

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK SMSA LIMITED PARTNERSHIP d/b/a/
VERIZON WIRELESS, and HOMELAND TOWERS, LLC

18-CV-5932

Plaintiffs,

-against-

THE VILLAGE OF NELSONVILLE, THE VILLAGE OF
NELSONVILLE VILLAGE BOARD, THE VILLAGE OF
NELSONVILLE ZONING BOARD OF APPEALS, THE
VILLAGE OF NELSONVILLE PLANNING BOARD,
MINDY JESEK, FOIL OFFICER AND VILLAGE CLERK
(in her official capacity), and WILLIAM BUJARSKI,
BUILDING INSPECTOR (in his official capacity),

Defendants.

Expert Report of Matthew Allen

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Dated: January 14, 2019

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INTRODUCTION

1. I am a Principal at Saratoga Associates, Landscape Architects, Architects, Engineers and Planners, P.C. (“Saratoga”). My primary office address is 21 Congress Street, Saratoga Springs, New York. I am a registered landscape architect in New York State and Principal with the firm. I have a Bachelor of Landscape Architecture from the State University of New York College of Environmental Science and Forestry in Syracuse, New York and a Master of Science in Urban and Environmental Studies from Rensselaer Polytechnic Institute in Troy, New York. I have significant experience in regional, community and environmental planning and routinely review municipal code and planning documents to determine a project’s consistency with local regulations. I also have over 30 years of experience in the specialized discipline visual impact assessment. I am very familiar with conducting visual evaluations utilizing various techniques; in addition, I provided a peer review for the July 2000 New York State Department of Environmental Conservation Program Policy concerning visual impact assessment and mitigation. I also have experience in the application of advanced computer-generated visual simulation and viewshed development technology. My curriculum vitae is attached as Exhibit A.

2. My testimony is offered on behalf of the Applicants. I was retained by the Applicants to opine on the potential impact of the proposed telecommunications tower at 15 Rockledge Road, Nelsonville, NY (the “Facility”) on the scenic and historic resources of the area and the aesthetic impact of any potential alternate sites or facility options identified by defendants. On this project, I serve as Principal-in-Charge (“PIC”), which makes me responsible for all day-to-day services in connection with the zoning process. As PIC, I have supervised internal staff that assisted me with this project, although I personally performed a majority of the research and analysis completed during the zoning process.

3. The purpose of this report is to explain and demonstrate that the Facility will not have a significant adverse visual impact on scenic or historic resources and is consistent with all applicable zoning regulations governing this type of development in the Village of Nelsonville. Moreover, this report will explain and demonstrate that the Facility in the proposed location, as designed or with an alternative stealth design offered by the Applicants – is the least intrusive means with regard to aesthetic impact compared to other potential alternatives and presents, at most, a minimal intrusion on the community.

4. In my work on this project I have prepared detailed visual analysis of the proposed Facility. My evaluation considered project visibility and potential aesthetic impact on scenic and historic resources within a two-mile radius of the Facility. The visual analysis placed specific emphasis on views from the adjacent Cold Spring Rural Cemetery which has been determined by the New York State Historic Preservation Office (“NYSHPO”) to be eligible for listing on the National Register of Historic Places, and has been a point of public interest with regard to the visual impact of the Facility.

5. The visual analysis conducted for this project is consistent with accepted professional practice for visual impact assessment and guidance found in the New York State Department of Environmental Conservation’s Program Policy on Assessing and Mitigating Visual Impact (“DEC Visual Policy”) (DEP 00-2) (attached as Exhibit B). The DEC Visual Policy is considered the basis for determination of visual significance under the State Environmental Review Act (“SEQRA”). I was a peer reviewer working with the New York State DEC in the development of this first of its kind visual policy in 2000.

6. Article VII of the Nelsonville Municipal Code addresses specific requirements for the issuance of a Special Permit for commercial communications towers. Article

VII §188-68 (12) identifies specific analysis that must be conducted to provide the Village of Nelsonville Zoning Board of Appeals (the “Board”) sufficient information for decision-making. Specific requirements include a long Environmental Assessment Form (“long-form EAF”) (including the EAF Visual Addendum) and a visual assessment that includes, at a minimum, assessment of the tower’s siting from significant vantage points and/or historic and scenic resources, by balloon testing or similar methodology, as well as visual simulations (e.g., photo montage) of the tower’s siting. Significant vantage points potentially impacted must be determined by the Board and such analysis should be performed, when possible in the winter months to ensure a thorough examination of potential impacts. All requirements of §188-68 (12) were met in significant detail as part of this application. Documents I personally prepared and provided to the Board during the course of municipal review include:

- Visual Resource Assessment Report (June 2, 2017) (attached as Exhibit C);
- Letter from Saratoga Associates to the Board (November 15, 2017) (attached as Exhibit D);
- Letter from Saratoga Associates to the Board (December 19, 2017) (attached as Exhibit E);
- Letter from Saratoga Associates to the Board (February 7, 2018) (attached as Exhibit F);
- and
- Letter from Saratoga Associates to the Board (March 21, 2018) (attached as Exhibit G).

7. Consistent with the requirements of §188-68 (12) the Visual Resource Assessment Report (Exhibit C) includes a viewshed analysis identifying the geographic area of project visibility, photographic simulations illustrating the degree of project visibility and visual character of the Facility as viewed from significant vantage points, as well as an objective evaluation of project visibility that demonstrates the Facility will have minimal aesthetic impact on historic or the scenic resources of the area. Analysis of design and location alternatives were

provided in subsequent submissions to the Board. Exhibits D, E, F and G describe the visual character and impact of various design and siting alternatives that have been considered.

8. Also consistent with the requirements of §188-68 (12), I personally conducted balloon visibility tests on November 4, 2017 and January 31, 2018. These tests allowed the general public and local decision-makers an opportunity to observe a visual reference point representing the high point of the proposed tower. These balloon tests were publicly advertised to provide appropriate notice to Village residents and were conducted during winter leaf-off season to represent the worst-case (i.e., most exposed) visual condition. At the November 4, 2018 balloon test the balloon was raised to an elevation of approximately 120 feet above grade (top of balloon). Although the tower height being assessed was lower at 110 feet, the balloon was intentionally flown higher at the request of the Village Engineer. While the balloon was in the air, I visited each visual resource evaluated in the VRA as well as specific locations identified by the Board. As such I have direct knowledge of the visual conditions which inform my opinions and conclusions. I personally conducted field photography documenting existing conditions and balloon exposure. I also personally prepared 3D computer modeling-based photographic simulations that accurately depict the degree of visual exposure and aesthetic character of the proposed project and design alternative from representative vantage points. I relied on this technical analysis in formulating my findings and conclusions concerning project visibility and potential aesthetic impact.

BACKGROUND

9. The Applicants submitted an application (the “Application”) for a special permit and variance to the Village of Nelsonville Zoning Board of Appeals (the “Board”) to construct the Facility - a 110-foot-tall stealth monopine design telecommunications tower and associated equipment on an undeveloped parcel at 15 Rockledge Road in the Village of

Nelsonville.

10. The Visual Resource Assessment (Exhibit C) and associated submissions (Exhibits D, E, F and G) provided extensive information and analysis demonstrating project visibility will be limited and, when visible, the Facility will not create a detrimental effect on the historic or scenic resources of the area, nor will it cause the diminishment of public enjoyment and appreciation of any visually sensitive place. As such, the Facility will not result in an adverse visual impact and would result in, at most, a minimal intrusion on the community.

11. The Village of Nelsonville retained AKRF Environmental, Planning, and Engineering Consultants (“AKRF”) to review the visual assessment and related documents. AKRF requested additional information be provided by the applicants to supplement the VRA. Saratoga provided this information in a letter to the Board dated February 7, 2018 (Exhibit G). AKRF confirmed the completeness of the visual assessment and reported that the Board had sufficient material to complete SEQRA review and issue a determination of significance.¹ AKRF also reported to the Board that the VRA reaches conclusions as to potential visual impact that is supported by the analysis. Specifically, AKRF advised the Board that the Facility would not have a significant adverse aesthetic impact on the Cold Spring Rural Cemetery.²

12. While AKRF indicated that the proposed monopine design would adequately mitigate visual impact, it was their opinion that mitigation could be better achieved through the use of alternative design measures such as internal mounting of antenna panels or the use of a “flagpole” installation.³ In response, to AKRF’s recommendation the Applicants offered

¹ AKRF letter to the Village of Nelsonville Zoning Board of Appeals, March 30, 2018, p. 2 (attached as Exhibit H).

² AKRF letter to the Village of Nelsonville Zoning Board of Appeals, January 2, 2018, p. 4 (attached as Exhibit I).

³ *Id.*

several stealth design alternatives for Board consideration. Photo simulations of these alternative designs were provided to the Board in a letter from Saratoga dated March 21, 2018 (Exhibit G).

These design alternatives included:

- Alternative 1 – two (2) 110—foot tall stealth “flagpoles” (each approximately 4-foot diameter at the base tapering to 3-foot diameter at the top);
- Alternative 2 – one (1) single 110-foot stealth “flagpole” (approximately 4-foot in diameter at the base tapering to 3-foot in diameter the top);
- Alternative 3 – single 120-foot stealth “flagpole” (approximately 4-foot in diameter at the base tapering to 3-foot in diameter the top); and
- Alternative 4 - 125-foot tall stealth “obelisk” (approximately 12-foot wide at the base tapering to 8-foot wide at 110 feet above grade then tapering to a point at 125 feet above grade).

13. The NYSHPO, the state agency responsible for review of the Application under Section 106 of the National Historic Preservation Act of 1966 (“NEPA”), reviewed the four design alternatives described above and determined that alternatives 2 and 3 (single 110-foot or single 120-foot pole alternatives) would have No Adverse Effect on the historic resources within the project’s area of potential effect. Either of these two options, as well as the original stealth tree option are acceptable to the NYSHPO. The letter from the NYSHPO to the Village of Nelsonville, dated April 16, 2018, detailing this conclusion is attached as Exhibit J.

14. Although the Applicants prefer the proposed stealth monopine design, they indicated to the Board they would accept either of these two alternative tower designs as a condition of approval to better achieve aesthetic mitigation objectives. The Applicants also offered to preserve the remaining woods on the Property, agree to not increase the height of the Facility

even though federal law permits such increase as of right, and proposed a significant landscaping and screening plan.

15. The Applicants also provided an analysis for development of a monopine tower at an alternative site off of Secor Street in the Village of Nelsonville. Photo simulations depicting the visual character of this alternative were provided to the Board in a letter from Saratoga dated November 15, 2017 (Exhibit D). Although this location was acceptable to the Applicants based on technical considerations, this alternative was rejected by the Town Board due to public opposition. The Town Board owns the property at Secor Street and thus controlled whether it would lease the property to the Applicants.

16. The Board denied the application at a joint meeting of the Nelsonville Planning Board and Zoning Board of Appeals on May 30, 2018. The Board did not complete SEQRA review or issue a determination of significance as required under SEQRA. No written resolution with findings of fact and conclusions was provided justifying the Board's basis for the denial. Based on discussion by the Board at May 30th meeting, (as set forth in the hearing transcript) the denial appears to be largely based on the belief of two Board members that the Facility would result in unacceptable impact on community aesthetics - particularly on views from the adjacent Cold Spring Rural Cemetery. The Board Chairman, a professional Architect, voted to approve the Facility after a lengthy explanation in support of his position.

OPINIONS:

The Board failed to follow basic SEQRA procedures, which resulted in an unsupported determination of visual significance.

17. The Village of Nelsonville Zoning Board of Appeals was designated as the lead agency under the State Environmental Quality Review Act ("SEQRA"). As lead agency, the Board had the responsibility to comply with SEQRA. A key step in the SEQRA process is the

preparation of an Environmental Assessment Form (“EAF”). A long-form EAF is specifically required under §188-68 (12) of the Municipal Code to provide sufficient information for decision-making. The EAF provides an organized approach to identifying and assessing the information needed by the lead agency as it makes its determination of significance. A properly completed EAF describes the proposed action, its location, its purpose and its potential impacts on the environment. EAF Part 1, typically prepared by the applicant, is intended to provide a concise description of the whole action and basic data about the project and its site. Homeland Towers completed the EAF Part 1 and submitted this document to the Board (lead agency) as part of the Application. EAF Part 2, which is required to be prepared by the lead agency, examines the range of possible impacts and their magnitude to assess their significance. EAF Part 3, also to be prepared by the lead agency, evaluates the importance of such impact(s). The Board failed to prepare a Part 2 or a Part 3.

18. According to the SEQRA Handbook, if the lead agency finds one or more significant adverse environmental impacts, it must prepare a positive declaration (“Pos Dec”) identifying the significant adverse impact(s) and requiring the preparation of an Environmental Impact Statement (“EIS”) before agency decisions may be made regarding the action. A lead agency must prepare positive declaration (“Pos Dec”) if it finds, based on comparing the information in the EAF to the criteria in the SEQRA regulations (see 617.7(c)), “that one or more adverse environmental impacts may be significant”.⁴

19. Inexplicably, the Board (lead agency) failed to prepare the EAF Part 2 or Part 3. Similarly, the Board did not issue a determination of significance or a Pos Dec formally acknowledging their belief that the project would result in a significant adverse visual impact. This

⁴ <https://www.dec.ny.gov/permits/47962.html>

significant procedural error alone renders the Board's denial of the subject application unsustainable. Setting this procedural issue aside, without an evidence-based determination of significance, the Board's denial of the application based on a subjective belief that the Facility would result in a significant unmitigable visual impact is unsubstantiated and arbitrary.

The Board erred in its determination of visual significance.

20. The Village Code requires the Board determine whether or not the project will have a significant adverse impact on scenic or historic resources and confirm proposed mitigation measures minimize such impacts to a level of insignificance (§188-70 A[6]). However, the Code does not provide a definition for these terms. Absent a specific definition in the Code, the Board should have referred to SEQRA for guidance in determining visual significance.

21. According to the SEQRA Handbook, a legally sufficient determination of significance implies that a lead agency has in its possession, and can demonstrate that it has considered, the information provided from the EAF and any other information provided by the applicant, including the underlying application, the criteria for determining significance under SEQRA, and any input from involved and interested agencies, interested organizations or other groups of people and the general public.⁵

22. As discussed above, the Board failed in its capacity as lead agency under SEQRA to complete the required long-form EAF. Without completing this most critical step, the Board was not able to review objective information in the procedural manner necessary to render a sustainable determination of significance. The Board appears to have disregarded the substantial information in the Visual Resource Assessment (Exhibit C) and associated documents (Exhibits D, E, F, and G) provided by the Applicants that conclude the Facility would not result in a

⁵ <http://www.dec.ny.gov/permits/91829.html>

significant adverse visual impact as defined under SEQRA, even though these findings are supported by the Board's own consultant who had previously advised the Board that the Facility would not have a significant adverse aesthetic impact on the Cold Spring Rural Cemetery.⁶ The Board also disregarded the determination of No Adverse Effect on the historic resources within the project's area of potential effect issued by the NYSHPO (Exhibit J), the state agency responsible for protecting the historic resources of the state. Instead the Board appears to have given significant credence to unsupported subjective opinions of objectors. While the Board has an obligation to consider all substantive comments on their merit, ultimately the Board's decision must be based on the totality of the record. In dismissing factual information, the Board failed to meet the requirements of the Code and SEQRA necessary for a legally sufficient determination of significance.

23. The DEC Program Policy on Assessing and Mitigating Visual Impact (DEP-00-2) (DEC Visual Policy)⁷ defines visual significance as follows; "Aesthetic impact occurs when there is a detrimental effect on the perceived beauty of a place or structure. Mere visibility, even startling visibility of a project proposal, should not be a threshold for decision making."⁸ Significant aesthetic impacts are those that may cause a diminishment of the public enjoyment and appreciation of an inventoried resource, or one that impairs the character or quality of such a place. Proposed large facilities by themselves should not be a trigger for a declaration of significance."⁹ In other words, the DEC Visual Policy recognizes that not everything that is visible rises to the level of an Aesthetic Impact, and not all Aesthetic Impacts rise to the level of a Significant Aesthetic Impact that may diminish public enjoyment of the resource.

⁶ Exhibit I p. 4.

⁷ http://www.dec.ny.gov/docs/permits_ej_operations_pdf/visual2000.pdf

⁸ Exhibit B p.9.

⁹ *Id.* p.5.

24. Based on the degree of project visibility and proposed mitigation measures presented in the application, it is clear any remaining project visibility is not of a size or extent that it would constitute an unacceptable magnitude, nor does the project affect a sufficient number of public viewers or geographic area where the project can reasonably be deemed to be visually important as defined by SEQRA.

25. Furthermore, when considered within the framework of the DEC Visual Policy's definition of "significant adverse visual impact", it is clear the project will not cause a diminishment of the public enjoyment and appreciation of any scenic or historic resource, or one that impairs the character or quality of such a place. Since the project does not result in a significant adverse visual impact as defined by SEQRA it meets the criteria of approval under §188-70 A(6) of the Nelsonville Zoning Code.

26. The definition of "significant adverse visual impact" and "insignificance" is governed by the SEQRA, which requires evidence-based decision making. As an example of how municipalities must objectively address visual impact on scenic and historic resources, the NYSDEC website points to the *Matter of WEOK Broad. Corp. v Planning Board of the Town of Lloyd*, 79 NY2d 373 (1992). In this case, the Court sustained lower court decisions that annulled the planning board's decision to deny site plan approval for a radio transmitter tower based on its conclusion that adverse aesthetic environmental impacts to the Franklin D. Roosevelt homestead in Hyde Park, NY revealed in the environmental impact statement could not be avoided or sufficiently mitigated. The applicant had applied to the Town of Lloyd Planning Board for site plan approval to construct an AM radio tower consisting of five transmission facilities. An analysis showed that there would be minor visual impact from six viewpoints and moderate impact from one viewpoint. The analysis was conducted during the leaf-off period in the spring. The applicant

thereafter reduced the height of tallest proposed tower by nearly half, agreed to construct the towers with an open lattice works to make them less visible, and also agreed to paint three of the five towers gray to further decrease visibility. The Planning Board, nonetheless, denied site plan review based on the possibility that there may be a visual impact on the FDR homestead. In holding the Planning Board's site plan review denial to be arbitrary and capricious, the Court found that the Board had unlawfully relied on general community objection rather than expert or scientific evidence to counter the applicant's detailed analysis.¹⁰

The Facility is consistent with New York utility zoning preference standards.

27. Under New York law, land use applications for personal wireless facilities are evaluated under a public utility standard, on the basis of whether the public utility (in this case, personal wireless services carriers) has shown a need for its facilities and whether the needs of the broader public¹¹ would be served by granting the variance. Where the intrusion or burden on the community is minimal, the showing required by the utility is correspondingly reduced. *Omnipoint Communications, Inc. v. Town of LaGrange*, 658 F.Supp.2d 539 (S.D.N.Y. 2009). Under this standard, a telecommunications provider that is seeking a variance for a proposed facility need only establish that there are gaps in service, that the location of the proposed facility will remedy those gaps and that the facility presents a minimal intrusion on the community. *Decarr v. Zoning Bd. of Appeals for Town of Verona*, 154 A.D.3d 1311 (App. Div. 2017). It is important to note that in this case no variances are required for the Facility. The Facility meets the height, location, use, and setback requirements of the Village Code. The only variance that may be necessary is for access to the parcel.

¹⁰ <http://www.dec.ny.gov/permits/55303.html#weak>

¹¹One contribution to broad public need is that a portion of AT&T's bandwidth is also used by FirstNet, a dedicated national public safety broadband network for first responders operated by a public-private partnership between AT&T and the First Responder Network created by the Middle Class Tax Relief and Job Creation Act of 2012.

28. The proposed facility is consistent with New York utility zoning preference standards, the application of which to personal wireless services reflects the broad public importance of personal wireless services. Based on the radio frequency data presented in the hearing below, Verizon Wireless and AT&T both have significant gaps in service in the area surrounding the proposed Facility, and the proposed Facility would remedy these gaps. For the reasons set forth above, the proposed Facility presents, *at most*, a minimal intrusion on the community.

29. Here, the broader public need is substantial and any impact is, at most, de minimis. Denial of the facility was inconsistent with New York law's public utility preference.

The Facility is the least intrusive means of remedying the carrier applicants' service gaps.

30. Under federal law, a municipality violates federal law when it denies an application for the least intrusive site to remedy a significant gap in service. Because the proposed Facility will have no significant adverse visual impact, it follows that no other site capable of remedying the gap in service would be materially less intrusive. In addition, based on my review of the area, given the need for any facility to extend above the height of surrounding trees and be located within the gap, I am aware of no other location which, in my opinion, would be less intrusive. My understanding is that to date in this litigation defendants have not identified any location they contend would remedy that gap and be less intrusive. Should defendants identify such a location, I reserve the right to supplement this report to opine on the merits of any location so identified.

31. Article VII §188-68 (a) of the Nelsonville Municipal Code states, "[a] new tower and ancillary buildings and parking shall, to the extent possible, be sited where their visual

impact is least detrimental”¹² (emphasis added). Moreover, the terms “to the extent possible” and “least detrimental” instruct the Board that some degree of project visibility is acceptable provided that practicable siting and/or design alternatives are can be employed to minimize tower visibility and visual contrast. A plain reading of this Code requirement makes it clear that §188-68 (a) is not a prohibition against a communications tower that is visible from off-site locations but rather a directive for the Board to balance the need for telecommunications services with community aesthetics by finding the “least detrimental” (or least intrusive) alternative.

32. §188-70 A(6) of the Nelsonville Code states, “[t]hat the proposed antenna installation or tower will not have a significant adverse impact on scenic or historic resources. If a significant adverse visual impact is identified, the applicant shall demonstrate that suitable landscaping, buffering or other techniques will be used, and that they are able to minimize such impact to the level of insignificance.” In describing the type of mitigation that may be applied to render the impact “insignificant”, the code states, “[s]uch mitigation shall include, in the discretion of the Board, fencing, berms, trees, shrubs and other landscaping, together with the requirement that they shall be maintained in a vigorous growing condition.” §188-68 (b) requires “[a] new tower shall, to the extent possible, be sited distant from residential properties and where visual impacts upon residential properties can be minimized”. §188-70 A(6) and §188-68 (b) offer a clear mechanism to minimize visual impact to an acceptable level; or in the terms of the Code, minimize visual impact to the “least detrimental” (least intrusive) condition. Clearly, the intent of the Code is not to prohibit approval of a communications tower due to mere visibility from a scenic or historic resource, or from residential properties, but rather to reduce the inherent visual contrast of

¹² According to the Merriam Webster Dictionary (<https://www.merriam-webster.com/dictionary/detrimental>), a synonym to “detrimental” is “adverse”. Adverse is the term used under SEQRA to describe a potentially harmful environmental impact.

telecommunications infrastructure through various mitigation techniques. The Board never made a finding that there would be a “significant adverse visual impact.” Thus, there was never a requirement that any such impact be minimized. Nevertheless, the Applicants offered mitigation as required by the Village Code.

33. Consistent with §188-68 (a) and (b), the Application includes substantial design considerations intended to minimize visual impact to the least detrimental (least intrusive) condition. These include:

- Use of a stealth design. The project utilizes a stealth monopine design to make the structure as visually unobtrusive as possible by minimizing visual contrast with the surrounding landscape. Moreover, alternative flagpole and obelisk designs were also offered.
- Locating the Facility in a low-lying area (e.g., away from hilltops) to avoid visibility above ridgelines;
- Siting the Facility outside of the village center to avoid visibility from scenic and historic resources and to minimize the number of affected properties and viewers;
- Locating the Facility within a densely forested area to maximize vegetative screening. The 9.63-acre subject lot is 100% wooded with mature deciduous and evergreen trees. Proposed tree removal will be limited to 1/2-acre, including the 3,250 square-foot fenced compound area, 393-foot-long gravel access drive and associated parking/turn areas and site grading. The proposed project includes retaining walls along the gravel access drive and fenced compound to minimize site clearing. Just 47 trees greater than 8” DBH¹³ will be removed. Approximately 95 percent of the subject parcel will remain

¹³ DBH means diameter at breast height, which is the standard method of expressing the diameter of the trunk of a tree.

fully wooded. In fact, the Plaintiff offered to preserve the woods by way of a conservation easement in perpetuity. Between 170 feet and 540 feet of undisturbed mature forest will remain between the proposed fenced compound and adjacent property lines. The Applicants also studied and offered alternative access drive proposals to minimize disturbance.

- Landscape screening plan. The project includes landscape planting to further buffer views of the fenced compound from adjacent residences on Rockledge Road.
- Siting the Facility on a large lot size with extended setback. The project would be located on a 9.63-acre undeveloped parcel. The subject property is within the Mountain Residential (“MR”) zone as defined by the Nelsonville Code. The existing parcel is substantially larger than the minimum 1.84-acre (80,000 square foot) lot size required for development within the MR zone. At 168.75 feet, the project also exceeds the minimum 150-foot required front yard and 137.5-foot side yard (50 feet or 125% of the height of the tower, whichever is greater) setbacks as required by zoning.
- Limiting the Facility height to 110 feet (the lowest height possible to retain the required coverage while still meeting the express height limitation of the Code) to minimize the geographic extent of the project viewshed and the portion of the Facility visible above intervening vegetation. No setback or height variances are required;
- Extended distance to nearest structure. Zoning requires a minimum distance of 300 feet between the Facility and the nearest habitable structures. Six (6) residential structures are within 800 feet of the tower location. These structures are approximately 310, 360, 530, 560, 610 and 660 feet distant. Substantial existing woodland vegetation within the project parcel will remain in place as a visual buffer between the Facility and each of

these residential structures.

- Extended distance from visually sensitive resources. The Cold Spring Rural Cemetery is the nearest identified scenic resource to the Facility location. The nearest cemetery monument and the historic cemetery gatehouse are 330 feet and 910 feet to the west of the tower location respectively. Approximately 300 feet of existing mature woodland vegetation located on the project parcel will remain undisturbed as a visual buffer.
- Small developed area. The zoning code permits a maximum building coverage of ten (10) percent of the lot size; 41,975 square feet (0.96 acre) for the subject lot. The proposed fenced compound area will be approximately 3,250 square feet (0.075 acres) feet in size.

34. These design techniques effectively minimize the degree of project visibility, modify the visual character of the project to be more compatible with the surrounding landscape, and minimize visual impact to the maximum extent practicable, all consistent with the requirements of §188-70 A(6) of the Nelsonville Zoning Code.

35. The project proposes a stealth monopine design to make the structure as visually unobtrusive as possible by minimizing visual contrast with the surrounding landscape. This is inarguably a less visually intrusive alternative than a traditional galvanized monopole type tower. NYSHPO and AKRF have concluded that the proposed 110-foot tall monopine would have no adverse effect on the historic resources within the project's area of potential effect. Based on the conclusion of this interested agency and the Board's own consultant who had previously advised the Board that the Facility would not have a significant adverse aesthetic impact on the Cold Spring Rural Cemetery¹⁴, use of a stealth monopine effectively reduces visual impact to a

¹⁴ Exhibit I p. 4.

level of insignificance. Use of a stealth flagpole design further reduces visual contrast by reducing the tower's visual profile. The Board's consultant AKRF indicated that although the proposed monopine design would adequately mitigate visual impact, it was their opinion that mitigation could be better achieved through the use of alternative design measures such as internal mounting of antenna panels or the use of a "flagpole" installation.¹⁵

36. The Board dismissed without explanation the NYSHPO's regulatory determination. NYSHPO determined that the proposed stealth monopine and two stealth flagpole design alternatives would have No Adverse Effect on the historic resources within the project's area of potential effect. Considering that NYSHPO is the state agency responsible for preserving the scenic integrity of the state's cultural and historic resources, the Board should have given deference to the position of this involved agency. Instead, one Board member stated during the May 30, 2018 joint Planning Board and Zoning Board of Appeals meeting that "just because SHPO, for example, has said that it has determined that a 110-foot pole painted in a neutral color, one [sic], would not have a significant visual impact. That does not mean that's the truth, right?"¹⁶ This Board member, who voted to deny the Application, disregarded NYSHPO's regulatory authority and its high level of experience in this specialized discipline.

37. The Application offers substantial mitigation measures that effectively minimize visual impact consistent with the purpose and intent of §188-68 (a) and §188-70 A(6). The Board's decision to deny the Application based on the subjective belief that the project would result in significant adverse and unmitigatable visual impact is inconsistent with the objectives of Article VII and represent an arbitrary application of its discretion under the Code.

38. The Applicants have put forth substantial mitigation measures that combine

¹⁵ Exhibit H p. 4.

¹⁶ May 2018 transcript, p. 28, lines 12-16 (attached as Exhibit K).

to effectively minimize visual impact to the extent possible. The Facility will have no significant adverse visual impact and no other site capable of remedying the gap in service would be materially less intrusive (less detrimental). In my opinion the Applicants have clearly met the visual mitigation requirements of §188-68 (a) and §188-70 A(6) and the Facility is the least intrusive means of remedying the carrier applicants' significant service gaps.

Additional FRCP 26(a)(2) Disclosures

Pursuant to Rule 26(a)(2) of the Federal Rules of Civil Procedure, I provide the following information:

I have provided visual impact assessment and planning and zoning expert testimony by deposition or in trial in the following cases:

- Cricket Valley Transmission Line Visual Analysis - Cricket Valley Energy, LLC, Pleasant Valley, NY, before NYS Public Service Commission.
- Dantara Drive Cell Tower Visual Assessment - Homeland Towers, LLC., East Fishkill, NY
- EcoSite Somers Wireless Telecommunications Tower - Infinigy, Somers, CT, before Connecticut Siting Commission.
- Smith's Basin Mine Visual Assessment - Jointa Galusha, LLC, Hartford, NY, before New York State Department of Environmental Conservation.
- Greenport Replacement Project Visual Assessment - St. Lawrence Cement, Greenport, NY, before New York State Department of Environmental Conservation.
- EcoSite Glastonbury Wireless Telecommunications Tower - Infinigy, Glastonbury, CT, before Connecticut Siting Commission.
- BlueSky Towers Evergreen St. Telecommunications Tower – IVI Telecom Services, Bridgeport, CT, before Connecticut Siting Commission.
- Indian Point Cooling Feasibility Study Visual Assessment - Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Indian Point 3, LLC, Buchanan, NY, New York State Department of Environmental Conservation.
- Integrated Concept Plan - Scenic Resource Management Plan - Plum Creek Maine Timberlands, LLC, Moosehead Lake Region, ME, before Maine Land Use Regulation Commission.
- Bethlehem Energy Center Visual Impact Assessment - PSEG Power New York, Bethlehem, NY before NYS Public Service Commission.
- King's Park Energy Project - South Hempstead Alliance for Responsible Energy Development, Smithtown, NY, before NYS Public Service Commission.

All facts or data that I considered in forming my opinions are contained in this report and identified in the exhibits attached hereto.

My compensation for the services provided or expected to be provided in this matter are as follows:

- Visual impact assessment and planning and zoning services related to reviews, conference calls, preparation of exhibits and report preparation shall be billed at the rate of \$142.00 / hour.
- Expenses related to travel, lodging and meals reimbursed at cost.
- Expert testimony at trial or by deposition shall be billed at \$1,200.00 per day.

Date: January 14, 2019



Matthew Allen