MARK W. BLANCHARD
PARTNER

KRISTEN K. WILSON
PARTNER
*Also admitted in CT

ALAN H. ROTHSCHILD
OF COUNSEL

DENNIS E.A. LYNCH
OF COUNSEL

BLANCHARD & WILSON LLP

235 Main Street / Suite 330 / White Plains, NY 10601
P (914) 461-0280 F (914) 461-2369
BlanchardWilson.com

November 27, 2017

VIA Electronic and UPS Overnight Delivery

Zoning Board of Appeals of the Village of Nelsonville
258 Main Street
Nelsonville, New York 10516
Attention: Honorable William Rice, Chairman
Ms. Pauline Minner, Village Clerk

Re: Application for Special Permit for Cellular Tower Placement on 15 Rockledge Road with Construction of Permanent Access Road and Utility Corridor passing over 16 Rockledge Road as Submitted by Homeland Towers, LLC

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

The undersigned represents the owners ("Owner") of 16 Rockledge Road (the "Access Parcel"), and respectfully submits this letter in opposition to the application for a special permit to allow the installation of a cellular tower at 15 Rockledge Road (the "Land-Locked Parcel"). The application is brought by Homeland Towers, LLC (the "Applicant") and proposes the following actions[1]: the installation of a 110' monopole for cellular communications; the construction and placement of a permanent concrete pad, infrastructure, lighting, power conduits, utilities, and other related equipment on the Land-Locked Parcel; trenching and construction of a utility corridor across the Access Parcel; the destruction of the existing hard-pack gravel private road across the Access Parcel, removal of vegetation including old-growth trees on the Access Parcel, removal of a hand-built rock wall on the Access Parcel, the widening of the private road and encroachment on the Access Parcel, and the replacement of a community-consistent existing hard-pack gravel lane with an asphalt road capable of supporting heavy machinery, utility maintenance equipment, and various pieces of first responder apparatus as required by the monopole and equipment; (the "Project", or sometimes referred to the "Application"). The above described actions are before the Village of Nelsonville's Zoning Board of Appeals (the "Board") without the Owner's consent.

The Applicant has no legal authority to unilaterally undertake any of the above described activities on the Access Parcel. The only rights reserved to the owner of the Land-Locked Parcel ("Logan"), by recorded instruments or otherwise, is for passage over the Access Parcel, nothing

[1] Information describing the full-extent of the Project has not yet been provided to this Board.

more. Therefore, Logan, enjoying only the right of passage, cannot grant consent because to do so, he would have to claim title ownership over that portion of the Access Parcel sought to be traversed. Therefore, this incomplete Application sits before this Board without owner authorization and without compliance with the State Environmental Quality Review Act ("SEQRA"). This Board is well within the authority granted to it under state and federal law to reject outright this application as incomplete and without owner authorization, or, in the alternative to deny the request for the special permit based upon the information provided herein.

The Board's Jurisdiction and Standard of Review

The Project is in the Mountain Residence District ("MR District"). The Board's authority to review the Application is established under Chapter 188 of the Village of Nelsonville's Code (the "Zoning Code"[2]), with specific attention to Chapter 188, Article VII. Cellular Communication Towers[3]. The Board also reviews the Project subject to the requirements of the Federal Telecommunications Act (the "Act"). While the Act sets forth certain standards to which local approval agencies must comply, i.e., acceptable evidentiary standards, a prohibition against discrimination of one cellular provider to favor another, and the federally mandated reasonable-time for review by local boards (most commonly known as the shot-clock) to name a few, it expressly preserves the Board's local authority for a meaningful review of the instant Application. The law states that "nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities[4]."

Or, in other words, the Act does not limit or pre-empt the Board from following the Zoning Code requirements that a completed application be submitted, that the proper owner certify the application, that all reasonable requests for information be satisfied, and compliance with the implementing regulations of SEQRA. The Zoning Code charges this Board with the duty to preserve and protect the character and appearance of the village and conservation of the value of buildings and property[5], and the Act expressly protects that duty.

During review this Board may "request such other and further information as it finds necessary to evaluate the applicant's proposal.[6]" The Act's pre-emption does not mandate local approval of non-compliant submissions. The practical result of the deficiencies in this Application is that the Board and its consultants have not been provided with a sufficient record upon which it may perform its statutory duty. Without a sufficient record, it is impossible for the Board to take its lawful hard-look and be in a position to grant an approval.

It is well-settled and indisputable law that a zoning board of appeals must demonstrate that a decision has a rational basis that is supported by substantial evidence[7]. A failure of a zoning

---

[2] *See, Village of Nelsonville Zoning Code, Chapter 188.*
[3] *See, generally, Chapter 188 §§ 67-72.*
[4] *See, 47 USC § 337(C)(7) Preservation of Local zoning authority (2017)*
[5] *See, Chapter 188, § 188-2(c).*
[6] *See, Chapter 188-68(B).*
[7] *See, Ifrah v. Utschig, 98 NY2d 304, 746 NYS 2d 446 (Ct of App 2004).*

board of appeal or a planning board to approve an application without a substantial record is arbitrary, capricious, an abuse of discretion and must not stand[8].

The Application is Incomplete and Must be Supplemented or Denied

a. The Applicant has no Legal Authority over the Access Parcel.

New York's highest court, the Court of Appeals has held that "where the intention in granting an easement is to afford only a right of ingress and egress, it is the right of passage, and not any right in a physical passageway itself, that is granted to the easement holder."[9] The opinion continues to explain the well-settled law that is directly on-point in this matter, "[a]s this Court observed more than a century ago, '[a] right of way along a private road belonging to another person does not give the [easement holder] a right that the road shall be in no respect altered or the width decreased, for his right…is merely a right to pass with the convenience to which he has been accustomed.'"[10]. It is clear from the Court of Appeals that it is the land-owner, not a mere access beneficiary, who has the sole authority to physically alter its property.

The Court in *Grafton* emphasized that the right of way through and over the way (an alley), was held not to be a reservation of the alley-itself, but only the right-of-passage over the alley way or carriage way[11]. As recently as 2015, the court with appellate jurisdiction over this Board's decisions, the Second Department of the New York Appellate Division, confirmed that legal principal when it held that a right-of-access preserves only passage, while title to a private road remains with the owner[12]. This is consistent with an earlier Second Department holding that the beneficiary of a right-of-access enjoys the right of unimpeded passage and holds no right in the physical passageway itself[13].

Here, the Project can only move forward under a theory that has no legal grounding: that the Land-Locked Parcel, benefiting only from right of-way access, has the legal right to unilaterally and without the owner's consent, undertake the following: 1) trench and install a utility corridor with permanent infrastructure across the Access Parcel; 2) cut-down and otherwise remove old-growth trees on the Access Parcel; 3) dismantle hand crafted rock-walls the owner paid to have installed on the Access Parcel; 4) widen a private road across the Access Parcel; and, 5) increase the impervious surface over the Access Parcel by replacing a hard-pack gravel private road with a yet-unidentified number of yards of asphalt. The result of which will be a significantly negative change to the surrounding community in the MR District. The Applicant's theory is without any basis in law and must be wholly rejected.

---

[8] *Id., generally.*
[9] *See, Lewis v. Young, 92 NY 2d 443, 682 NYS 2d 657 (Ct of App 1998).*
[10] *See, Id, citing, Grafton v. Moir 130 NY 465 (Ct. of App 1865).*
[11] *Id.*
[12] *See, Mazzaferro v. Association of Owners of Mill Neck Estates, Inc., 131 AD 3d 949, 16 NYS 3d 83 (2nd Dep't 2015).*
[13] *Guzzone v. Brandariz, 57 AD 3d 481, 868 NYS 2d 755 (2nd Dep't 2008).*

All of the above is being proposed without the Owner's consent. The Applicant's theory also ignores the Owner's constitutionally protected due process rights governing the use and enjoyment of private property. Here, the Application is unlawfully seeking control over private property. Not only is this Application violative of due-process, it also creates a potential regulatory taking claim, for which the Village, not the Applicant, would be held wholly liable. Also, the Application creates a realistic possibility that the Access Parcel could be re-assessed due to the installation of the asphalt road and related construction and the Owner forced to pay higher taxes for use of his land to which he never consented. The United States Supreme Court has consistently held that the right to exclude is one of the most treasured strands in the owner's bundle of property rights[14].

b. The Application Materials Confirm Only a Right of Passage.

At Appendix D, Section D-5 of the application for special permit, the applicant is required to identify easements. In answering D-5a, the Applicant directs the Board to "See Title Letter."[15] The so-called "Title-Letter" includes copies of a deed reserving access over tax lot 8 with the express language for "the right to use a right-of-way"; and over tax lot 5 with the "rights previously granted to others to use a right-of-way"[16] to the benefit of the Land-Locked Parcel. By producing the deeds for the Board's consideration, the Applicant has proven that the Land-Locked Parcel enjoys only passage to the Land-Locked Parcel. There is no evidence that the Land-Lock Parcel rights have been enlarged at any time throughout the course of ownership. There have been no taxes paid by the owner of the Land-Locked Parcel, no maintenance payments or requirements, no evidence of previous improvements, no activity at all to show an ownership interest greater than a right to passage. There is no basis to support any theory that the Land-Locked Parcel is entitled to make even a minor alteration of the Access Parcel, let alone undertake a Project resulting in the change to the character of a neighborhood. In fact, there is no evidence to support a theory that the Land-Locked Parcel is entitled to make even a temporary alteration to the Access Parcel.

Furthermore, the so-called "Title-Letter" is not a title letter at all. It contains the explicit disclosure that the "letter is provided for information only and should not be considered a commitment to insure title." The material provided to establish something more than a right-of-way is woefully inadequate. There are no updated surveys, the copies are of such poor quality as to render much of the material un-decipherable, the subdivision maps are illegible, and the packet fails to include the most recent deed to the Access Parcel. The submission makes it is impossible for this Board and its consultants to confirm the metes and bounds of the right-of-way access and, therefore, a crucial part of the record is incomplete. This Board has the authority to request an independent and meaningful title analysis of the subject properties or to deny the Application as incomplete.

---

[14] *See, Loretto v. Teleprompter Manhattan CATV Corp. (USSC 1982).*

[15] *See, Copy of the Application for Special Permit, sworn to on July 20, 2017.*

[16] *See, Cover Letter dated June 13, 2017 and accompanying documents submitted to purportedly to satisfy the requirements of Section D-5 of the application for approval of special use permit or site plan.*

Based upon the showing of the Applicant's legal rights limited to passage only, it is respectfully submitted that the Board must disregard, in its entirety, the portion of the Applicant's attorneys' November 1, 2017 letter that states "Homeland Towers agrees to improve the right-of-way along the area previously documented as providing access to the property to the standards requested.[17]" The Applicant has no legal authority to be bound to such a statement; it cannot enter upon the Owner's land to make permanent improvements to the Access Parcel. Therefore, the Applicant is unable to satisfy the proposed conditions of the special permit and its application must fail.

c. The Application has not Complied with the State Environmental Quality Review Act

The Act does not invalidate the requirement of an applicant to comply with SEQRA. Applicant has not met its burden under SEQRA and the Application is incomplete. For example, the Applicant's answer to question E3(h) on the revised Environmental Assessment Form is incorrect. The Applicant answered "no" when asked if the project site is within five miles of any officially designated and publicly accessible federal, state or local scenic or aesthetic resource. The Applicant failed to account for the report of the Scenic Areas of Statewide Significance ("SASS"[18]). The SASS is over four-hundred pages in depth and was first published by the New York State Department of State in July 1993 with a re-printing in 2004. The Project is located squarely within the area identified as the Hudson Highlands and within the overall scope of the SASS. The Villages of Cold Spring and Nelsonville are specifically mentioned and defined within the study as the Cold Spring subunit. The Village of Nelsonville is included in this study due to its "high-scenic quality[19]". However, the Applicant has failed to include any mention of the SASS within its submission. There is no analysis of the adverse impacts the Project will have on the scenic areas, a defect that must be supplemented or alternatively is grounds for denial.

In its second deficiency, the Applicant has made it impossible for the Board to take a hard-look at the potential adverse impacts resulting from the construction of the utility corridor and new road from Mofatt Road, across the Access Parcel to the Land-Locked Parcel. The site-plan drawings are either obsolete, incomplete or entirely missing from the Application. Setting aside the question of ownership, the Board, prior to issuing a negative declaration pursuant to SEQRA must be presented with sufficient information to consider the potential adverse impact of the new road. Those adverse impacts include but are not limited to the following Project requirements:

- Potential adverse impact due to removal of existing vegetation and old-growth trees on the Access Parcel and surrounding properties; and,

---

[17] *See, Letter from Applicant's attorneys, Synder & Snyder, LLP, dated November 1, 2017 at numbered paragraph 5 a.*

[18] *See,* https://www.dos.ny.gov/opd/programs/HudsonSASS/Hudson%20River%20Valley%20SASS.pdf

[19] *See, SASS at pp 360-361; and, generally, at pp 269-369 for the full-study relating to the Hudson Highlands area.*

- Potential adverse impact of storm-water run-off due to the increase of impervious surfaces into the MR district, particularly as constructed on an elevation higher than at least two-existing homes; and,
- The cumulative impacts to the neighborhood and community character recognized by SEQRA by the destruction of a hard-pack gravel lane to be replaced by a code-compliant asphalt road; and,
- Potential adverse impacts to aesthetic and view-shed considerations of the Access Parcel and surrounding properties.

In addition to the above, it is entirely reasonable for this Board to request confirmation from the local utility provider that it would be willing to review, approve and construct a new utility corridor over land which it does not have permission to enter.

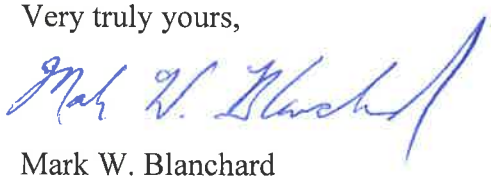
Conclusion

The Applicant is without legal authority to either initiate this Application or to fulfill the requirements of this Project. Simply stated, the Application is incomplete, and, in the event the Application is found to be complete, the Board has not been provided with a record sufficient to support an approval. An approval without sound evidence and without compliance with SEQRA would be the definition of an arbitrary and capricious action and would certainly be held to be an abuse of discretion. Furthermore, unauthorized entry upon private property creates causes of action based in nuisance, trespass and other torts. And such unauthorized entry, if sanctioned by a government action, creates a liability in a full or partial unconstitutional taking.

The Board's jurisdiction over these threshold questions is expressly protected under the Act and the "shot-clock" does not prevent this Board's ability to reject or deny the instant application for the myriad failures and deficiencies cited above.

Thank you for your attention to this matter and please do not hesitate to contact the undersigned should additional information be required.

Very truly yours,



Mark W. Blanchard

cc: **Via UPS Overnight Delivery**

Robert C. Lusardi, Esq.
Robert D. Gaudioso, Esq.
Daniel M. Laub, Esq.