintain a connection capable of supporting a reasonably uninterrupted communication. When a coverage gap exists customers cannot receive and send [] signals, and when customers pass through a coverage gap their calls are disconnected. [A] 'coverage gap' exists or a 'need' for a proposed site is found to be substantial by the Courts where, *inter alia*, the coverage needed by a carrier is not limited to a small number of houses in a rural area or merely the interior of buildings in a sparsely populated area."

It is beyond argument that *Verizon* cannot claim that it suffers from a "significant gap" in its wireless services within the Village of Nelsonville because the evidence submitted herewith as Exhibits "E", "F", and "G" proves that neither *Verizon* nor *AT&T* do not suffer from any gaps, much less any "significant gaps", in their wireless services.

Without exception, the most accurate proof of whether or not such a gap exists is call testing. Simply stated, a test is conducted whereby calls and texts are both sent and received using the applicant's service, on telephones situated within the area in which the applicant claims a gap to exist.

If persons are able to both make and receive both telephone calls and texts, and they are able to initiate, maintain and conclude such calls without failure, then it is simply beyond argument that the provider does not suffer from a "significant gap" in its personal wireless service.

A. The Call & Text Logs

To establish that the proposed one hundred ten (110) foot tall cell tower is wholly unnecessary, residents conducted actual call testing employing local wireless services, and recorded call logs as direct evidence of such tests, all of which are collectively annexed hereto as Exhibit "E."

As evidenced by Exhibit "E," actual call testing revealed that those conducting the tests were able to initiate, maintain and conclude a total of one hundred sixty-eight (168) communications, including voice calls and text messages, with one hundred sixty-eight (168) of those calls having been initiated, maintained and concluded without interruption, difficulty or loss of service.

The Jeffrey Rossi Call Log

The call logs were prepared by Jeffrey Rossi wherein he recorded actual call testing. Employing both *Verizon's* and *AT&T's* wireless services, Mr. Rossi made and received voice calls and text messages, on 11/24/2017, 11/25/2017, 11/26/2017, 11/28/2017, 12/4/2017, 12/6/2017, 12/12/2017, and 12/15/2017, and recorded the date and time of each respective call, the specific geographic location at which each respective call was made or received, and whether the communication was a voice call or text.

As reflected within his log, Mr. Rossi was able to send and receive, and to initiate, maintain and conclude a total of one hundred sixty-eight (168) telephone calls, without failure or interruption, out of one hundred sixty-eight (168) attempted calls (*See Exhibit "E"*).

In total, the call and text log reflect that one hundred sixty-eight (168) communications were successful, which translates to a success rate of one hundred (100%) percent.

B. *Verizon's Coverage Map*

Any claim by *Verizon* of significant gap in service is in direct contradiction with what *Verizon* has published upon its own current online coverage map, which *Verizon* has posted on its website.

As is reflected upon *Verizon's* own coverage map, current as of January 10, 2018, *Verizon* has indicated that it has wireless coverage over the entire area which is the subject of this

application.⁶

In view of the forgoing, it is simply indisputable that *Verizon* does not suffer from any significant gap in its wireless coverage in the area that the proposed eleven (11) story tower will purportedly serve.

C. *AT&T's Coverage Map*

Further, any claim by *AT&T* of significant gap in service is in direct contradiction with what *AT&T* has published upon its own current online coverage map, which *AT&T* has posted on its website.

As is reflected upon *AT&T's* own coverage map, current as of January 10, 2018, *AT&T* has indicated that it has wireless coverage over the entire area which is the subject of this application.⁷

In view of the forgoing, it is simply indisputable that *AT&T* does not suffer from any significant gap in its wireless coverage in the area that the proposed eleven (11) story tower will purportedly serve.

D. The Applicant has Wholly Failed to Establish That
There Are No Less Intrusive Alternative Sites Available.

Cost as the Principal Factor in the Proposed Siting of the Facility

Unfortunately, when seeking to construct commercial wireless installations, wireless companies do not seek to locate their facilities upon sites which would minimize the adverse impacts which such installations would inflict upon nearby homes and/or the community at large.

Instead, the owners of such facilities simply seek to install them at sites which are the least expensive to build upon. There are three (3) principal site criteria that affect the cost of constructing such facilities. They are electrical power, road access and rent.

Driven by a concern for minimizing expenses, siting preferences for these facilities is

⁶ Attached as Exhibit "F" is *Verizon's* wireless coverage map from January 10, 2018.

⁷ Attached as Exhibit "G" is *AT&T's* wireless coverage map from January 10, 2018.

quite simple. Applicants seek to build upon sites where they secure the lowest rent, are near a power line to which they can attach, and are near an existing road which can be used for access to the installation.

By contrast, building such a facility in a "remote location," and further away from residential areas, would require them to run power lines, either on poles or in trenches, and to install gravel access roads, both of which are expenses they prefer to avoid.

Where, as here, they locate a potential site which would be cost effective, but would inflict adverse impacts upon nearby residences or the community at large, companies typically fabricate purely hollow explanations as to why their chosen site is their only viable option.

In this case, it appears that the low cost of building at its proposed site is why *Homeland* has failed to give any meaningful consideration to potential alternative sites, which would have far less adverse impacts upon the community.

It is beyond argument that *Homeland* cannot claim that there are no alternative locations on which this tower can be placed because there are less intrusive alternative sites available that are not in the midst of a residential community.

As reflected within *Homeland's* plans and project descriptions, a power line is closely situated to the proposed site, and a short access easement will extend to the site.

Less Intrusive Alternative Sites Are Available

As detailed herein above, if *Homeland* is given permission to construct its proposed facility at the site it has chosen, such installation would adversely impact many individual nearby residences and the nature of this residential community.

But *Homeland* could easily build its desired facility at any of a number of alternative locations at which it would not be closely situated to residential homes, and would have no adverse impacts upon the applicable properties.

By way of example, *Homeland* could build such a facility at several alternative locations such as: (a) at 59 Lane Gate Road, Cold Spring, NY 10516 on a landfill owned by the Town of

Phillipstown, (b) at the existing telecommunications facility located at McKeel's Corners, (c) upon power transmission lines (utilizing a DAS system) within the Town of Phillipstown, or even a combination of such locations, to remedy any alleged gaps in wireless services which it claims to exist.

Absent from *Verizon's* application is any evidence that *Homeland* has given any *meaningful* consideration to this, or any other potential alternative locations, at all.

The fact remains, that there are less intrusive alternative locations available for the installation being proposed by *Homeland*. As such, *Homeland's* application should be denied, because granting such application without requiring *Homeland* to prove that no less intrusive location is possible, would violate both the letter and the spirit of the Zoning Law of the Village of Nelsonville.

Point II

Homeland's Application Must Be Denied Because it Does Not Comply with the Zoning Law of the Village of Nelsonville

- A. *Homeland's* Application Must be Denied, Because the Proposed Tower Would Inflict Upon the Residential Neighborhood the Very Impacts Which the Provisions of the Code Were Specifically Intended to Prevent
 - (i) The Proposed Installation Will Inflict a Dramatic and Wholly Unnecessary Adverse Impact Upon the Aesthetics and Character of The Area.

As is stated within the text of the Zoning Law of the Village of Nelsonville (hereinafter "ZLVN "), the purpose of the ZLVN is "to promote the health, safety, morals and general welfare of the Village of Nelsonville. *See* ZLVN § 188-2. Further the ZLVN provides that its purpose is to "promote the orderly growth, development and preservation of the Village of Nelsonville with due consideration for economic well-being, adequate housing opportunity, the character and appearance of the village, conservation of the value of buildings and property, conservation of

historical landmarks, sites, buildings and places and the appropriate use and conservation of land and water resources." See ZLVN § 188-2.

Homeland's application should be denied because the installation of such a massive tower so unnecessarily close to residential homes will adversely affect the visual character and the aesthetics of the adjacent properties, nearby properties, and the community in general.

Within its proposal, *Homeland* proposes to construct a one hundred ten (110) foot tall cell tower where it would be immediately visible to approximately thirty (30) homes in the heart of a residential neighborhood, known for its natural beauty, where no existing structure stands more than three (3) stories in height. *Homeland's* proposed one hundred ten (110) foot monstrosity will most definitely stick out like a sore thumb and definitely not fit in with the historical and scenic character of the community

As such, the proposed tower would inflict upon the neighborhood, and the homes within it, the very types of adverse impacts which the Zoning Law of the Village of Nelsonville was specifically enacted to guard against.

This board has already received voluminous testimonial evidence from homeowners who live in close proximity to the proposed tower site where the homeowners have personally detailed the adverse aesthetic and other impacts that the proposed installation would inflict upon their respective homes.

As federal Courts have ruled, where a local government is entertaining a cell tower application, it should accept, as evidence, such statements and letters of homeowners, because they are in the best position to know and understand the actual extent of the impact they stand to suffer See e.g. Omnipoint Communications Inc. v. The City of White Plains, 430 F2d 529 (2nd Cir. 2005). Furthermore, Federal Courts have consistently held that adverse aesthetic impacts

are a valid basis on which to deny applications for proposed telecommunications towers. *See Omnipoint Communications Inc. v. The City of White Plains*, 430 F2d 529 (2nd Cir. 2005).

Many of the neighboring property owners have provided detailed and compelling explanations of the dramatic adverse impacts their properties would suffer if the proposed installation is permitted to proceed.

Such installation would dominate the skyline, tower over their homes and destroy the views from all areas of their properties and from both inside and outside of their homes.

Once again, all of the adverse aesthetic impacts which the proposed cell tower would inflict upon their respective homes is entirely unnecessary. First, it is unnecessary because *Homeland's* providers do not need the proposed one hundred ten (110) foot cell tower to provide wireless services within the Village. Second, it is unnecessary because there are superior alternative locations where a new cell tower could be constructed, with far less dramatic impacts upon the community. There has been no showing by *Homeland* that this location is the least intrusive location.

(ii) **The Proposed Installation Will Inflict a Substantial and Wholly Unnecessary Loss in the Values of the Adjacent and Nearby Residential Properties**

In addition to the adverse impacts upon the aesthetics and residential character of the area at issue, the construction of such a massive tower at the proposed location would contemporaneously inflict an adverse impact upon the actual value of the several residential properties situated in close proximity to the proposed tower.

Across the entire United States, both real estate appraisers⁸ and real estate brokers have

⁸ *See e.g.* a February 22, 2012 article discussing a NJ appraiser's analysis wherein he concluded that the installation of a tower in close proximity to a home had reduced the value of the home by more than 10%, go to <http://bridgewater.patch.com/articles/appraiser-t-mobile-cell-tower-will-affect-property-values>

rendered professional opinions which simply support what common sense dictates.

When large cell towers are installed unnecessarily close to residential homes, such homes suffer material losses in value which typically range anywhere from 5% to 20%.⁹

In the worst cases, towers built near existing homes have caused the homes to be rendered wholly unsaleable.¹⁰

As has been recognized by federal Courts, it is perfectly proper for a local zoning authority to consider, *as evidence*, the professional opinions of real estate brokers, (as opposed to appraisers) as to the adverse impact upon property values which would be caused by the installation of a proposed cell tower *See Omnipoint Communications Inc. v. The City of White Plains, 430 F2d 529 (2nd Cir. 2005)*, and this is especially true when they are possessed of years of real estate sales experience within the community and specific geographic area at issue.

Given the reduction in property values which the nearby homes would sustain, the granting of *Verizon's* application would inflict upon the residential neighborhood the very

⁹ In a series of three professional studies conducted between 1984 and 2004, one set of experts determined that the installation of a cell tower in close proximity to a residential home reduced the value of the home by anywhere from 1% to 20%. These studies were as follows:

The Bond and Hue - *Proximate Impact Study* - The Bond and Hue study conducted in 2004 involved the analysis of 9,514 residential home sales in 10 suburbs. The study reflected that close proximity to a Cell Tower reduced price by 15% on average.

The Bond and Wang - *Transaction Based Market Study*
The Bond and Wang study involved the analysis of 4,283 residential home sales in 4 suburbs between 1984 and 2002. The study reflected that close proximity to a Cell Tower reduced the price between 20.7% and 21%.

The Bond and Beamish - *Opinion Survey Study*
The Bond and Beamish study involved surveying whether people who lived within 100' of a tower would have to reduce the sales price of their home. 38% said they would reduce the price by more than 20%, 38% said they would reduce the price by only 1%-9%, and 24% said they would reduce their sale price by 10%-19%.

¹⁰ Under FHA regulations, no FHA (federally guaranteed) loan can be approved for the purchase of any home which is situated within the fall zone of a cell tower. *See* HUD FHA HOC Reference Guide Chapter 1 - hazards and nuisances. As a result, there are cases across the country within which: (a) a homeowner purchased a home, (b) a cell tower was thereafter built in close proximity to it, and (c) as a result of same, the homeowners could not sell their home, because any buyer who sought to buy it could not obtain an FHA guaranteed loan. *See, e.g.* October 2, 2012 Article “. . . Cell Tower is Real Estate Roadblock” at <http://www.wfaa.com/news/consumer/Ellis-County-Couple--Cell-tower-making-it-impossible-to-sell-ho-me--172366931.html>.

impacts which the Zoning Law of the Village of Nelsonville sections were intended to prevent.

Accordingly, its application must be denied.

B. *Homeland's Application Must be Denied Because the Proposed Installation Does Not Meet the General Standards Applicable for Site Plan Development*

ZLVN § 188-35(A) provides that one of the general standards applicable for a site development plan to be approved is that "the use of land, buildings and other structures, the location and bulk of the buildings and other structures and site development shall be of a character as to harmonize with the neighborhood, to accomplish a transition in character between areas of unlike character, to protect property values in the neighborhood and to preserve and enhance the appearance and beauty of the Village of Nelsonville and shall conform to the purposes of this chapter."

As has been shown above, the proposed tower will cause severe adverse aesthetic impacts and will cause a severe reduction in property values for homeowners living in close proximity to the proposed tower. As such, *Homeland* has utterly failed to meet the general standards applicable for site plan approval.

As such, *Homeland's* application must be denied.

C. *Homeland's Application Must be Denied Because Homeland has failed to Show that Homeland or its Providers Needs the Proposed Facility.*

ZLVN § 188-70(A)(2) provides that "where a new tower is proposed, the applicant has shown an actual need for the construction of the new tower." As has been show above, neither of *Homeland's* carriers (*Verizon* and *AT&T*) suffer from a gap in service. Neither provider has shown that it suffers from a gap in service and it has been convincingly shown above that in fact there is no gap of service within the Village of Nelsonville for neither *Verizon* nor *AT&T*.

As such, *Homeland's* application must be denied.

D. *Homeland's* Application Must be Denied Because It Did Not Adequately Show that Collocation of the Tower on an Existing Site was Not Feasible.

ZLVN § 188-70(A)(4) requires that all applicants for a new communications towers must demonstrate that "shared use of existing tall structures and existing or approved communications towers is undesirable or unattainable due to:

- (a) The absence of existing towers or eligible structures for collocation.
- (b) The technical feasibility of collocation in light of the applicant's system requirements, frequency incompatibilities or engineering limitations.
- (c) The existence of physical constraints that render the collocation infeasible.
- (d) The inability to secure permission to collocate, in spite of good-faith efforts.
- (e) The adverse impact of the applicant's proposed collocation on the site on the surrounding area which exceeds that of the proposed new tower, or the creation of a need for a greater number of towers to provide service, which , when considered together, would have a cumulative adverse effect on the surrounding areas which exceeds that of the proposed tower."

Homeland has failed to demonstrate any of these required findings. In fact, there are alternative locations for the proposed site (including collocation on the McKeels corner site). Further, *Homeland's* justifications for why collocation on another site would be infeasible are entirely conclusory and provide no analysis whatsoever why the antennas cannot be placed upon a pre-existing tower.

As such, *Homeland's* application must be denied.

- E. If the Village is Inclined to Approve *Homeland's* Application, it Should Condition the Approval of Such Facility on Random Independent Testing to Ensure Compliance with FCC Regulations.

ZLVN § 188-70(4) provides that Board can requires testing and inspection of communications towers as part of a special use permit approval. Further, 'after transmission begins, testing and certification of EMG radiation shall be required in accordance with the requirements set forth.' *See* ZLVN § 188-70(4). If the Board is so inclined to approve *Homeland's* application (even though there is overwhelming evidence for its denial), it should condition such approval on random and independent testing of the facility to ensure compliance with FCC regulations on RF emissions.

Point III

Homeland's Application Should be Denied Because § 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 Would Allow *Homeland* to Increase the Size of the Proposed Cell Tower Without Prior Zoning Approval.

§ 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 provides "notwithstanding section 704 of the Telecommunications Act of 1996 or any other provision of law, a State or local government may not deny, and shall approve, any eligible request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station." *See* 47 U.S.C. § 1455(a). Under FCC regulation, there is a "substantial change" when "it increases the height of the tower by more than 10% or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater." *See* 47 C.F.R. § 1.40001(b)(7).

Under the FCCs reading of § 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, local governments are prohibited from denying modifications to cell towers unless

the modification will "substantially change" the physical dimensions of the tower. The FCC defines "substantial change" to include any modification that would increase the height of the tower by more than ten (10%) percent or by more than "the height of one additional antenna with separation from the nearest existing antenna not to exceed 20 feet, whichever is greater." Typical telecommunication antennas are usually eight (8) feet tall, so this provision would allow an increase in cell tower's height by approximately twenty-eight (28) feet, and this height increase could not be challenged by local governments.

Under the FCC's regulation, once this proposed one hundred ten (110) foot cell tower is put in place, *Homeland* at any time could increase the height of the tower by approximately twenty-eight (28) feet, and there would be no way for the Village of Nelsonville to prevent such an occurrence.

Even more alarming is the fact that *Homeland* is not prevented from making even further "modifications." Once *Homeland* has made its first modification, it can subsequently further modify the cell tower by increasing its height by approximately twenty-eight (28) feet or by ten (10%) percent of the towers present height, whichever is greater. In this way, what was supposed to be a one hundred forty (110) foot cell tower, after various "modifications," can become potentially a one hundred sixty (160) foot tower.

Because of the potential for abuse by *Homeland* once the tower is installed, *Homeland's* application should be denied.

Point IV

Homeland's Application Should be Denied, Because its Proposed Installation Does Not Provide a Sufficient Fallzone or Safezone Around the Towers

Consistent with local governments across the entire United States, the Village of Nelsonville has enacted a setback/fallzone requirement for cell towers for the purpose of protecting its citizenry, and the public at large, against the potential adverse impacts which irresponsibly placed towers present.

ZLVN § 188-71(5)(a) provides the setback for new commercial telecommunications towers in the Village of Nelsonville as:

- [1] The minimum front set back to a tower in all zones shall be 150 feet or 125% of the height of the tower, whichever is greater.
- [2] The minimum side setback in all zones shall be 50 feet or 125% of the height of the tower, whichever is greater.
- [3] The minimum setback from Route 301 shall be 500 feet.

See ZLVN § 188-71(5)(a).

These sections mean that a new commercial communications tower must be setback by at least the 125% of the height of the tower height of the tower from the property line.

There are three (3) physical dangers that have induced local governments, such as the Village of Nelsonville, to adopt specific setback requirements for cell towers, and which serve as the reason why the required setback distances for cell towers are invariable tied directly to the height of respective towers.

These dangers are ice fall, debris fall and structural failures.

Since the entire compound described by *Homeland* is to be within a five sided 60 foot x 60 foot x 38 foot x 38 foot x 12 foot fence with the cell tower measuring one hundred ten (110) feet, it is factually impossible to afford a sufficient safezone or fallzone to afford safety to the

public.

Despite the fact that the cell tower will be located on a larger property, *Homeland* will only be leasing a five sided 60 foot x 60 foot x 38 foot x 38 foot x 12 foot parcel of that property with an access easement to get to and from the compound. *Homeland* only has the power to exclude people from the leased parcel and cannot prevent people from going elsewhere on the larger property and protect them. Even if the eleven (11) story tall cell tower is placed in the very center of the compound, the one hundred ten (110) foot cell tower would not be set back by 125% of the height of the tower. The location of this tower on such a small parcel of leased land makes it impossible for *Homeland* to afford safety to the public.

Since *Homeland* is entirely without power to exclude persons from entering the area outside of its small leased parcel, *Homeland's* proposed compound offers absolutely no protection to anyone who could be standing or passing outside of *Homeland's* compound, but within the fallzone of the tower, or the ice fall or debris fall zones of the tower.

Ice Fall

A natural, but well-known danger associated with communications towers is “ice,” and the very real risk that can come during the winter-early spring, when ice, which has formed upon an installation, begins to melt, comes loose, and hurdles to the ground. It would fall, in this case, from a height as high as one hundred ten (110) feet, and could reach a very high and dangerous speed by the time it hit the ground.¹¹

¹¹ To see dramatic video footage of chunks of ice falling from a communications tower causing severe damage to automobiles in a parking lot below, go to www.youtube.com/watch?v=pfBp2QYOIbc www.youtube.com/watch?v=YWqiSHRwmk8 or search on YouTube for “ice falls from tower”. While such video depicts ice falling from a tower higher than that being proposed, experts have calculated that ice falling from a 150-foot tower would reach the speed of 67-70 mph by the time it hit the ground (*See e.g.* Exhibit “H” - a true copy of a physicist’s report dated April 16, 2013 which calculates the speed of ice falling from a 150-foot cell tower).

As logic would dictate, if chunks of ice fell from a height of one hundred ten (110) feet, they could seriously injure or kill anyone struck by them. Worst of all, chunks of ice falling from cell towers generate no noise, and as such, any person under it would receive no warning before being struck by same.

Structural Failures

Equally well-documented are the multiple dangers of structural failures of all types of cell towers, from lattice structures to monopoles, wherein a component of an installation fails, causing an element or part of the structure to hurdle to the ground, or in some cases, the entire tower to collapse¹² or to burst into flames and fall over.¹³

Some of the most common elements and areas of failure which result in the collapse of cell towers are baseplates,¹⁴ flanges, joints, bolts and guy wires.¹⁵

Debris Fall

Finally, there is the danger of falling debris, and more specifically, items dropped or caused to fall during routine maintenance activities that must be performed upon such towers on a regular basis.¹⁶

¹² To see dramatic images of a 165-foot tower having collapsed at a firehouse, crushing the Fire Chief's vehicle, go to www.firehouse.com/news/10530195/oswego-new-york-cellular-tower-crushes-chiefs-vehicle, or go to Google and search for "Oswego cell tower collapse."

¹³ To see videos of modern towers bursting into flames and/or burning to the ground, go to <http://www.youtube.com/watch?v=0cT5cXuyiYY&NR=1> or <http://www.youtube.com/watch?v=yNKVWrazg>, or simply go to *Google*, and search for "cell tower burns."

¹⁴ To see images of monopole baseplate failures, go to <http://residentsact.blogspot.com/2007/11/just-how-safe-are-monopole-cell-towers.html>

¹⁵ To see multiple images of telecommunications towers which have collapsed, go to google, type in a search for "radio tower collapse", and then choose "images" from the search results.

¹⁶ Annexed hereto as Exhibit "I" is a page from a study completed by a consultant hired by the City of Brookfield Wisconsin, - which depicts a lump hammer which had been dropped from a cell tower during routine maintenance, and crashed through the roof of a nearby structure.

To afford adequate protections against these very real dangers, local governments (including the Village of Nelsonville) have imposed setback requirements to afford sufficiently sized buffer/safety areas to ensure the safety of both their citizens and the public at large.

These buffer or safety zones consist of an area surrounding a tower which is restricted from public or personal access, and which is large enough to ensure that if a tower were to fail or collapse, or ice were to hurdle downward from the top of it, nobody would be close enough to be injured or killed by same.

A sample of a typical local government zoning regulation which actually describes such concerns is the Town of Huntington, NY Code Section §113 which provides as follows:

“It shall be demonstrated to the satisfaction of the Town Board that the proposed facility is set back adequately to prevent damage or injury resulting from ice fall or debris resulting from the failure of a wireless telecommunications facility, or any part thereof and to avoid and minimize all other impacts upon adjoining properties.”

Huntington Town Code §113-58.1(F)

As a rule of thumb, to ensure that a buffer/safety zone of sufficient size is maintained, knowledgeable local governments across the Country (such as the Village of Nelsonville) have enacted ordinances that generally require minimum setbacks ranging from 100% to 200% of the height of a respective communications tower.

Pursuant to the ZLVN, because the one hundred ten (110) foot tower if it were to collapse would fall outside the leased parcel and because the tower is set back less than the height of the tower from all sides of the leased parcel, the Zoning Board should determine that the required minimum setback in this case is not met by *Homeland*. Since *Homeland's* proposed tower does not

meet such setback requirements, nor afford a sufficiently safe fallzone around its proposed tower to restrict access to the zones for structural failures, ice fall or debris fall, its application should be denied.

Point V

Homeland's Application Must Be Denied Because the Applicant's Photo Submission is Defective and Should be Disregarded Entirely

In connection with its application, *Homeland* has provided various photographs and/or photo simulations in an effort to persuade the Village that the adverse aesthetic impact, which its proposed compound and tower would inflict upon the community, would not be substantial.¹⁷

Such simulations and presentations are inherently defective, and should be wholly disregarded by the Village of Nelsonville, because the applicant has conveniently abstained from providing images taken from the perspective of the nearby homes, or any location which would reflect the most significant adverse aesthetic impacts.

As is likely known to the applicant, photo simulations of proposed cell towers are inherently defective, and serve no legitimate purpose from a zoning perspective, when they do not include recorded images taken from the properties of nearby residential homes which stand to suffer the most significant adverse aesthetic impact if the proposed installation is constructed.

In *Omnipoint Communications Inc. v. The City of White Plains*, 430 F2d 529 (2nd Cir. 2005), a federal court explicitly ruled that where, as here, a proponent of a cell tower presents a visual impact study wherein they “omit” from the study any images or analysis of the perspectives of homeowners whose homes are in close proximity to the proposed installation, the study is inherently defective, and should be properly disregarded by the respective government entity that received it.

As was explicitly stated by the federal court, “the Board was free to discount Omnipoint’s study because it was conducted in a defective manner. . . because the study was

¹⁷ Annexed hereto as Exhibit "J" is *Homeland's* Visual Resource Assessment Photo Simulation.

conducted without notice to the Board or the community, the observation points were limited to locations accessible to the public roads, and no observations were made from the residents' backyards much less from their second story windows" *Id.*

Not surprisingly, the images presented by *Homeland* do not include any images taken from the properties of the nearby homeowners who have provided detailed descriptions of the adverse aesthetic impacts their respective homes will sustain if the proposed tower is constructed.

As such, in accord with the federal court's holding in Omnipoint, the applicant's photo submission must be disregarded in its entirety.

Point IV

To Comply With the TCA, *Homeland's* Application Should Be Denied in a Written Decision Which Cites the Evidence Provided Herewith

The Telecommunications Act of 1996 requires that any decision denying an application to install a cell tower: (a) be made in writing, and (b) be made based upon substantial evidence, which is discussed in the written decision. *See* 47 U.S.C.A. §332(c)(7)(B)(iii).

The Written Decision Requirement

To satisfy the requirement that the decision be in writing, a local government must issue a written denial which is separate from the written record of the proceeding, and the denial must contain a sufficient explanation of the reasons for the denial to allow a reviewing Court to evaluate the evidence in the record supporting those reasons. *See e.g. MetroPCS v. City and County of San Francisco*, 400 F.3d 715(2005).

The Substantial Evidence Requirement

To satisfy the requirement that the decision be based upon substantial evidence, the decision must be based upon such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. "Substantial evidence" means "less than a preponderance, but more than a scintilla. Review under this standard is essentially deferential, such that Courts may neither engage in their own fact finding nor supplant a local zoning board's reasonable determinations. *See e.g. American Towers, Inc. v. Wilson County*, Slip Copy 59 Communications Reg. P & F 878 (U.S.D.C. M.D. Tennessee January 2, 2014)[3:10-CV-1196]

To ensure that the Board's decision cannot be challenged under the Telecommunications Act of 1996, it is respectfully requested that the Board deny *Verizon's* application in a separate written decision, wherein the Board cites the evidence based upon which it made its determination.

CONCLUSION

In view of the forgoing, it is respectfully submitted that *Homeland's* application should be denied in its entirety.

Respectfully Submitted,

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