

TOWN OF SAUGERTIES
STATE OF NEW YORK

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In the Matter of the Application of:

**Tarpon Towers II, LLC and
Cellco Partnership d/b/a
Verizon Wireless**

Application for a Special Use Permit, Site Plan Approval,
a Use Variance and an Area Variance

**MEMORANDUM
IN OPPOSITION**

Premises: 766 Kings Highway, Saugerties, NY

Section: 28.4
Block: 11
Lot: 13.1
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MEMORANDUM IN OPPOSITION

Respectfully Submitted,

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Preliminary Statement

Tarpon Towers II, LCC and Verizon Wireless (hereinafter "*Tarpon*") have filed an application for a Special Use Permit, Site Plan Approval, a Use Variance and an Area Variance seeking to install a one hundred twenty (120) foot monopole, equivalent to twelve (12) stories, in a residential neighborhood where no existing structure currently stands taller than two (2) stories in height.

Despite filing such applications *Tarpon*, a site developer, is attempting to induce the Town of Saugerties to improperly circumvent its own Zoning Code, and specifically, its provisions which were enacted by the Town for the explicitly stated purpose of protecting the Town and its Constituents.

As was made crystal clear within its text, the Town of Saugerties Zoning Code was enacted for the purpose of "protecting and promoting public health, safety, comfort, convenience, economy, and general welfare."¹ Specifically, the Town explicitly detailed the specific purposes behind its enactment of the Zoning Code, which included the following:

- A. To promote the use of land for its most appropriate, reasonable and beneficial purposes;
- B. To promote the character, rights and stability of established residence and businesses;
- C. To conserve and enhance the value of land, farms, viewsapes, and buildings; and
- E. To provide an attractive landscape that enhances the physical environment of the Town, and to promote appropriate scale and design of land and buildings.²

¹ See Section §245-2 the Town of Saugerties Zoning Code.

² See Sections §245-2(A) - (C) and §245-2(D) of the Town of Saugerties Zoning Code.

Consistent with the smart planning provisions set forth within the Town Code, which are similar to smart planning provisions which have been enacted by Towns across the State, the Town has adopted permit requirements to protect against the irresponsible placement of wireless facilities such as the one hundred twenty (120) foot tower which *Tarpon* currently seeks to build.

Apparently aware of the adverse impacts which its proposed twelve (12) story tower would inflict upon the Town, and the likelihood that *Tarpon* would be incapable of meeting the permit requirements to obtain zoning approval for such tower, *Tarpon* is *seeking to circumvent* the Town's Zoning Code entirely by inducing the Town to improperly perform a “*Monroe* Balancing Test” instead of applying its own Zoning Code.

If the Town allows itself to be misled by *Tarpon*, it will inflict upon the both the Town and its constituents the precise types of adverse aesthetic impact and negative property value impacts that the Town's Zoning Code was specifically enacted to prevent.³

This Memorandum is submitted in opposition to *Tarpon's* contention that the Town should disregard its own Zoning Code, and should perform a *Monroe* Balancing Test, in direct violation of the Town's duties to its constituents.

Additionally, this Memorandum is submitted in opposition to *Tarpon's* application for a Special Use Permit, Site Plan Approval, a Use Variance and an Area Variance.

³ See Sections §245-11(P)(2)(a) - (i) of the Town of Saugerties Zoning Code.

As set forth hereinbelow, the Town of Saugerties should deny *Tarpon's* application, because:

- (a) *Tarpon* has failed to establish that granting the application would be consistent with smart planning requirements under the Town of Saugerties Zoning Code;
- (b) granting the application would violate both the Town of Saugerties Zoning Code and the legislative intent of the Zoning Code;
- (c) the irresponsible placement of such massive a tower at the proposed location would inflict upon the nearby homes and community the precise types of adverse impacts which Section §245-11(P) was enacted to prevent;
- (d) there are far less intrusive alternative locations where the desired facility could be built, in greater conformity with the requirements of the Town Zoning Code; and
- (e) the irresponsible placement of the tower proposed by the application would not provide a safe fall zone around the proposed tower.

As such, we respectfully submit that the Planning Board should Deny *Tarpon's* application and we seek to ensure that it be denied in a manner that does not violate the Telecommunications Act of 1996.

POINT I

Applying the *Monroe* Balancing Test is Not a Proper Method to Determine Whether the Town of Saugerties Needs the Proposed Wireless Facility at the Location *Tarpon* Proposes

The "*Monroe* Balancing Test" is derived from the case *Matter of County of Monroe* (City of Rochester). In *Matter of County of Monroe*, "the Court of Appeals addressed the applicability of local zoning laws where a conflict exists between two governmental entities." *Town of Hempstead v. State*, 840 N.Y.S.2d 123, 125. *See also Matter of County of Monroe*, 72 N.Y.S.2d 338. Specifically, the Court in *Monroe*, "articulated a 'balancing of public interests' test which requires the consideration of various factors in order to determine whether one local government should be granted immunity from another local government's zoning requirements." *Id.*

In "balancing" an unavoidable conflict of interest which existed between a Town and a County, the Court in *Monroe* recognized that *it was forced* to weight the competing interests of the two municipalities, and that the factors in should weigh into such balancing test would include:

- (i) the nature and scope of the instrumentality seeking immunity,
- (ii) the kind of function or land use involved,
- (iii) the extent of the public interest to be served thereby,
- (iv) the effect local land use regulation would have upon the enterprise concerned, and
- (v) the impact upon legitimate local interests.

Id.

The matter at issue here is distinguishable from that in *Monroe* because in *Monroe*, the Court was tasked with "resolving conflict between zoning ordinance of one political unit and statutory authority of another unit to perform designated public function." *Matter of City of Rochester*, 72 N.Y.2d 338 (1988).

Here, there is no conflict between two governmental agencies as only the Zoning Code for the Town of Saugerties would apply.

It appears that *Tarpon* is only seeking to apply the *Monroe* balancing test to avoid having to present evidence to the Town which the Town regularly requires applicants seeking to install wireless facilities to provide. *Tarpon* is attempting to bypass the Town of Saugerties's Zoning Code all together.

As the Town's own zoning code and common sense dictate, the "weighing" of any potential adverse impacts which *Tarpon*'s proposed tower would inflict upon the Town and its communities and citizens vs any possible benefit to same, should lawfully and properly be entertained by the applicable Planning Board or Zoning Board.

As such, *Tarpon* should simply be required to apply for and obtain the permits which are required under the Town's Zoning Code.

The Town should not allow *Tarpon* to bypass its Zoning Code as the Zoning Code, specifically Section §245-11(P)(1), was enacted to ensure that "[n]o commercial telecommunications facility ... be used, erected, moved, reconstructed ... unless in conformity with the standards, regulations and procedures set forth below."

The Town has enacted such requirements to promote the health, safety and general welfare of the residents of Saugerties." The Town owes its residents a duty of care to apply its Zoning Code which was specifically enacted to protect the residents.

Even if the Town erroneously choses to apply the "*Monroe* Balancing Test", the test would fail. The interests of the Town to protect its residents from improper and unreasonable aesthetic intrusions which would impact the residents use and enjoyment of their property as well persevering the property values in the community outweighs *Tarpon's* needs.⁴

As will be demonstrated below *Tarpon* is site Development Company that does not even provide any personal wireless coverage. Moreover, *Tarpon* has failed to submit any documentation demonstrating any need for the proposed tower or whether it is feasible to co-locate the facility both of which is required under the Town Zoning Code.

Without actually demonstrating any "need," it is impossible for the Town to weigh *Tarpon's* need to install and construct the proposed tower with the Town's need to protect its residents and employ its smart planning provisions.

Thus, the Town should not apply the "*Monroe* Balancing Test" and should instead require *Tarpon* to adhere to the requirements set forth in the Town of Saugerties Zoning Code and obtain the proper permits prior to installing the proposed facility.

⁴ See Sections §245-2(A) - (C) and §245-2(D) of the Town of Saugerties Zoning Code.

POINT II

Granting *Tarpon* Permission to Construct a Massive Twelve (12) Story Wireless Facility at the Location it Proposes Would Violate Both the Requirements Under the Town Zoning Code and Legislative Intent Based Upon Which Those Requirements Were Enacted by the Town

As set forth hereinbelow, *Tarpon's* application should be denied because granting the application would violate the *requirements* of the Town of Saugerties Zoning Code as well as the *legislative intent* behind those requirements.

The Town of Saugerties enacted its Zoning code for the purpose of "protecting and promoting public health, safety, comfort, convenience, economy, and general welfare."⁵

More specifically, the Town of Saugerties Zoning Code has enacted sections which deal specifically with site planning standards, location and design standards as well as approval criteria.⁶ Each of these sections were enacted to further ensure that the legislative intent of the Town Code is enforced.

As is explicitly set forth within its text,

"No commercial telecommunications facility (CTF) shall hereafter be used, erected, moved, reconstructed, changed or altered not shall any existing structure be modified to serve as a commercial telecommunications facility unless in conformity with the standards, regulations and procedures set forth below."⁷

Pursuant to Section §245-11(P)(2), the legislative intent behind codifying specific regulations and requirements for wireless communication facilities include:

- (a) Preserve the character and appearance of the Town while simultaneously allowing adequate commercial telecommunications services to be developed, and provide a sufficient number of locations to accommodate the needs of telecommunications service providers;

⁵ See Section §245-2 the Town of Saugerties Zoning Code.

⁶ See Sections §245-11(P)(4), §245-11(P)(5), §245-11(P)(6), §245-11(P)(7), §245-11(P)(9) and §245-11(P)(10) of the Town of Saugerties Zoning Code.

⁷ See Section §245-11(P)(1) of the Town of Saugerties Zoning Code.

- (b) Protect the scenic, historic, environmental, and natural or man-made resources of the community;
- (c) Provide standards and requirements for regulation, placement, construction, monitoring, design, modification, and removal of commercial telecommunications facilities;
- (d) Establish a systematic review process that ensures action within a reasonable period of time for requests for authorization to place, construct, operate or modify commercial telecommunications facilities;
- (e) Preserve property values;
- (f) Minimize the total number and height of facilities throughout the community while providing adequate coverage for the Town Saugerties;
- (g) Locate CTFs so that they do not have negative impacts, such as, but not limited to, attractive nuisance, noise and falling objects, on the general safety, welfare, and quality of life of the community;
- (h) Require owners or sponsors of CTFs to configure them so as to minimize and mitigate the adverse visual impact of the facilities; and
- (i) Provide opportunities for the location of emergency service telecommunications systems on commercial facilities and to encourage commercial facilities to expedite such co-location.⁸

As set forth hereinbelow, and as established by the admissible evidence being submitted herewith, if *Tarpon's* application was to be granted, the irresponsible placement of a tower at the location proposed by *Tarpon* would inflict upon the nearby homes and residential community the precise types of adverse impacts which the Town Code was specifically enacted to prevent.

⁸ See Sections §245-11(P)(2)(a) - (i) of the Town of Saugerties Zoning Code.

A. Tarpon's Application Does Not Comply with the Requirements for a Use Variance to be Granted

Tarpon is required to obtain a Use Variance because the property upon which *Tarpon* seeks to install its proposed one hundred twenty (120) foot tower is located in a Residential Hamlet (RH) Zoning District. The Zoning Code prohibits such facilities from being installed in such Zoning District without a Use Variance.

Pursuant to Section §245-36(E)(1)(c) it is the duty and responsibility for the Zoning Board of Appeals to grant variances in accordance with Section §245-37.

Specifically Section §245-37(A)(6) states that:

The Board of Appeals shall, in the granting of both use variances and area variances, have the authority to impose such reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property. Such conditions shall be consistent with the spirit and intent of this chapter and shall be imposed for the purpose of minimizing any adverse impact such variance may have on the Town of Saugerties.

As detailed in *Tarpon's* application, Verizon Wireless is considered a Public Utility and thus the *Rosenberg* standard applies. However, even applying the non-traditional, public utility standard set forth in Cellular Tel. Co. v. Rosenberg, 82 N.Y.2d 364 (1993) *Tarpon's* application still does not comply with the necessary requirements.

In *Rosenberg*, the court held

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 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 the currently prevent it from

providing adequate service to its customers in the ... area.

Rosenberg, 82 N.Y.2d at 372-74 (citing Consolidated Edison Co. v. Hoffman, 43 N.Y.2d 598 (1978)).

Thus, the law in New York is that a municipality may not prohibit facilities necessary for the transmission of a public utility.

It is *Tarpon's* burden to prove that there is a need for the proposed tower. Despite *Tarpon's* contentions that it has met that burden, it has not. As is reflected within the records *Tarpon* has failed to submit any form of hard data demonstrating an actual need for the proposed facility. Typically to establish the need for a wireless facility applicants will submit hard data in the form of Drive Test Data and Dropped Call Records. Here, *Tarpon* has not submitted either form of substantial evidence to prove its proposed facility is needed.

Moreover, the proposed facility is being considered to provide coverage to the Glasco Turnpike - Rt. 32 corridor. However, as is reflected within the records *Tarpon* has failed to submit any form of hard data demonstrating an actual need for the proposed facility. In fact, in the December 13, 2019 letter, Verizon's engineer Michael Crosby addresses the concern that the proposed tower will not address a concern of lack of coverage in the Rt. 32 area. Specifically he states that the proposed site

cannot provide dominant coverage in the Rt. 32 area. It is known that the Rt. 32 area south of Saugerties experiences areas of variable coverage ... The Rt. 32 area is a complete gap area for Verizon's higher frequency (AWS/PCS) bands (p20,21). The lack of high band in this area causes the 700MHz layer to become overloaded creating capacity issues that compound these areas already subject to variable coverage conditions further degrading capabilities. Verizon is actively working to resolve this area with other solutions that complement the Glasco Tpk 1-87 project.

When questioned about this statement at the August 3, 2020 ZBA hearing Mr. Crosby dismissed such discussion by stating that "there are no solution being considered, and that he was mistakenly referencing Rt. 32 in the northern part of Saugerties."⁹

Here, Verizon itself is admitting that the proposed facility will not even remedy the gap in coverage it purports to have and thus, demonstrating there is no need for the proposed facility.

Additionally, the engineer hired by the Town, Ronald E. Graiff notes that he finds it "very difficult to determine any significant differences between one of the alternative sites and the proposed location."¹⁰ Thus, again demonstrating the proposed facility is not needed and could be located at a less intrusive site.

Moreover, Mr. Graiff concluded in his February 19, 2020 letter that "[a]ll of the calculated coverage predictions do demonstrate less than ideal coverage further justifying the site. Notwithstanding that opinion, there remain issues with respect to the justification of the proposed facility at chose location."

Mr. Graiff additionally points out that the maps submitted by the applicant are not useful as they do not contain a scale making it impossible to determine how large the search ring is. Mr. Graiff further discusses that there are other possible sites that might be considered if the search ring was expanded by a 1/2 mile radius. Specifically, he notes that there is another possible site located on Industrial Drive which only consist of a bus parking area and commercial buildings. Mr. Graiff concludes that the Industrial Drive site "appears to be within a reasonable search ring and may be correctly zoned" and that "a complete critical review may indicate alternative locations."¹¹

For the forgoing reasons, *Tarpon's* application for a Use Variance should be denied.

⁹ See page 3 of the WebEx Meeting Minutes from the August 3, 2020 Hearing.

¹⁰ See page 1 of Ronald E. Graiff's June 29, 2020 letter.

¹¹ See Ronald E. Graiff's February 19, 2020 letter.

B. *Tarpon's Application Does Not Comply with the
Requirements for an Area Variance to be Granted*

Section §245-37(C)(3)(b) of the Zoning Code, explicitly provides that when determining whether or not to grant an Area Variance, the Zoning Board of Appeals shall "take into consideration the benefit to the applicant if the variance is granted as weighted against the detriment to the health, safety and welfare of the neighborhood or community by such grant."

When making such a determination the ZBA must also consider:

- (1) Whether an undesirable change will be produced in the character of the neighborhood or a determinant to nearby properties will be created by granting of the area variance;
- (2) Whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance;
- (3) Whether the requested area variance is substantial;
- (4) Whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and
- (5) Whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the Board of Appeals but shall not necessarily preclude the granting of the area variance.¹²

Section §245-37(C)(3)(c) additionally mandates that when granting an area variance the ZBA must grant "the minimum variance that it shall deem necessary and adequate and at the same time preserve and protect the character of the neighborhood and health, safety and welfare of the community."

Here, it is undeniable that the detriment to the community outweighs the benefit to the applicant. As will be demonstrated below the facility does not present a minimal intrusion to the community. Specifically, the proposed facility will have extreme adverse aesthetic impacts to the

¹² See Sections §245-11(P)(2)(a) - (i) of the Town of Saugerties Zoning Code.

surrounding residential community. Moreover, the homes in the surrounding residential community will suffered a reduction in property value due to the facility being in such close proximity.

As detailed in T-Mobile Ne. LLC v. Town of Islip, in New York concerns regarding aesthetics can be a valid ground for local boards to make zoning decisions. T-Mobile Ne. LLC v. Town of Islip, 893 F. Supp. 2d 338, 356 (E.D.N.Y. 2012). "Although a reviewing court would not normally look far beyond [a local board's] citing of aesthetics to find a valid basis for a local zoning decision, ... under the TCA, a reviewing court can find that aesthetics qualify as a permissible ground for denial of a permit." Id.

Further, the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursues, other than an area variance. Specifically, the RF Consulting Engineer, Ronald Graiff, hired by the Town notes that he "finds it very difficult to determine any significant differences between one of the alternative sites and the proposed location."¹³

Moreover that the "differences in coverage, primarily between the Industrial Drive site and the proposed site are de-Minimis at best."¹⁴

Thus, Tarpon can achieve the same objective of providing wireless coverage even if it locates the facility at a different location. As is detailed above Mr. Graiff states that the same objective can be reached by located the tower in an industrial location rather than the proposed residential site. Specifically, Mr. Graiff concludes that "it is impossible for this engineer to report that the proposed site is significantly better than the Industrial Rd. site."

¹³ See page 1 of Ronald E. Graiff's June 29, 2020 letter.

¹⁴ Id.

Additionally, the difficulty here has been self-created by *Tarpon* who has failed to seriously consider alternative sites such as Industrial Dr. or Tower Dr.

The requested area variance is substantial, will create an undesirable change to the character of the neighborhood, and a determinant to nearby properties because of the extreme adverse effects it will have the surrounding residential community.

Of most import, in addition to those adverse effects placing the tower at the proposed location creates an unsafe fall zone. Pursuant to Section §245-11(P)(2)(g) the purpose of the Zoning Code is to locate Wireless Facilities "so that they do not have negative impacts, such as, but not limited to, attractive nuisance, noise and failing objects, on the general safety, welfare, and quality of life of the community." Detailed on page 4 *Tarpon's* Statement of Intent, *Tarpon* is seeking an area variance for setback purposes. Specifically, "the tower is not able to meet the 186' setback requirement." The proposed tower will only have a 19' setback from the near property line, meaning that if the tower were to fall one hundred one (101) feet of the tower would fall onto the neighboring property.

C. *Tarpon's* Application Does Not Comply with the Requirements for Granting a Special Use Permit

A simple review of the record reflects that *Tarpon's* application must be denied because such application, and all of its supporting submissions, wholly fail to establish that the application complies with the requirements and limitations of the Town Code regarding wireless communications facilities regulations.

As explicitly stated in Section §245-11(P)(3), an application for a special use permit is required. Specifically,

- (a) An applicant shall be required to submit an application for a special use permit in accordance with the requirements of §245-34 of this chapter.
- (b) All special use permit application require site review. In addition to the data required in §§ 245-33 and 245-34, applications for CTFs shall be accompanied by the supporting documentation set forth in Subsection P(7) below.
- (c) The cost of any reviews by outside experts deemed necessary by the Planning Board to fulfill any of its responsibilities hereunder shall be at the applicant's expense. Such experts may include but not be limited to civil engineers, professional planners, attorneys and radio frequency engineers.

"In granting any special use permit, the Planning Board shall take into consideration the public health, safety and general welfare and the comfort and convenience of the public in general in the Town and of the immediate neighborhood in particular."¹⁵

Pursuant to Section §140-75(A), wireless communication facilities require "Special Permit approval from the Planning Board." Moreover, as is explicitly set forth in Section §245-11(P)(9)(a), "the Planning Board shall specifically make all of the following findings before granting the special use permit:"

- (1) The applicant is not already providing adequate coverage and/or adequate capacity to the Town of Saugerties;

¹⁵ See Section §245-34(D)(2) of the Town of Saugerties Zoning Code.

- (2) That the applicant is not able to use existing facilities or sites to provide adequate coverage and/or adequate capacity to the Town of Saugerties;
- (3) That the applicant has agreed to rent or lease available space on the facility, under the terms of a fair market lease, without discrimination to other telecommunications providers;
- (4) That the proposed CTF does not exceed the minimum height required to provide adequate service and will not have significant adverse impact on historic resources, scenic views, residential property values, natural or man-made resources; and
- (5) That the proposed CTF shall comply with all FCC regulations regarding emissions of electromagnetic radiation, and that the required monitoring program described in Subsection P(10) below is in place and shall be wholly paid for by the applicant.

As is explicitly set forth in Section §245-34(A), the intent behind requiring Special Use Permit review is to:

- (1) ... require special consideration so that they may be properly located and planned with respect to the objectives of this chapter and their effect on the surrounding properties and community character.¹⁶
- (2) ... to ensure compatibility with the surrounding neighborhood and to ensure the long-term benefit of the use to the Town.¹⁷

¹⁶ See Section §245-34(A)(1) of the Town of Saugerties Zoning Code.

¹⁷ See Section §245-34(A)(2) of the Town of Saugerties Zoning Code.

(i) Tarpon's Proposed Wireless Facility is not Compatible with Surrounding Properties or the Community Character.

Recognizing the likely adverse aesthetic impacts that an irresponsibly placed wireless facility tower would inflict upon nearby homes and residential communities, the Town of Saugerties enacted several Zoning Code requirements to regulate the placement of wireless facilities to prevent unnecessary adverse aesthetic impacts upon same.

Specifically, Section §245-34(D)(2)(v) requires "[t]he design of structures and the operation of the use shall ensure compatibility with surrounding uses and with the scenic and visual characteristics of the Town." Additionally, Section §245-34(D)(2)(w) requires "[c]ompatibilty of the proposed use with the principal of the district, the purposes set forth in this chapter, and the goals of the Comprehensive Plan."

It is beyond argument that the irresponsible placement of *Tarpon's* massive twelve (12) story tower in a residential neighborhood, where no other structures stand more than two (2) stories in height, would cause the massive facility to *stand out like a sore thumb*, dominate the skyline, and inflict substantial adverse aesthetic impacts upon the nearby homes.

Moreover, as has been held by federal courts, including the United States Court of Appeals for the Second Circuit, significant and/or unnecessary adverse aesthetic impacts are proper legal grounds upon which a local government may deny a zoning application seeking approval for the construction of a cell tower. *See Omnipoint, infra.*

As an initial matter, *Tarpon* has wholly failed to comply with Sections §245-34(A)(1), §245-34(A)(2), §245-34(D)(2)(v) or §245-34(D)(2)(w). Each of these above-referenced sections requires compatibility of the proposed wireless facility with the "surrounding uses and with the scenic and visual characteristics of the Town;" "surrounding properties and community character;"

"surrounding neighborhood and to ensure the long-term benefit of the use to the Town;" and with the "principal of the district, the purposes set forth in this chapter, and the goals of the Comprehensive Plan."

It is unreasonable to believe that a one hundred twenty (120) foot cell tower will be compatible with a residential neighborhood. As will be detailed below if installed, the tower will cause substantial adverse aesthetic impacts to the surrounding residential community and a reduction in property values.

Moreover, as is set forth hereinbelow, *Tarpon* has failed to provide a shred of probative evidence to establish that the wireless communications facility is not injurious to the neighborhood. *Tarpon's* application essentially contends that the proposed site is the best possible location for a minimized impact on the surrounding residential properties.

Further, *Tarpon* attempts to minimize the adverse aesthetic impacts by stating "[d]ue to the fact that objects tend to appear smaller the farther they are from the viewer, in this case, the structure would appear very small, if visible at all, from a distance of more than five (5) miles."¹⁸ However, *Tarpon* also admits that the surrounding trees have an estimated height of forty (40) to seventy (70) feet. Thus, the proposed tower will stand at least fifty (50) taller than even the tallest of the surrounding trees.

Pursuant to Section §245-2 the purpose of the Town of Saugerties Zoning Code is to: (i) promote the use of the land for its most appropriate, reasonable and beneficial purposes¹⁹; (ii) promote the character, rights, and stability of established residence and businesses²⁰; (iii) conserve

¹⁸ See page 1 of June 10, 2020 Visual Resource Evaluation.

¹⁹ See Section §245-2(A) of the Town of Saugerties Zoning Code.

²⁰ See Section §245-2(B) of the Town of Saugerties Zoning Code.

and enhance the value of land²¹; and (iv) provide an attractive landscape that enhances the physical environment of the Town.²²"

Here, as stated above not only is *Tarpon* seeking to place the facility in a residentially zoned area, but it is also seeking to place a one hundred twenty (120) foot facility, equivalent to twelve (12) stories, in an area where first, no other surrounding structure stands more than two (2) stories tall and second, the surrounding trees do not stand more than seventy (70) feet in height. Thus, it is impossible for *Tarpon* to claim that its facility is compatible with the surrounding area or promotes the surrounding land use and character. It is obvious that the proposed wireless facility, which is over fifty (50) feet taller than the surrounding trees, will *stand out like a sore thumb* and is not compatible with the surrounding landscape.

(ii) Evidence of the Actual Adverse Aesthetic Impacts Which the Proposed Tower Would Inflict Upon the Nearby Homes

As logic would dictate, the persons who are best suited to accurately assess the nature and extent of the adverse aesthetic impacts that an irresponsibly placed wireless facility would inflict upon homes in close proximity to the proposed facility, are the homeowners themselves.

Consistent with same, The United States Court of Appeals for the Second Circuit has recognized that when a local government is entertaining a wireless communications facility application, it should accept, as direct evidence of the adverse aesthetic impacts that a proposed facility would inflict upon nearby homes, statements and letters from the actual 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

²¹ See Section §245-2(C) of the Town of Saugerties Zoning Code.

²² See Section §245-2(E) of the Town of Saugerties Zoning Code.

(2nd Cir. 2005). Federal Courts have consistently held that adverse aesthetic impacts are a valid basis on which to deny applications for proposed wireless facilities. *See Omnipoint Communications Inc. v. The City of White Plains*, 430 F2d 529 (2nd Cir. 2005), *T-Mobile Northeast LLC v. The Town of Islip*, 893 F.Supp.2d 338 (2012).

Additionally, as is explicitly set forth in the Zoning Code the legislative intent behind enacting a Wireless Section of the Code was to: (i) protect and preserve the scenic character and appearance of the Town²³ and (ii) require wireless facilities to be configured in a way to minimize and mitigate the adverse visual impact of the facilities²⁴.

Annexed as "substantial evidence" of the wholly unnecessary and substantial adverse aesthetic impacts that the irresponsible placement of *Tarpon's* twelve (12) story wireless facility would inflict upon the nearby homes are letters from the owners of those homes who detail, from their personal perspective, the specific adverse aesthetic impacts their homes and residential properties would suffer if the massive facility proposed by *Tarpon* were permitted to be built so close to their respective homes.

Annexed collectively herein as Exhibit "A," are letters from: Jill DelVillano, 558 Glasco Turnpike, Saugerties, NY; Biagio DelVillano, 558 Glasco Turnpike, Saugerties, NY; Gina Pierson, 776 Kings Highway, Saugerties, NY; Doug Pierson, 776 Kings Highway, Saugerties, NY; Raymond Smith, 783 Kings Highway, Saugerties, NY; Tamara Schuppin, 1221 Church Road, #3, Saugerties, NY; Craig Hagquist, 1221 Churchland Road, Saugerties, NY; Tim Wells, 515 Glasco Tpke, Saugerties, NY; Arzi McKeown, 520 Glasco Turnpike, Saugerties, NY; Jay Mooers, 719 Churchland Road, Saugerties, NY; Sarah Conroy, 64 Dussol Road, Saugerties, NY; Julie Desch,

²³ See Sections §245-2(P)(2)(a) and §245-2(P)(2)(b) of the Town of Saugerties Zoning Code.

²⁴ See Section §245-2(P)(2)(h) of the Town of Saugerties Zoning Code.

793 Kings Hwy, Saugerties, NY; Vincent Cinelli, 583 Glasco Turnpike, Saugerties, NY; and Charlene and David (Travis) Hughes, 780 Kings Highway, Saugerties, NY.

Within each of those letters, the homeowners personally detail the adverse aesthetic impacts that the proposed facility would inflict upon their respective homes. They have provided detailed and compelling explanations of the dramatic adverse impacts their properties would suffer if the proposed installation of a massive cell tower is permitted to proceed.

The specific and detailed impacts described by the adjacent and nearby property owners constitute "substantial evidence" of the adverse aesthetic impacts they stand to suffer because they are not limited to "generalized concerns," but instead contain detailed descriptions of how the proposed facility would dominate their views from their "dining room," "bedroom," "bathroom," "family room," "deck," and backyards, and generally from all over their properties. As detailed therein, the substantial adverse aesthetic impacts which the irresponsible placement of the proposed facility would inflict upon the nearby homes, are the precise type of injurious impacts which the Town Zoning Code was specifically intended to prevent.

(iii) *Tarpon's Application Fails to Demonstrate
That The Proposed Facility is Necessary*

As detailed above, pursuant to Section §245-11(P)(9)(a), "the Planning Board shall specifically make all of the following findings before granting the special use permit:"

- (1) The applicant is not already providing adequate coverage and/or adequate capacity to the Town of Saugerties;
- (2) That the applicant is not able to use existing facilities or sites to provide adequate coverage and/or adequate capacity to the Town of Saugerties;
- (3) That the applicant has agreed to rent or lease available space on the facility, under the terms of a fair market lease, without discrimination to other telecommunications providers;

- (4) That the proposed CTF does not exceed the minimum height required to provide adequate service and will not have significant adverse impact on historic resources, scenic views, residential property values, natural or man-made resources; and
- (5) That the proposed CTF shall comply with all FCC regulations regarding emissions of electromagnetic radiation, and that the required monitoring program described in Subsection P(10) below is in place and shall be wholly paid for by the applicant.

As is reflected within the records, *Tarpon* has failed to submit any form of hard data demonstrating an actual need for the proposed facility. There is no way for the Board to determine whether or not the applicant is already providing adequate coverage without seeing any hard data.

Additionally, in the December 13, 2019 letter, Verizon's engineer Michael Crosby, responded to a concern that Verizon "should provide coverage maps of each site in Saugerties along with that service is provided."²⁵ Mr. Crosby responded that such coverage maps have been provided. However, a simple review of the coverage maps submitted by Verizon show that maps presented do not include any information about how the maps were constructed, what data was used to reach such conclusions or any information as to who created the maps.

Tarpon has also failed to adequately demonstrate that it is unable to use an existing facility to provide adequate coverage. Verizon simply makes generalized conclusions as to why no existing facility is a viable option. Neither Verizon nor *Tarpon* have provided any meaningful analysis or data to prove why the use of an existing facility is not viable.

Neither Verizon nor *Tarpon* also fail to provide substantial evidence detailing their conclusion that the proposed height is the minimum height necessary. Instead Verizon simply states the surrounding landscape prevents *Tarpon* from lowering the height of the proposed tower.

For the foregoing reasons, *Tarpon's* application for a Special Permit should be denied.

²⁵ See Verizon's December 13, 2019 letter

D. *Tarpon's Application Does Not Comply With The
Requirements For Site Plan Approval*

Pursuant to Section §245-33(A)(1) the reason that the Town requires Site Plan review is to:

Allow the proposer integration of uses into the community based on their characteristics or special characteristics of the area in which they are to be located; to allow the Town to accommodate growth without creating an adverse effect on the Town and its citizens and taxpayers; to protect the health, safety and welfare of the citizens; and to promote consistent with the goals and objectives of the Town of Saugerties Comprehensive Plan.

Moreover, Section §245-11(5)(b) requires that "tree plantings shall be required where deemed necessary to screen portions of the facility and accessory structures from nearby residential properties."

When determining whether Site Plan Approval may be granted the Planning Board considers the following:

- (i) Conformity with the Town of Saugerties' Design Guidelines.²⁶
- (ii) Location, arrangement, size, design and general site compatibility of buildings...²⁷
- (i) *Tarpon's Proposed Wireless Facility Does Not Conform with the Town's Goals or Accommodate Growth within the Town without Creating an Adverse Effect*

As set forth in the legislative purpose of Section §245-2, the Town adopted the provisions of its Zoning Code to establish "a comprehensive plan for protecting and promoting public health, safety, comfort, convenience, economy, and general welfare." Further, the design standards set forth in Section §245-11(P)(4)(a)(1) require that "visibility of a facility shall be limited to the absolute minimum necessary to provide adequate service."

²⁶ See Section §245-33(D)(5)(c)(1) of the Town of Saugerties Zoning Code.

²⁷ See Section §245-33(D)(5)(c)(2) of the Town of Saugerties Zoning Code.

However, as stated above, here *Tarpon* is seeking to place a one hundred twenty (120) foot tower in a residential neighborhood. Moreover, *Tarpon's* visual assessment is inherently defective and should be disregarded entirely.

In a hollow effort to induce the Town to believe that the installation of a massive twelve (12) story cell tower *would not* inflict a severe adverse aesthetic impact upon the adjacent homes, *Tarpon* has submitted only a vague Visual Resource Assessment.

As is undoubtedly known to *Tarpon*, the Visual Assessments presented to the Board are inherently defective, because they do not serve the purpose for which they have been purportedly offered. The whole purpose for which local governments require photo-simulations of a proposed cell tower is to require applicants to provide the reviewing authority with a clear visual image of the *actual* aesthetic impacts which a proposed installation is going to inflict upon the nearby homes and residential community.

Not surprisingly, applicants often seek to disingenuously minimize the visual impact depictions, by *deliberately omitting* from any such photo-simulations, any images **actually taken from** the nearby homes which would sustain the most severe adverse aesthetic impacts.

In Omnipoint Communications Inc. v. The City of White Plains, 430 F2d 529 (2nd Cir. 2005), the United States Court of Appeals for the Second Circuit explicitly ruled that where a proponent of a wireless facility presents visual impact depictions wherein they "omit" any images from the actual perspectives of the homes that are in closest proximity to the proposed installation, such presentations are inherently defective, and should be 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. . . *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.*

Omnipoint Communications Inc. v. The City of White Plains, 430 F2d 529 (2nd Cir. 2005).

A simple review of the Visual Resource Assessments submitted by *Tarpon* reflects that it does not include a single image taken from any of the nearby homes that will sustain the most severe adverse aesthetic impacts from the installation of the massive tower, which *Tarpon* seeks to construct in such close proximity to those homes.

Instead, it contains photos taken from public roads, much less from the homes that stand to suffer the most severe adverse aesthetic impacts. Additionally, at the July 6, 2020 ZBA hearing it was pointed out that the board spotted errors with the Balloon Test and asked that a corrected version be submitted.²⁸

This is the exact type of "presentation," which the federal court explicitly ruled to be defective in Omnipoint.

As such, in accord with the federal court's holding in Omnipoint, *Tarpon's* Visual Resource Assessments should be recognized as inherently defective and disregarded entirely.

²⁸ See page 2 of the July 6, 2020 ZBA WebEx Meeting Minutes.

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

In addition to the adverse impacts upon the aesthetics and residential character of the area at issue, the irresponsible placement of such a massive wireless facility in such close proximity to nearby residential homes would contemporaneously inflict upon such homes a severe adverse impact upon the actual value of those residential properties.

The type of severe adverse impact that the proposed facility will have on the surrounding homes is the exact type of harm the Zoning Code was enacted to prevent. For example, Section §245-11(P)(2)(e) states that the purpose in enacting a Wireless Facility Section of the Zoning Code was to "[p]reserve property values."

As established by the evidence being submitted herewith, if *Tarpon* is permitted to install the wireless facility it proposes in such close proximity to nearby homes, they would inflict upon the homes dramatic losses in property value, to the extent that the homeowners would suffer significant losses in the values of their residential properties.

Across the entire United States, both real estate appraisers²⁹ and real estate brokers have rendered professional opinions that 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%.³⁰

²⁹ See e.g. a February 22, 2012 article discussing a NJ appraiser's analysis wherein he concluded that the installation of a Cell 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>

³⁰ 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.

In the worst cases, cell towers built near existing homes have caused the homes to be rendered wholly unsaleable.³¹

As has been recognized by federal courts, it is perfectly proper for a local zoning authority to consider, as direct evidence of the reduction of property values that an irresponsibly placed wireless facility would inflict upon nearby homes, the professional opinions of licensed real estate brokers, (as opposed to appraisers) who provide their professional opinions as to the adverse impact upon property values which would be caused by the installation of the proposed cell tower *See Omnipoint Communications Inc. v. The City of White Plains*, 430 F2d 529 (2nd Cir. 2005). This is especially true when they possess years of real estate sales experience within the community and specific geographic area at issue.

As evidence of the adverse impact that the proposed cell tower would have upon the property values of the homes that would be adjacent and/or in close proximity to it, annexed hereto as Exhibit "B" are letters setting forth the professional opinions of licensed real estate professionals, who are acutely familiar with the specific real estate market at issue, and who submit their professional opinions that the installation of the proposed massive twelve (12)

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 Cell 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%.

³¹ 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-home--172366931.html>.

story wireless facility would cause property values of the affected homes to be reduced by ten (10%) to twenty-five percent (25%) (or more), and would make those homes more difficult to sell, even at reduced purchase prices.

Given the significant reductions in property values that the proposed installation would inflict upon the nearby homes, the granting of *Tarpon's* application would inflict upon the residential neighborhood the very type of injurious impacts that the Town Zoning Code was specifically intended to prevent. Accordingly, *Tarpon's* application should be denied.

E. *Tarpon's* Application Must Be Denied Because The Proposed
Location Fails to Afford Any Meaningful Fall Zone or Safe Zone

Remarkably, *Tarpon* proposes to place its desired one hundred twenty (120) foot monopole tower without any meaningful *fall zone* or *safe zone*, which is typically required for monopole towers.

Due to the well-documented dangers which the irresponsible placement of monopole cell towers present, local governments across the entire United States have enacted and enforce zoning provisions to ensure that the installation of such towers includes a fall zone or safe zone of sufficient size to preserve the health and safety of their residents.

As detailed herein, and as supported by the evidence submitted herewith, the four principal dangers that irresponsibly placed monopole cell towers present are structural failures, fires, ice fall, and debris fall.

Due to the speed at which such cell towers are being constructed in the United States, and a desire on the part of *site developers* to build them as cheaply as possible, quality control over the manufacture, construction, and maintenance of monopole cell towers is nearly non-existent.

Not surprisingly, structural failures of monopole cell towers and monopole fires occur far more often than the public is aware of. Such failures and fires often result in a monopole cell tower collapsing to the ground, presenting a severe risk of property damage, injury, or death.

The two most common causes of the failure and complete collapse of a monopole cell tower are baseplate failures (*See Exhibits "D" and "E"*) and fires (*See Exhibits "G" and "H"*).

Baseplate failures cause the entire tower to collapse³² and fires either cause the tower to "warp" or to collapse in a flaming heap.³³ In addition to baseplate failures, monopole collapses are also caused by failures of flanges, joints, and bolts.

Although it is not widely publicized, even brand new monopoles are known to fail, in dramatic fashion, often going from being 165 feet "*tall*" to 165 feet "*long*," in a matter of seconds.

By way of example, annexed hereto as Exhibit "D" is a photograph of a new 165-foot cell tower which failed and collapsed, with the remains of the monopole landing more than half a football field from its base, crushing a Fire Chief's vehicle in the process. Annexed hereto as Exhibit "E" is a mere sampling of images of collapses, which were due to baseplate failure.

Monopoles, such as the one being proposed by *Tarpon*, are, *by far*, the most susceptible fires and collapse due to fire. *See Exhibits "G" and "H,"* which respectively include a sampling of images of monopoles, which suffered fires, and articles regarding the same.

For at least the past decade, engineering firms have conducted thorough analyses of the causes of such failures and fires, and have proposed safer designs for monopole cell towers. Still,

³² 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."

³³ 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=y__NKVWrazg, or simply go to *Google*, and search for "cell tower burns."

site developers generally do not avail themselves of the safer designs, simply because of cost. At https://www.towernx.com/downloads/Monopole_Structures_Current_Issues.pdf, one can view an engineering report that was completed by structural engineers. That report clearly documents instances of both structural failures of, and fires on, monopole cell towers (with images), and provides recommended structural upgrades to prevent such failures and fires.

In all, there are four (4) principal dangers that have induced local governments to adopt specific setback requirements for cell towers, and which serve as the reason why required setback distances are invariably tied directly to the height of monopole cell towers. Those well-documented dangers consist of structural failures, fires, ice fall, and debris fall, each of which are documented immediately hereinbelow.

(i) Structural Failures

As reflected within Exhibits "D," "E," "G" and "H" and as confirmed within an engineering report which can be found at https://www.towernx.com/downloads/Monopole_Structures_Current_Issues.pdf, the most common causes of the collapse of monopole cell towers are component failures at the base of the tower, and fires. When such failures occur, an entire sixty thousand (60,000) pound steel tower will collapse with its wreckage landing at a distance that is equal to, or sometimes greater than, the height of the tower itself.

The danger of such a collapse cannot be overstated. While deaths from cell tower collapse have been documented, most of the fatalities are workers who work on the towers, or emergency response personnel who are injured or killed when responding to a cell tower collapse and/or fire.

Annexed hereto as Exhibit "F" is an article about an incident involving the death of several

individuals resulting from the collapse of two cell towers. While the article indicates that two victims had been identified, a third victim, who was also killed in the collapse, was a firefighter, responding to the scene to provide emergency assistance to the workers.

(ii) Fire

At least once per month, a monopole cell tower somewhere in the U.S will burst into flames, and an unspecified number of them will, thereafter, proceed to collapse in a flaming heap.

The most notorious example was a monopole cell tower in Wellesley MA, which erupted into flames on a main thoroughfare, and the entire tower proceeded to collapse in flames. Meanwhile, hundreds of drivers drove past it.

To watch a color video of that event, simply go to *YouTube* and perform a search for "Cell Tower Burns to the ground." The results will include one or more color videos of the flaming tower collapsing as motorists drove by.

Annexed respectively hereto as Exhibits "G" and "H" are photographs depicting, and articles describing, a mere sampling of well-documented monopole cell tower fires.

(iii) Ice Fall

A natural, but well-known danger that is also associated with the placement of monopole cell towers in close proximity to homes or public areas, is "ice," and the genuine 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.

With one hundred fifty (150) feet being the most common height of monopole cell towers in New York, a physicist prepared a formal report detailing the speed of ice chunks, which are

commonly known to fall after a winter thaw, based upon a tower height of 150 feet.

Annexed hereto as Exhibit "I" is a true copy of a physicist's report dated April 16, 2013, which calculates the speed of ice falling from a one hundred fifty (150) foot cell tower at sixty-seven (67) miles per hour.

As logic would dictate, if chunks of ice fell from a height of twelve (12) stories, they could seriously injure or kill anyone they strike. Anyone coming in close proximity to the undersized compound proposed by *Tarpon* would be well within the ice fall zone of the proposed tower.

Worst of all, chunks of ice falling from cell towers generate no noise, and as such, anyone in such danger area would receive no warning before being struck by same.

(iv) Debris Fall

Finally, there is also the danger associated with debris fall, which pertains to those cases within which entire sections of a monopole (up to ten feet in length), antennas, or decorative pieces of a tower, actually fail and fall off.

"Fake tree" monopoles, are known to have their "decorative elements" literally fall off the structure. When they do, they become dangerous projectiles that hurl towards the ground. Annexed hereto as Exhibit "J" is an image from a video posted by ABC7, KVIA news, Florida, which can be viewed at that stations' website, is an example of same where a "decorative frond" fell from a cell tower and "sliced through" a man's car.

Other debris fall cases often occur during routine maintenance work on the cell tower, during which a portion of a tower, an attachment on the tower, or a tool used to work on the tower, are caused to fall from the Tower.

Much like falling ice, falling debris exposes anyone in the debris fall zone to extreme

danger of personal injury or death, if they are struck by the falling debris or tools. Exhibit "K" is a photographic image of a worker's lump hammer, which, after being dropped from a too closely placed tower, crashed through the roof of a nearby structure.

While the rest of the Country is actively enacting and enforcing ordinances to require safe zones around monopoles to protect their citizens and the public from the well-documented dangers described hereinabove, it would behoove the Town of Saugerties to apply its Zoning Ordinance similarly.

Granting *Tarpon's* application to construct its massive tower at the specific location it proposes would clearly violate the intent of the Zoning Code because it would virtually guarantee that the adjacent property, would be within or would have access to, the fall zone, ice fall zone, and debris fall zones of the proposed tower.

Accordingly, *Tarpon's* application should be denied.

POINT III

§ 6409(a) of the Middle-Class Tax Relief and Job Creation Act of 2012 Would Allow *Tarpon* to Increase the Height of the Proposed Wireless Facility Without Further or Prior Zoning Approval

As substantial as the adverse impacts upon the nearby homes and communities will be if the proposed wireless communications facility was constructed at the one hundred twenty (120) foot height currently proposed by *Tarpon*, if such facility were to be built, *Tarpon* might unilaterally choose to increase the height of the facility to as much as one hundred forty (140) feet. The Town would be legally prohibited from stopping them from doing so, due to the constraints of the Middle-Class Tax Relief and Job Creation Act of 2012.

§6409(a) of the Middle-Class Tax Relief and Job Creation Act of 2012 provides that 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 facility or base station that does not substantially change the physical dimensions of such facility or base station. *See* 47 U.S.C. §1455(a).

Under the FCC's reading and interpretation of §6409(a) of the Act, local governments are prohibited from denying modifications to wireless facilities unless the modifications will "substantially change" the physical dimensions of the facility, pole or tower.

The FCC defines "substantial change" to include any modification that would increase the height of the facility by more than ten (10%) percent of the height of the tower, plus the height of an additional antenna, plus a distance of ten (10) feet to separate a new antenna from the pre-existing top antenna, up to a maximum height increase of twenty (20) feet.

Considering the even more substantial adverse impacts which an increase in the height of the wireless communications facility to one hundred forty (140) feet would inflict upon the

homes and communities nearby, *Tarpon's* application should be denied.

Once again, this is especially true since, as set forth in Point III hereinbelow, *Tarpon* has not even established that the proposed tower is actually needed to provide wireless coverage within the Town.

POINT IV

Tarpon Has Failed To Proffer Probative Evidence Sufficient To
Establish A Need For The Proposed Wireless Facility At The Location
And Height Proposed, Or That The Granting Of Its Application Would
Be Consistent With The Smart Planning Requirements Of The Town Code

The obvious intent behind the provisions of Sections §245-2, §245-11(P), §245-33, and §245-34 as well as several other sections of the Town Zoning Code, was to promote "smart planning" of wireless infrastructure within the Town.

Smart planning involves the adoption and enforcement of zoning provisions that require that cell towers be *strategically placed* so that they minimize the number of towers needed to saturate the Town with complete wireless coverage, while contemporaneously avoiding any unnecessary adverse aesthetic or other impacts upon homes and communities situated in close proximity to such towers.

Entirely consistent with that intent, Section §245-11(P)(2)(c) states that the purpose of the Zoning Code is to "[p]rovide standards and requirements for regulation, placement, construction, monitoring, design, modification, and removal of commercial telecommunications facilities." Additionally, Section §245-11(P)(2)(d) detailed that the purpose of the Zoning Code is also to "[e]stablish a systematic review process that ensure action within a reasonable period of time for requests for authorization to place, construct, operate, or modify commercial telecommunications facilities."

To enable them to determine if a proposed cell tower would be consistent with smart planning requirements, sophisticated zoning and planning boards require site developers to provide direct evidentiary proof of:

(a) the precise locations, size, and extent of any geographic gaps in personal wireless services that are being provided by *Tarpon*, which provides personal wireless services within the respective jurisdiction and

(b) the precise locations, size, and extent of any geographic areas within which that identified wireless carrier suffers from a capacity deficiency in its coverage.

The reason that local zoning boards invariably require such information is that without it, the Board is incapable of knowing: (a) if, and to what extent a proposed tower will remedy any actual gaps or deficiencies which may exist, (b) if the proposed height for a tower is the minimum height needed to remedy such gaps, and (c) if the proposed placement is in such a poor location that it would all but require that more towers will need to be built because the proposed tower did not actually cover the gaps in service that actually existed, thereby causing an unnecessary redundancy in cell towers within the Town.

In the present case, *Tarpon* has failed to provide any substantial hard data to establish that the proposed placement of its tower would, in any way, be consistent with the smart planning. By virtue of same, it has failed to provide actual probative evidence to establish: (a) the *actual location of* gaps (or deficient capacity locations) in personal wireless services within the Town, and (b) why or how their proposed massive wireless tower would be the best and/or least intrusive means of remedying those gaps.

A. *Tarpon* Has Failed to Submit Probative Evidence to Establish
The Need for The Proposed Tower at The Height and Location Proposed

As explicitly stated in Section §245-11(P)(2)(f), the Zoning Code seeks to "[m]inimize the total number and height of facilities throughout the community while providing adequate coverage for the Town of Saugerties."

(i) The Applicable Evidentiary Standard

To the extent that applicants seeking to build cell towers seek to have their applications reviewed under the "Public Necessity" standard established in Consolidated Edison co. v. Hoffman, 43 N.Y.2d 598 (1978), the applicant must prove that the new cell tower it proposes is "a public necessity that is required to render safe and adequate service" and that there are compelling reasons why their proposed installation location is more feasible than at other locations. *See T Mobile Northeast LLC v. Town of Islip*, 893 F.Supp.2d. 338 (2012).

Within the context of zoning applications such as the current application that has been filed by *Tarpon*, the applicant is required to prove [1] that there are gaps in a specific wireless carrier's service, [2] that the location of the proposed facility will remedy those gaps, and [3] that the facility presents a "minimal intrusion on the community." *Id.*

As logic would dictate, it is critical that the Planning Board makes factual determinations regarding these specific issues, and that it issues a written decision setting forth those determinations, citing the evidence based upon which it makes its factual determinations.

In the absence of same, any determination which the Board ultimately makes could easily be challenged by the applicant by the filing of a complaint based upon the Board's failure to make such determinations.

As has been clearly enunciated by the Court in T-Mobile, if a local zoning board denies a

cell tower application, it must do so within a written decision which sets forth its factual determinations, and cites the evidence based upon which it made those determinations:

"[E]ven one reason given for the denial is based upon substantial evidence, the decision of the local zoning body cannot be disturbed [by a federal court]"

T Mobile Northeast LLC v. Town of Islip, 893 F.Supp.2d. 338, 354 (2012).

(ii) Tarpon Has Failed To Meet Its Burdens

It is beyond argument that *Tarpon* has failed to meet its burden of proving: (a) that its proposed tower is a Public Necessity, (b) that, as proposed, its tower would present a minimal intrusion on the community, (c) that its proposed placement would minimize its aesthetic intrusion within the meaning of the applicable sections of the Town Zoning Code, and (d) that denial of its applications would constitute a "prohibition of personal wireless services" within the meaning of 47 U.S.C.A. §332(7)(B)(i)(II).

Glaringly absent from *Tarpon's* application is any "*hard data*," which could easily be submitted by the applicant, as *probative evidence* to establish that: (a) there is an actual Public Necessity for the tower being proposed, which (b) not only necessitates the installation of a new tower, but (c) requires it to be built at the specifically chosen location, (d) on the specifically chosen site (as opposed to being built upon alternative less-intrusive locations), and (e) contemporaneously requires that it be built at an elevation no lower than the height now being proposed by *Tarpon*.

(iii) Hard Data and the Lack Thereof

Across the entire United States, applicants seeking approvals to install large cell towers provide local governments with *hard data*, as both: (a) actual evidence that the tower they seek to build is actually necessary, and (b) actual evidence that granting their application would be consistent with smart planning requirements.

The most accurate and least expensive form of *hard data* which can be used as evidence to establish the location, size, and extent of *significant gaps* in personal wireless services is drive test data.

The most accurate and least expensive form of *hard data* that can be used as evidence to establish the location, size, and extent of a geographic area suffering from a *deficiency in capacity* in personal wireless services, is dropped call records.

Unlike "Specialist's reports," RF modeling and propagation maps, all of which are most often manipulated to reflect whatever the preparer wants them to show, *hard data* is straightforward and much less likely to be subject to manipulation, unintentional error or inaccuracy.

Drive Test Data

Actual drive test data does not encompass and does not typically involve the type of manipulation that is almost uniformly found in "computer modeling," the creation of hypothetical propagation maps, or "expert interpretations" of actual data, all of which are so easily manipulated, that they are essentially rendered worthless as a form of probative evidence.

To obtain drive test data, all that is required is the performance of a drive test. This involves attaching a recording device to a cell phone and driving through any given area to test for gaps in wireless service. The device records wireless signal strength every few milliseconds

so that in a two-hour drive test, the device records several hundred thousand recorded signal strengths, which collectively depict a complete and accurate record of the existence, or lack, of any significant gap in wireless service.

Hard drive test data consists of the actual records of the actual recorded strengths of a carrier's wireless signal at precise geographic locations.

Dropped Call Record

Dropped call records are generated by a carrier's computer systems. They are typically extremely accurate because they are generated by a computer that already possesses all of the data pertaining to dropped calls, including the number, date, time, and location of all dropped calls suffered by a wireless carrier at any geographic location, and for any chronological period.

With the clicks of a few keystrokes, each carrier's system can print out a precise record of all dropped calls for any period of time, at any geographic location, and the likelihood that someone would enter false data into a carrier's computer system to materially alter that information is highly unlikely.

As is reflected in the record in the case, *Tarpon* has not provided either of these forms of *hard data* as probative evidence.

Instead, *Tarpon* has provided its own vague analyses regarding existing and potential coverage. A simple review of the submissions from *Tarpon* reflects that they contain no hard data, whatsoever.

The maps presented by *Tarpon* were not actually based on any hard data recorded from any actual drive test, simply because no such drive test was conducted. Concomitantly, the maps do not possess any probative value in establishing: (a) the existence of any location of any

significant gap in personal wireless service, or are suffering in any capacity deficiency, much less (b) the location and geographic size of any actual gap in service or area suffering from a capacity deficiency.

Without providing a shred of hard data to support the same, and after manipulating the actual data, *Tarpon* arrived at what was undoubtedly their pre-determined conclusion that *Tarpon* "needs" to have this massive 120-foot tower, to enable Verizon to provide reliable wireless services within the Town.

Further, Tarpon has failed to demonstrate an actual need for the proposed facility. In fact, in the December 13, 2019 letter, Verizon's engineer Michael Crosby addresses the concern that the proposed tower will not address a concern of lack of coverage in the Rt. 32 area. Specifically he states that the proposed site

cannot provide dominant coverage in the Rt. 32 area. It is known that the Rt. 32 area south of Saugerties experiences areas of variable coverage ... The Rt. 32 area is a complete gap area for Verizon's higher frequency (AWS/PCS) bands (p20,21). The lack of high band in this area causes the 700MHz layer to become overloaded creating capacity issues that compound these areas already subject to variable coverage conditions further degrading capabilities. Verizon is actively working to resolve this area with other solutions that complement the Glasco Tpk 1-87 project.

Thus, admitting that the proposed facility will not remedy the gap in coverage that *Tarpon* is claiming there is.

Additionally, Ronald Graiff a RF Consulting Engineer hire by the Town concluded in his February 19, 2020 letter that "[a]ll of the calculated coverage predictions do demonstrate less than ideal coverage further justifying the site. Notwithstanding that opinion, there remain issues with respect to the justification of the proposed facility at chose location."

Mr. Graiff further points out that the maps submitted by the applicant are not useful as they do not contain a scale making it impossible to determine how large the search ring is. Mr. Graiff

further discusses that there are other possible sites that might be considered if the search ring was expanded by a 1/2 mile radius. Specifically, he notes that there is another possible site located on Industrial Drive which only consist of a bus parking area and commercial buildings. Mr. Graiff concludes that the Industrial Drive site "appears to be within a reasonable search ring and may be correctly zoned" and that "a complete critical review may indicate alternate locations."³⁴

B. *Tarpon's* Provided Analysis Regarding its Wireless Coverage
is Contradicted By *Verizon's* Own Actual Coverage Data

As is a matter of public record, *Verizon* maintains an internet website at the internet domain address of <http://www.verizonwireless.com>.

In conjunction with its ownership and operation of that website, *Verizon* contemporaneously maintains a database that contains geographic data points that cumulatively form a geographic inventory of *Verizon's actual current* coverage for its wireless services.

As maintained and operated by *Verizon*, that database is linked to *Verizon's* website, and functions as the data-source for an interactive function, which enables users to access *Verizon's* own data to ascertain both: (a) the existence of *Verizon's* wireless coverage at any specific geographic location, and (b) the level, or quality of such coverage.

Verizon's interactive website translates *Verizon's actual coverage data* to provide imagery whereby areas that are covered by *Verizon's* service are depicted in red, and areas where *Verizon* has a lack (or gap) in coverage, are depicted in white.

Contemporaneously, the website further translates the data from *Verizon's* database to specify the actual *coverage* at any specific geographic location. Exhibit "C," which is being

³⁴ See Ronald E. Graiff's February 19, 2020 letter.

submitted together with this Memorandum, is a true copy of a record obtained from *Verizon's* website³⁵ on September 1, 2020.

This Exhibit depicts *Verizon's* actual wireless coverage at 766 Kings Highway, Saugerties, New York that being the specific geographic location at which *Tarpon* seeks to install its proposed tower under the claim that *Verizon* "needs" such tower to remedy a gap in *Verizon's* personal wireless service at and around such location.

As reflected within Exhibit "C," *Verizon's* own data reflects that there is no coverage gap in *Verizon's* service at that precise location, or anywhere around or in close proximity to it.

Tarpon's submissions are entirely void of any hard data or probative evidence that establishes that *Verizon needs* the tower being proposed, and *Verizon's* own data affirmatively contradicts what it placed in its application. As such, it is beyond argument that *Tarpon* has wholly failed to submit documentation that "demonstrates and proves" that *Tarpon's* proposed tower is necessary *for Verizon* to provide personal wireless services within the Town.

As such, *Tarpon's* application for a Special Use Permit, Site Plan Approval, Use Variance and Area Variance should be denied.

³⁵ <http://www.verizonwireless.com>.

POINT V

To Comply With the TCA, *Tarpon'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 wireless facility: (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).

A. 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).

B. 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 *Tarpon's* application in a separate written decision, wherein the Board cites the evidence upon which it based its final determination.

Conclusion

In view of the foregoing, it is respectfully submitted that the Town require *Tarpon* to adhere to its Zoning Code and that *Tarpon's* application for approval to build its proposed wireless communications facility should be denied in its entirety.

Respectfully Submitted,

Andrew J. Campanelli