



# PHILIPSTOWN CELL SOLUTIONS

Honorable Chairman William Rice,  
Special Counsel Todd Steckler,  
Members of the Zoning Board of Appeals, and  
Planning Board  
Village of Nelsonville  
258 Main Street  
Nelsonville, NY 10516

April 3, 2018

## **Memorandum on Alternate Design Proposal**

We thank the board for requiring the applicant to submit alternative design options that would possibly reduce the intrusiveness of the proposed tower on this sensitive ridge above the historic cemetery to a level of "insignificance". Because of the applicant's late submission right before (again) a widely celebrated holiday, the public has not had the time promised in the last public meeting to review these 54 pages and to seek our own professional advice before public comment is taken in the next meeting.

Although Homeland seems to have discarded the obelisk and double flagpole designs following SHPO objections, we, a community group, would like to state our objection to the location of these proposed designs. Each have significant visual impact in the historic cemetery and stand out strangely in the natural surroundings.

## **I. SHPO Reverses Its *No Adverse Effect* Finding**

The design Homeland now proposes: 110-foot flagpole, does not resolve numerous aesthetic problems. Contrary to Homeland's claim<sup>1</sup> that the letter from SHPO is an approval of this new flagpole, the letter from SHPO actually *reverses* its No Adverse Effect finding and includes further conditions on Homeland's application to build a cell tower. These conditions are:

1. Appropriate visual camouflage method to allow it to blend more effectively in the landscape
2. The height be capped at 110 feet.

There is no mention of a flagpole meeting these new conditions, nor an assumption that whatever the new proposed design will meet these conditions. This is, most importantly, a rejection of all of the designs Homeland has already formally proposed to the Board.

## **II. Alternate sites must be re-considered with reduced need and smaller design**

At first glance it seems clear that, unfortunately, none of the alternative designs Homeland has proposed meet the "insignificance" test in our code. It is also clear that this tower on the key ridge--odd and out-of-character and highly visible upon entry and from the most important vantage points in the cemetery--is not the least intrusive location for a tower of this height. We hope the board will deny this application in favor of better alternative designs and locations that that have been broached throughout this process but substantially ignored by the applicant. Some of these alternatives include the imminent Butterfield facility site, a simple DAS system installed on a few existing utility poles or other tall opportunity sites away from homes, the 50 Fishkill Rd site, raising/altering existing infrastructure like McKeel's corner tower, locating a slim flagpole design on other NY state and NYC owned parcels in the area, and a closer evaluation of multiple church steeple opportunity sites.

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<sup>1</sup> Homeland states, misleadingly, that "correspondence from SHPO. . . confirming that there will be no significant visual impact from a facility designed with an appropriate visual camouflage at 110 feet in height" somehow supports its newest flagpole proposal.

We'd particularly like to note the following factual changes to the record which should render suspect some previous claims by the applicant concerning the suitability of alternative sites, and should affect the board's consideration of truly feasible alternative sites that would be in keeping with our historic and scenic area. We submit that:

1. Anecdotal observations used in Homeland evaluations, i.e. disqualifying a site because it is "below the tree line," should not necessarily be reason enough to rule out an opportune site for collocation. Clearly, the previous Butterfield site used by AT&T (and offering adequate coverage by their own admission in the public record of this application) was located "below the tree line" on the low roof of the old Butterfield Hospital. The imminent facility to be re-installed on the newly built development should give the Board great pause in considering the applicant's argument that the intrusive Rockledge tower is the only and best site available.

2. If a 3ft-4ft diameter pole can house the necessary equipment, then certain church steeples should be re-examined as possible locations. In particular, the Cold Spring Baptist Church at 245 Main St should be more closely examined. The pastor expressed interest in housing a facility (as was stated by Mr. Xavier in the record of this application). The steeple was previously "ruled out" by the applicant's consultant because it was deemed too "narrow" and also "below the tree line" and would require alterations not in keeping with historic standards. However, this church features roofing material (asphalt shingles) and many louvers in a conical array that could be adapted to RF-friendly materials without compromising historic integrity. We've also seen with the alternative designs offered that a slim array fitting in 3ft diameter space *IS* possible from a design standpoint. What we have not seen is any kind of serious consideration of this site by Homeland Towers' consultants.

Homeland's latest proposal, narrowing consideration to a single, 110' pole, considerably reduces Homeland's stated design need. Therefore, alternate locations must be re-considered with the same reduced need.

### **III. The Board’s denial will be upheld if the alternate designs do not succeed in lowering the visual impact to a level of insignificance**

As previously discussed in Section II, the visual impact continues to be significant. When a Village Board denies an application after evaluating the alternate “stealth” tower design the applicant submits, the Board’s denial will be upheld if the decision was based on aesthetic judgment. (See, i.e. *Vertex Dev. LLC v. Manatee County*, 761 F. Supp. 2d 1348, citing the disparity between the existing tree line and the top of the flagpole tower, the court cites the “lack of transition in the step down of height serves to accentuate the visual obtrusiveness...”; see also *Cellco P'ship v. Town of Grafton*, 336 F. Supp. 2d 71, crediting the applicant for modifying the proposal “to accommodate the Board’s desire for a less conspicuous facility”, but deciding the 100-foot “stealth” flagpole remained visible from the “visually sensitive Historic District” and the Board “reasonably concluded that the flagpole design was not architecturally compatible with the surrounding area and was not sufficiently screened from view”; cf., *Cellular South Real Estate, Inc. v. City of Mobile*, 2016 U.S. Dist. LEXIS 88444, the Court found the Town Board did not ask for camouflage for cell tower because flagpole design would have prevented collocation on the tower, a condition required by the municipal code, and therefore did not support the aesthetics argument.

### **IV. Finally, the flagpole design in a historic cemetery is contrary to American Flag etiquette.**

To honor our country, American flag etiquette must follow code: 4 US Code §6, *Time and occasions for display*, states the universal custom is to display flags only from sunrise to sunset on stationary flagstaffs in the open. The exception to this, “when patriotic effect is desired,” the flag must be “properly illuminated” during the hours of darkness. In this case, the flag being used to cover a commercial enterprise- not to show patriotism- and therefore should not be flown twenty-four hours a day. If the applicant follows the code, and illuminates the flag at night, this is another visual impact that must be considered, as a lit flag 110’ over a darkened cemetery would look bizarre and distasteful.

Courts have sided with communities that were offended by the use of an American Flag to cover a cell phone tower. (See, i.e., *Sprint Spectrum vs. Bd. of Zoning Appeals*, 244 F. Supp. 2d 108, “Finally, camouflaging the proposed monopole as a flagpole does not overcome the finding of substantial evidence. Contrary to Sprint's argument, the proposed monopole is not a flagpole; it would be much wider in diameter and would contain equipment not found on a flagpole. Also, in this Court's view, it is reasonable for many residents to find camouflaging a monopole as a flagpole flying an American flag to be offensive, as the Town planning consultant found.)

The cemetery is also the final resting place of Julia Butterfield, the wife of the Civil War General Daniel Butterfield, the author of “Taps”. Special consideration and care must be given to the display of the American Flag, or even a flagpole, in this instance.

## **V. Conclusion**

Thank you for your time and consideration of our request to give the community a reasonable amount of time to respond to the newest design proposed by Homeland.