

Zoning Board of Appeals
Village of Nelsonville
258 Main St
Nelsonville, NY 10516

RE: Application of Homeland Towers to erect a new facility at 15 Rockledge Rd.

Submitted by Philipstown Cell Solutions
January 2, 2018

BRIEF OVERVIEW: BASIS FOR DENIAL

There is substantial evidence in the record before the Boards to deny the Rockledge application based on failure to meet **ALL** the criteria delineated in Nelsonville's Code §188-70 "Standards for issuing special permits" section A. The following provides an abbreviated overview of the legally sound reasons that the application does not meet at least three of the seven key criteria—specifically CRITERIA # 3, # 6 and #2. If the Board finds that even just one of the seven evaluation Criteria under 188-70 (A) is not met, they are not allowed by law to issue the special permit.

The following is meant to assist the Boards in their deliberations. Any decision or action of the Boards will be upheld by a reviewing court so long as it is "rationally based" upon substantial evidence – **does the action or decision make sense, and is it supported by the record?**

PCS will be shortly submitting an additional report into the public record with additional substantial evidence in support of a denial of this application.

"No special permit for a communications tower or a communications antenna installation shall be granted absent a finding by the Zoning Board that the applicant has met the following criteria." §188-70 A "Standards for issuing special permits."

CRITERIA 3 NOT MET BY THE APPLICANT

CRITERIA 3:

"That, where a new tower is proposed, the applicant has shown an actual need for construction of the new tower." §188-70 (a) (3)

The Applicant's submissions do not amount to substantial evidence showing "an actual need."

1. The applicant's submitted **RF REPORTS** are not adequate proof of actual need for construction of the tower at the proposed height and location because:
 - a. The **modeling software used to produce the propagation maps is speculative** in nature and is inherently incomplete without "ground truth data" in the form of actual drive tests or dropped calls statistics to confirm its alleged findings.
 - b. **The reports contradict the service providers' own maps** published on their respective websites that show no gaps in service in Nelsonville. Both the submitted RF maps and the website maps manipulate data to visually convince us of a "truth" that is convenient for these providers' purposes at any given moment. But **which "truth" do we trust**—no gap or gap?
 - c. **The applicant's RF expert advice and the Board's RF expert advice on the gap and actual need question should be discounted.** The applicant's RF consultants have made false or uninformed claims in the public record pertaining to carrier use of the 850Mhz bandwidth, casting doubt on the reliability of their expertise. The RF consultant hired by the village failed to advise the Board on the importance of drive tests he characterizes as "nearly the gold standard" until more than 5 months into the application review, casting doubt on the adequacy of his guidance and expertise.
 - d. **The applicant's RF reports contradict PCS submitted crowd-sourced call logs** which indicate users can successfully make and receive voice calls and texts in locations throughout Nelsonville thus further calling into question the "truth" of an alleged significant gap or actual need.
 - e. **The RF reports relay partial information only relating to wireless broadband capacity and projected future needs**, not proof of actual coverage need in the "personal wireless services" bandwidth. This indicates the tower is being built for speculative future data needs, not for actual, current cell phone needs. The Boards' RF expert indicates that the proposed facility will allow for off-loading among bandwidths when demand spikes, which amounts to a speculative future demand. Building capacity for increased future demand qualifies as a speculative need not allowed under the Code.

- f. **Courts and FCC rulings have stated** that wireless broadband access is an “information service” NOT regulated by the Telecommunications Act and thus **this application is not subject to the special status claims or time constraints** and other regulations imposed by the Telecommunications Act. Likewise, the **FCC has ruled that wireless broadband should not be regulated locally as a public utility.**
- g. **The proposed tower location and height is not proven to fill an actual demonstrated need within Nelsonville.** The proposed tower places an undue burden on our village’s treasured resources in order to achieve the applicant’s reported 7.18 square miles of coverage area largely outside the boundaries of our 1.004 sq mile village.
- h. The applicant has demonstrated an unwillingness to lower the tower height to reduce this undue burden stating it would not meet its “coverage goals”. **The applicant has not submitted substantial evidence that** a tower at lower heights, **alternative technologies or** at additional combined **locations would NOT work to cover Nelsonville’s alleged gaps and/or meet an actual need.**

CRITERIA 6 NOT MET BY THE APPLICANT

CRITERIA (6):

“That 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 impacts to a level of insignificance.” §188-70 (a) (6)

The applicant has failed to demonstrate that the proposed tower “will not have a significant adverse impact on scenic or historic resources.” §188-70 (a) (6)

- 1. **The Cold Spring Cemetery is a state/federal-recognized scenic and historic resource** in our community, as indicated by expert testimony in the record.
- 2. **The tower would negatively impact use and enjoyment of this resource** because:
 - a. **The tower will be significantly visible from multiple viewpoints** within the cemetery, as stated in the record by the applicant, visual resource experts and members of the public.

- b. **Three of these impacted views are among *the most significant and important views in the cemetery***: the view upon entering, the view from the central public gathering space around the flagpole, and the view up the hill to the prominent historic row of mausoleums.
 - c. The ***significant visibility*** of the tower from these 3 key viewpoints and others will **detract from the reverent and bucolic character** of the cemetery and negatively impact the community's use and enjoyment of the cemetery as a respected and sacred place of reflection, mourning, prayer, ceremony, celebration, educational excursions, public gathering and passive recreation.
3. **The tower is also *significantly visible from the public way***, a scenic bike route, and may likely be ***significantly visible from other key resources within a designated Statewide Area of Scenic Significance***; but the application fails to provide photo simulations from enough of these locations to enable the board to judge these impacts as **required under the Code**.

Furthermore, the proposed tower facility does not meet the requirements of § 188-70 (a), CRITERIA 6 because where significant adverse visual impacts are identified above the tower design does not “minimize[s] such impacts to a level of insignificance.” This same quoted language is repeated in the siting objectives under § 188-68 (11) (A), and therefore the application also does not meet this siting objective requirement of the code.

1. **The proposed tower camouflage is ineffective** because its height/scale is significantly taller than surrounding trees and structures and thus creates a jarring point of visual distinction from the sky and its surrounding landscape that is **not *significantly* or adequately reduced by the existing or proposed buffering**.
2. **The proposed tower camouflage does not blend the dominantly vertical protruding lines of the tower with the soft, rounded and feathery deciduous forest beneath it**. Instead it creates a point of visual distinction from several key viewpoints, as the color, texture and design of its artificial branches makes it stand out on a horizon framed by a horizontal ridgeline characterized by no directly neighboring evergreens of similar stature. The distinction created by this difference is jarring and/or discordant in all seasons, not just leaf-off season.
3. **The siting of a tower of this height on a prominent ridge looking down on the cemetery increases rather than minimizes the impact of the tower**.

4. Expert testimony in the record suggests that the ineffectively screened tower could **possibly create a point of visual distinction detrimental to the unimpeded views and other key components that characterize this SASS area**, but the applicant's VRA does not provide adequate photo simulations to judge this.

CRITERIA 2 NOT MET BY THE APPLICANT

CRITERIA (2):

"That the application meets the requirements of §188-67 for collocation or placement on an eligible building or structure or § 188-68 for a new tower, including the siting objectives."

The applicant fails to meet the siting objectives required by §188-70 (a) and delineated in §188-68 (11) in that they do not demonstrate that the proposed tower facility would "be sited where their visual impact is least detrimental." 188-68 (11) (A)

1. The proposed tower site, directly adjacent to a treasured historic and scenic resource **is hardly the only feasible site** and is certainly **not the least detrimental solution** to wireless growth in our village.
 - a. The applicant has **failed to prove that all alternate solutions** to meet the purported actual need **are not possible or reasonable**.
 - b. The application materials **do not adequately eliminate all feasible alternate sites**, particularly 50 Fishkill Rd and the NY State owned lots at tax map #38.1-3-1 and NY City owned parcels at 38.1-2
 - c. Nor does the evidence submitted by the applicant eliminate **less detrimental alternatives** like lower tower heights, shorter towers divided among a few locations, locating smaller antenna on more than one existing tall structure, or use of alternative technologies like small cells and DAS, as viable.