

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

Case # 2013-36-PFSPV

Motion by: Mr. James Hochberg

Second by: Mr. Alan Ozarow

WHEREAS, the applicant is New York SMSA Limited Partnership d/b/a Verizon Wireless;

WHEREAS, the property is known as 49-53 East Mount Pleasant Avenue and taxed as Block 1503, Lot 6; and

WHEREAS, the proposed site is on a lot which is in the B-1 Zone and the proposed use is a permitted conditional use in such zone but does not meet all the specified conditions, 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 D. Stanzione, Esq.; and

WHEREAS, a hearing was held on the within application before the Board on October 22, 2013; and

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;

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 one wireless communication antenna on the top of an office building located at 49-53 East Mount Pleasant Avenue and to site the telecommunication radio equipment on the roof of the building owned by Verizon Communications, which is a different company than the applicant. This is a permitted conditional use under the Livingston Ordinance in this zone. The antenna height will be 43 feet, the building height is 40 feet.

2. The application requires amended site plan approval and a conditional use variance because Section 170-88(1)(3)(b)(2) requires the antenna be at least 200 feet from the closest residential lot line. The antenna will be 162 feet from the closest residential lot line. The applicant requires a 38 foot variance due to this condition.

3. Section 170-88L(3)(b)(3) requires that the antenna be set back from the lot line at least the height of the antenna. The antenna will be set back only 16 feet from the closest lot line and 43 feet is required. A variance of 27 feet is required from this provision.

4. The Board had previously granted waivers of an environmental impact statement, storm water management plan and drainage calculations for this application which does not involve any site changes.

5. Mr. Anthony Suppa, an engineer, was qualified as an expert in site engineering and testified about the location of the radio cabinets and antennas to be installed. He answered the questions of the Board about location on the roof where the radio cabinets will be located and the height of the antenna. He testified that the cabinets will not be visible and there will be only one antenna, although there is room for a second equipment cabinet should more radio equipment be required in the future. The sole maintenance will be a monthly visit by a technician to inspect the equipment. He testified that the cabinets with equipment weighed 400 pounds and the roof was adequately strong to bear that weight. He was asked by Jerry Kitsopoulos of 55 East Mount Pleasant Avenue how loud the fans on the equipment would be and he testified that they fans would comply with applicable noise standards at the lot line and would be no louder than a small air conditioning unit.

6. Mr. Edwin Ortega, a radio frequency engineer familiar with its coverage in Livingston, was qualified as an expert in the area of radio frequency matters. Mr. Ortega stated that the location is needed to meet the capacity needs of the applicant, to improve the quality of service and to fill the "capacity" gap in the area of Town Center and the intersection of Livingston Avenue and Mount Pleasant Avenue, Livingston. Mr. Ortega had marked into evidence coverage maps that showed the coverage in Livingston. A-1 was the underlying topographic map of Livingston showing existing sites in Livingston that serve the area. A-2 showed coverage based on the antenna on the proposed site. Ortega said that calls in this service area are being dropped or cannot be completed. The proposed site would be a low powered site to fill a small gap in coverage due to the density of Town Center with only 5 watts of power compared to 40 watts for a full cellular site. On questioning by the Board, Mr. Ortega stated that he was not an expert on the microwave emissions for the proposed antenna.

7. The Board required that the applicant submit a report on the microwave emissions from the proposed facility to demonstrate the site will comply with applicable FCC and NJDEP maximum radiation emission standards. The applicant agreed to submit such a report to the Town Engineer for approval.

8. Mr. William F. Masters, a professional planner also testified for the applicant and the Board accepted Mr. Masters as an expert land use planner. Mr. Masters noted that the installation is on an existing building in the B-1 Zone and is a permitted conditional use and the standards of Coventry Square should be applied so the Board should decide if the departures from the conditional use standards are sufficient to deny the variances. The application needs a 38 foot variance from the distance to the nearest residential lot line and a 27 foot variance from the distance from the lot line of this lot. He said that the Livingston

Ordinance favors installations on existing buildings and structures versus new structures such as monopoles. He had marked into evidence as A-3 which was photographs of the building simulating the installation and stated that it was his conclusion that the visual impact of the antennas and facilities on the roof would be insignificant. He stated that the positive criteria were met in that the site was particularly suited for the use in filling the coverage gap. He said that telecommunications and the FCC license of the Applicant demonstrated that the public welfare was being served by the application. As to the negative criteria, Mr. Masters testified that there was virtually no negative impact at all on the public as the installation would not be noticed. Further, he opined that the application did not cause any impairment of the zoning ordinance or Master Plan.

Findings and Conclusions of the Board

1. The applicant has satisfied the statutory requirements of N.J.S.A. 40:55D-70(d)(3) for variances from the conditional use standards requested.

2. The Board concluded that the Applicant had proved that the deviation from the conditional use standards of the Ordinance did not make the site inappropriate for the conditional use in a material way due to the circumstances of this building and proposed antenna. The Board noted that the site selected is particularly suited for this use and will avoid the necessity of a monopole installation.

3. The Board was satisfied this site is best suited for the purpose of providing commercial telecommunication services to its customers. Due to the suitability of this site, its relative invisibility from the public and lack of interference with the health or welfare of the public and its promotion of the general welfare made the variances from the conditional use standards appropriate under these limited circumstances and conditions.

4. With regard to the negative criteria under N.J.S.A. 40:55D-70(d)(3), the Board again followed the Supreme Court's decisions in Smart SMR and Coventry. The Board accepted the testimony of Mr. Ortega subject and as a condition of issuing a permit an expert report that concluded that the proposed radio frequency emissions would be below FCC standards. Based on the testimony and evidence, the Board determined that health and safety would not be an issue if the proposed variance was granted. The Board noted that there would be no smoke, dust or other bothersome emissions from the antenna or equipment and would avoid the installation of a monopole which the Board deems aesthetically displeasing to the surrounding neighbors. Based on the foregoing, the Board concluded that there would be no negative impact on the municipal zone plan or the surrounding neighborhood if the Applicant were granted a variance from conditional use standards.

5. The Board noted that the use of rooftop facilities was anticipated by the Wireless Communications Facilities Ordinance. Their use here is appropriate and looked to other instances where carriers would use this method to provide service to customers thereby avoiding monopoles, flag poles and other intrusive devices not compatible with the suburban character of

the community and inconsistent with the Zone Plan.

6. With regard to the negative criteria, the Board concluded that there would be no negative impact on the municipal zone plan or the surrounding neighborhood.

Now, therefore, be it **RESOLVED** for the reasons set forth above and on the record of testimony by the members of the **ZONING BOARD OF ADJUSTMENT** of the Township of Livingston, resolved that the application herein submitted is granted for the following:

- A. Preliminary and final site plan approval under the Board's ancillary jurisdiction under N.J.S.A. 40:55D-76b be and hereby are granted subject to the terms and conditions set forth herein and as are reasonably consistent with the plans submitted and as testified to at the hearings before the Board;
- B. Variance from the conditional use standards in Section 170-88L(3)(b)(2) that requires the antenna be at least 200 feet from the closest residential lot line. The antenna will be 162 feet to the closest residential lot line. The applicant is granted a 38 foot variance subject to the terms and conditions set forth herein and consistent with the plans and application submitted and as testified to at the hearing before the Board;
- C. Variance from the conditional use standards in Section 170-88L(3)(b)(3) that requires that the antenna be set back from the lot line at least the height of the antenna. The antenna will be set back only 16 feet from the closest lot line and 43 feet is required. A variance of 27 feet is granted subject to the terms and conditions set forth herein and consistent with the plans and application submitted and as testified to at the hearing before the Board, and
- D. Waivers of an environmental impact statement, storm water management plan and drainage calculation are also granted.

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 conditions that the emissions from the antennas not exceed the FCC standards.

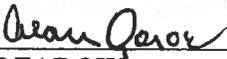
The applicant shall provide as a condition of issuance of any building permit the necessary microwave emission report by a qualified expert satisfactory to the Township Engineer. This approval is also subject to the Model Conditions of Approval of the Board attached hereto and made a part hereof; however, in place of Condition 15, the applicant shall provide a plan and section depicting the above ground utility service to the facility for approval of the Town Engineer.

The Resolution is a memorialization of the action of the Board of Adjustment of the Township of Livingston taken on October 22, 2013, in which Board seven (7) members present

Verizon Wireless
Hearing Date: October 22, 2013
49-53 East Mount Pleasant Avenue

and qualified to vote unanimously voted to approve the application in accordance with and subject to the conditions and terms set forth herein on the record.

CHAIRMAN:



ALAN OZAROW

Dated: December 10, 2013

Prepared by: Herbert S. Ford, Esq.

ZONING BOARD, TOWNSHIP OF LIVINGSTON

Model Conditions of Approval

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 wash down 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.

18. Compliance With Conditions

- a. Condition(s) numbered 6, 8(a), 11 and 17 shall all be complied with prior to issuance of any permit for demolition, site preparation or construction.
- b. Condition(s) numbered 1(a), and 3 shall be complied with prior to issuance of any certificate of occupancy.
- c. Condition(s) numbered 1(a) shall be continuing conditions.

