

**RESOLUTION OF THE ZONING BOARD OF ADJUSTMENT
TOWNSHIP OF LIVINGSTON, NEW JERSEY**

Case # 2010-59-PFSPV

Motion by: Mr. Ozarow

Second by: Ms. Boni

WHEREAS, the Applicant is MetroPCS New York, Inc.;

WHEREAS, the property is known as Old Road, and taxed as Block 5900, Lot 34; and

WHEREAS, the proposed site is located in the R-2 Zone, and

WHEREAS, the Applicant has satisfied the statutory procedural requirements of service and publication of notice, and there are no taxes or assessments due or arrearages; and

WHEREAS, the Applicant was represented by Richard Schkolnick, Esq. of Brown Moskowitz & Kallen, P.C.;

WHEREAS, a hearing was held on the within application before the Board on December 14, 2010 at which time all testimony was concluded and a decision rendered;

WHEREAS, the Zoning Board of Adjustment of the Township of Livingston has heard evidence presented and testimony of witnesses and has considered the numerous exhibits introduced into evidence, and has heard the arguments of counsel on behalf of the applicant and heard testimony by the public interested in this matter;

NOW THEREFORE, be it resolved by the Zoning Board of Adjustment of the Township of Livingston as follows:

Case Summary

1. The Applicant proposes to install wireless communication antennas on an existing JCP&L tower used for electric transmission located at Old Road in Livingston and to site the related telecommunications equipment cabinets at the base of the tower. A Verizon telecommunication facility with antennas are on this tower and the radios are in a small building at the base of this tower, which facility was previously approved by the Zoning Board. This is not a permitted use under the Livingston Ordinances in this zone; therefore, the applicant requires a use variance. As the height requested is more than 10% of the total height permitted in the zone, the applicant also needs a D(6) use variance. The applicant also requires preliminary and final site plan approval and related bulk variances including a front setback variance of four (4) feet and a side yard setback variance of 0.24 feet.

2. The application requires a height variance because the facility exceeds the maximum height in the zone, thirty five (35) feet permitted and the applicant proposes the antennas at a height of 154.23 feet, or a 119.23 foot height variance.

3. One other telecommunications company, Verizon, already has antennas on this tower and radios in a small building below the tower.

4. Counsel for the Applicant pointed out that the Applicant has supplied two reports concerning (i) the gap in coverage by a radio frequency engineer qualified to render such report and (ii) the compliance of the proposed facility (including the Verizon antennas) with FCC and NJDEP requirements which showed that the facility would emit radio frequency radiation at only one percent or less of the maximum permitted by the FCC and many times less under the standard permitted by the NJDEP. The Board acknowledged receipt of these expert reports and said that unless a question was raised that testimony on these matters would not be required.

5. On December 14, 2010, Ms. Tevia A. Adar, a professional planner, was accepted by the Board as an expert in planning and testified about the proposed installation. Ms. Adar discussed pictures of the tower with and without the proposed installation from various vantage points. She testified that the public would not notice the installation and that it was in effect unobtrusive having no visual impact. The pictures were part of the application, and, therefore were not marked as exhibits. She also testified about a map of the area of the tower from Google Maps which was marked as Exhibit A-1. She noted that the three sides of the fenced enclosure for the applicant's radio cabinets would be screened with "perma-hedge" slats in the color the Board preferred. The Board said that "green" would make the applicant's enclosure least intrusive and the applicant agreed to green slats to screen the equipment cabinets, but only on the additional fencing to be installed for applicant's cabinets. The Applicant pointed out that it had no authority as to the fencing for the tower and Verizon installation.

6. Ms. Adar then testified that based on the analysis under the Smart SMR of New York vs. Borough of Fairlawn case, in which the NJ Supreme Court permitted the use of the Sica balancing test, that the application should be granted. She also noted that the "special reasons" were satisfied by the FCC License of the Applicant and that the site was particularly suited for this use as it was adjacent to the Livingston Circle, Route 10 and Eisenhower Parkway, all major transportation roadways with high traffic volume. The positive criteria were met and there were almost no negative criteria so there would be no substantial detriment to the public good and no impairment of the zoning ordinance. She pointed out the alternative to this installation would be a monopole facility which would be more offensive to the Ordinance than a co-location facility on an existing tower.

7. The Board then recognized Edward Young, a member of the public, who was sworn and testified, that he resided at 60 Old Road, next to the tower, and that the current facility was noisy, especially in warm weather as its air conditioners made a constant humming noise and that the area of the tower was littered with debris and paper from staff and others from the nearby private school who used the area next to the fence for the tower for breaks leaving behind coffee containers and papers. Counsel for the applicant noted that all those conditions were not caused by the applicant, that the applicant would offer testimony on the noise levels of the

proposed installation and that while a concern, the issues raised by Mr. Young should not influence the Board's view of the application.

8. The Applicant then had Mr. Louis Moglino, AIA, an architect familiar with the proposed facility testify that the air conditioners to be used would not increase the noise coming from the tower area appreciably as they would comply with applicable noise regulations and would not appreciably increase the noise from the site.

9. At the Board's request, the Applicant agreed to all the conditions set forth in the Township Engineer's report.

10. The Applicant also agreed to that it would inquire of JCP&L and, if required, Verizon to be permitted at its expense to install the same green perma-hedge screening slats in the entire fence enclosure below the tower. If permission were granted, then the applicant will install screening on the entire enclosure.

11. The Applicant also agreed to comply with the Board's standard conditions for preliminary and final site plan approval, provided those conditions that did not apply would not be included. For purposes of this application, the only applicable sections are sections 3, 6 and 9 (d), (e), (f), (g), (h), 10 and 11 of the attached model conditions.

Findings and Conclusions of the Board

1. The Applicant has satisfied the statutory requirements of N.J.S.A. 40:55D-70(d)(1) for the use variance for this use in a residential zone. The Applicant also satisfied the statutory requirements of N.J.S.A. 40:55D-70(d)(6) for the use variance with respect to height exceeding the 10% limit as the property is particularly suited for the proposed use.

2. The Board was satisfied that this site is best suited for the purpose of providing commercial services to its customers in the western portion of the Township. Due to the suitability of this site, its practical invisibility from the public and lack of interference with the health or welfare of the public and its promotion of the general welfare, the Board finds that the use variances are appropriate under these circumstances.

3. With regard to the negative criteria under N.J.S.A. 40:55D-70(d)(1), the Board again followed the Supreme Court's decision in Smart. The Board accepted the reports that showed that there was a substantial gap and that the proposed radio frequency emissions would be well below FCC and New Jersey DEP standards. Based on the testimony and evidence, the Board determined that health and safety would not be an issue if the proposed variances were granted. The Board noted that there would be no smoke, dust or other bothersome emissions from the antennas or equipment and this installation would avoid construction of a monopole which the Board deems aesthetically displeasing to the surrounding neighbors.

4. Based on the testimony and evidence and weighing the positive and negative criteria as described in Smart, the Board determined that there would be no substantial detriment to the public welfare or good and there will not be any substantial impairment of the intent and purpose of the zone plan and zoning ordinance if the proposed variances were granted.

Based on the foregoing, after weighing the equities of the matter and considering the various factors referred to herein, the Board determined that the grant of the use variances, bulk variances for front and side yard variances and preliminary and final site plan approval will not be a substantial detriment to the public good and there will not be an impairment of the zoning plan or municipal zoning ordinance and the granting of preliminary and final site plan approval are consistent with good planning standards. The Board voted unanimously seven to none to approve the application and the variances requested.

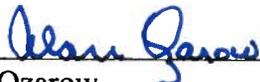
Now, therefore, be it **RESOLVED** for the reasons set forth above and on the record that the application herein submitted for the D(1) an (6) use variance, preliminary and final site plan and front yard setback bulk variances are granted and approved, subject to the terms and conditions set forth herein and consistent with the plans and application submitted and as testified to at the hearings before the Board. This approval is subject to the necessary review of the Township Engineer and all other requirements of the Township ordinances, building code, county and State laws and regulations and the right of appeal by any interested party. This approval is subject to the following conditions:

1. That the screening of the fence around equipment cabinets shall use a green color;
and
2. That the application shall seek the permission of JCP&L and Verizon to install screening slats of the same color around the entire fence enclosure below the tower and advise the Board Secretary within ninety (90) days if such permission were granted. If granted, the applicant would install such screening when its screening was installed.
3. The Applicant shall comply with all the conditions in the Engineer's memorandum of comments.
4. The applicant shall comply with those portions of the Standard Conditions specified above.

The Resolution is a memorialization of the action of the Board of Adjustment of the Township of Livingston taken on December 14, 2010, in which Board members voted to approve the application in accordance with and subject to the conditions and terms set forth herein on the record.

CHAIRMAN:

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Alan Ozarow

Dated: January 24, 2011

Prepared by: Herbert S. Ford, Esq.

ZONING BOARD OF ADJUSTMENTS, TOWNSHIP OF LIVINGSTON

Model Conditions of Approval
(Adopted August 14, 2008)

Every application turns on its own facts and is judged on its own merits. Listed below are models of conditions which may be considered "standard". A standard can be tailored to specific circumstances, and need not always apply. Other or additional conditions may be tailored for any application.

1. Architecture

- a. Rooftop ancillary structures and equipment shall be screened by material compatible with the exterior finish of the building and matching the exterior color of the building as closely as possible.
- b. Enclosures of trash bins or dumpsters shall be of the same type of materials and the same color as the exterior finish of the building.

2. Blasting

In the event that blasting be necessary on the Site, the following conditions shall apply in addition to all requirements of federal law or regulations:

- a. All blasting operations shall be performed in strict compliance with N.J.S.A. 21:1A-128 *et seq.* and N.J.A.C. 12:190-1.1 *et seq.*, or superseding requirements.
- b. A pre-blast inspection of all structures on all properties adjacent to the Site or within 200 feet of the blasting (whichever is the greater distance) shall be conducted at Applicant's expense.
- c. Blasting shall occur only between 10:00 a.m. and 3:00 p.m. on Monday through Friday. Blasting during other hours may be permitted, temporarily, by the Township Engineer upon his finding that a condition constituting an emergency exists and necessitates such permission.
- d. Applicant shall coordinate all blasting with the Livingston Police and Fire Departments. If traffic control is required, it shall be provided at Applicant's expense.
- e. Applicant shall give the Township Engineer, the Chief of Police, the Fire Chief, and all owners of structures required to be inspected under "b" above, written notice of scheduled blasting operations to be received not less than 20 days, nor more than 40 days, prior to their commencement. If scheduled blasting operations are delayed or suspended they shall not be resumed until new notice has been given and received. All notices shall include the name and telephone number of Applicant's representative for purposes of receiving and responding to questions and comments.
- f. These conditions do not supersede any requirements of law or regulation that are more strict or restrictive.

3. Cleanliness

- a. At the close of each work day the Site shall be thoroughly cleaned and all trash and construction debris, including that within buildings under construction, shall be placed in covered dumpsters which shall be removed from the Site, and replaced, before they overflow.
- b. Not less often than weekly, and whenever else required by the Construction Official or the Township Engineer, the public streets adjacent to the Site, and within 500 feet of the Site, shall be manually or mechanically broom swept to remove dirt, mud or debris originating from the Site.
- c. Dust suppression methods acceptable to the Construction Official and the Township Engineer shall be utilized on the Site.

4. Deeds & Easements

All deeds, easements, dedications or restrictions required by this approval shall be subject to review and approval by the Board Attorney prior to signing and filing for recordation.

5. Detention Basins

- a. Stormwater management basins shall be established on lots created for that purpose only. No structures that are not an approved part of the stormwater management system shall be erected on any such lot.
- b. If the approval of the Application calls for title to such a lot to be transferred to the Township; at such time as the Township accepts any new streets or roads on the Site, title to the lot shall be conveyed to the Township provided that the Township Engineer is then satisfied that the basin has been constructed in full compliance with all applicable requirements. The deed conveying such title shall be subject to prior approval by both the Board Attorney and the Township Attorney.
- c. A maintenance plan meeting the requirements of the Residential Site Improvement Standards or the Township's Stormwater Control Ordinance, or both, as applicable shall be prepared by Applicant in terms receiving the approval of the Township Engineer, the Board Attorney and Township Attorney. If the responsibility for maintenance is assumed by the Township, the plan shall be prepared by the Applicant and shall be subject to the approval of Township Engineer. If the responsibility for maintenance is not the direct responsibility of a public agency, the maintenance plan and any future revisions shall be recorded upon the deed of record for the property in terms approved in advance by both the Board Attorney and the Township Attorney.

6. Final Plans

- a. The full text of all of the conditions of this approval shall be set out on the final plans which shall be submitted to the Construction Official, the Township Engineer and the Board Secretary prior to the issuance of any Township permit in respect of demolition, preparation of the Site or construction of any improvement.
- b. Such final plans shall also include all changes agreed to in the course of the hearing, and shall have been reviewed by the Board Secretary or the Board's Planning Consultant for determination of whether the plans conform to the Board's approvals.

7. Flood Hazards

- a. Insert on the final subdivision map a metes and bounds description of all flood hazard areas located on the Site.
- b. Insert in all deeds for individual lots that contain or are adjacent to flood hazard areas, and on the preliminary and final subdivision maps or plats, the following covenant: "The lands designated herein contain flood hazard areas. There shall be no disturbance of any kind as to any flood hazard area unless permitted by N.J.D.E.P. pursuant to the Flood Hazard Control Act, N.J.S.A. 58:16A-50 *et. seq.* or superseding requirements.

8. Guarantees

- a. The approval of this Application is subject to the posting of any and all required performance guarantees, soil erosion and sediment control approvals, and any other requirements of Township ordinances prior to the commencement of Site preparation or construction.
- b. This approval is also conditioned upon the Applicant providing, prior to issuance of the first certificate of occupancy, a performance guarantee for any aspects of the approved landscaping or fencing that has not been completed by the time of issuance of such certificate.

9. Landscaping & Environmental Protection

- a. All deciduous trees planted shall have a caliper of 3.5 to 4.0 inches measured at a height of 4.0 feet above the root ball. All evergreen trees planted shall have a height of 8.0 to 9.0 feet.
- b. Street shade trees shall be planted in front yards and outside the right-of-way.
- c. Any tree or other planting installed in accordance with the plans which dies shall be replaced, within the current or next planting season, in kind and at the same size as it had reached at the time of death; except that if it died more than three years after planting its replacement need not be larger than the size it had reached three years after planting. The same replacement requirements shall apply to a tree or other planting removed because of damage or disease.
- d. No tree existing on the Site at the time of filing of the application shall be removed except as identified for removal on an approved plan. Every existing tree to be preserved shall be tagged and shall be shown on the Site Plan or Subdivision Plan. During site preparation and during construction, each such tree shall be protected by snow

fencing or a more substantial means approved by the Construction Official. No soils, excavated materials, or any construction equipment or building materials, shall be stored or operated within a root protection zone that shall be the greater distance of (i) the crown drip line, or (ii) a distance equal to caliper multiplied by one (1) foot, (but never less than eight (8) feet from the trunk of a tree to be preserved), or anywhere else where such soil or materials can adversely affect the health of trees to be preserved. All work done within the root protection zone shall be accomplished with hand tools.

- e. The grade of land located within the root protection zone shall not be raised or lowered more than three (3) inches unless compensated for by welling or retaining wall methods; but in no event shall welling or retaining walls be installed less than eight (8) feet from the trunk of a tree.
- f. During site preparation or construction, no fuel storage, and no refueling, maintenance, repair or washdown of construction equipment, shall occur within fifty (50) feet of any tree to be preserved.
- g. Any provision of the Trees Ordinance, § 170-53 et seq. of the Code of the Township of Livingston, that establishes a higher or more restrictive standard or requirement shall control.
- h. No mulch shall be placed, or allowed to accumulate, within six inches of the trunk of any tree or shrub planted on the Site in compliance with this resolution. Mulch shall not be applied, or allowed to accumulate, elsewhere within the drip line of the tree or shrub to a depth in excess of four inches.

10. Noise

- a. No site preparation, demolition or construction activity shall be performed on the Site on Sundays, or before 7:30 a.m. or after 5:00 p.m. on weekdays, or before 9:00 a.m. or after 5:00 p.m. on Saturdays or federal holidays.
- b. No machinery or heavy equipment shall be operated on Site on Saturdays, Sundays or federal holidays.
- c. All vehicles and motorized machinery operated on the Site shall be equipped with properly operating mufflers.
- d. No site preparation, demolition or construction activity (other than authorized blasting) shall produce, at the property line, (i) continuous airborne sound at a sound level in excess of 65 dBA, or which has an octave band sound pressure level in decibels which exceeds the standards provided in 32 N.J.R. 2230 et. seq., or (ii) impulsive sound in air which has a peak sound pressure level in excess of 80 decibels, or (iii) impulsive sound in air which repeats more than four times in any hour and has a peak sound pressure level in excess of 50 decibels.
- e. Relief from these noise conditions may be permitted, temporarily, by the Township Engineer upon his finding that a circumstance constituting an emergency exists and necessitates such permission.

11. Other Governmental Approvals

- a. Applicant shall comply with all applicable Federal, State and local laws and Regulations and obtain any other governmental approvals required for implementation of this application as approved. If any other governmental agency or authority grants a waiver of or variance from any law, rule or regulation, or imposes any condition or requirement, which affects this approval or any of the conditions contained herein, then this Board shall have the right to review such action as it relates to this Board's approval or conditions and to modify, amend or revoke its approval and/or conditions.
- b. No Township permit in respect of preparation of the Site or construction of any improvement shall be issued until proof of request for such approvals, and any action thereupon, shall have been presented to the Construction Official.

12. Paving and Sidewalks

- a. Applicant shall install the top course of street paving not later than the earlier of six (6) months after issuance of the last certificate of occupancy or three (3) years after the issuance of the first certificate of occupancy.
- b. All manholes, catch basins, and driveway curbs shall be ramped until the top course of street paving has been installed.
- c. All sidewalks shall be constructed of concrete or of non-asphalt pavers and shall be not less than four feet wide in a residence district or five feet wide in the Business Improvement District.

13. Signs

The Board shall retain jurisdiction over any and all signs until the final certificate of occupancy has been issued.

14. Traffic and Parking Enforcement

- a. The Applicant shall comply with Township Ordinances Chapter 29, Article 26, regarding handicapped parking and shall maintain such spaces and all the traffic and parking signage and markings on the Site in good order and repair.
- b. At the time of applying for a building permit the Applicant shall submit proof of having filed a written request pursuant to, and in accordance with, N.J.S.A. 39:5A-1, requesting that N.J.S.A. 39:1-1 *et seq.* be made applicable to the roads, streets, driveways, parking areas, etc. within the Site. The Applicant shall provide proof of the governmental action on such request to the Construction Official prior to issuance of the final certificate of occupancy.

15. Utilities for Site Plans and Major Subdivisions

Applicant will construct all utilities underground as required by law, and shall submit to the Building Department a written instrument from each serving utility evidencing full compliance with this condition and with Section 16-69(a)(17) of the Land Use Ordinance before issuance of any certificate of occupancy.

16. Wetlands

- a. Applicant will insert on the final subdivision map a metes and bounds description of all wetlands, wetlands transition areas, and buffers on the Site.
- b. Where applicable, each deed for a lot, and the subdivision plat, shall contain the following language: "The lands designated herein contain wetlands and wetlands transition areas. There shall be no disturbance of any kind as to any wetlands or wetlands transition areas unless permitted by N.J.D.E.P. pursuant to law, and Best Management Practices (as defined in N.J.A.C. 7:7A-1.4 or superseding requirements) for prevention or reduction of adverse impacts upon or pollution of wetlands, wetlands transition areas and buffers shall be followed at all times. This restrictive covenant shall run with the land and be binding upon the grantees, their heirs and successors and assigns."

17. Developer's Agreement

Prior to issuance of any permit for demolition, site preparation, or construction, the Applicant shall have entered into a Developer's Agreement with the Township.