

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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VERIZON WIRELESS OF THE EAST LP d/b/a
Verizon Wireless and TARPON TOWERS II, LLC,

Plaintiff,

-against-

TOWN OF WAPPINGER, TOWN OF WAPPINGER
PLANNING BOARD, and TOWN OF WAPPINGER
ZONING BOARD OF APPEALS,

Defendants.

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF AND
EXPEDITED REVIEW PURSUANT
TO 47 U.S.C. § 332(c)(7)(B)(v)**

Docket No.: 7:20-cv-8600

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Plaintiffs Verizon Wireless of the East LP d/b/a Verizon Wireless (“Verizon”) and Tarpon Towers II, LLC (“Tarpon”), as and for their Complaint against Defendants Town of Wappinger (“Wappinger” or the “Town”), Town of Wappinger Planning Board (“Planning Board”), and Town of Wappinger Zoning Board of Appeals (“ZBA” and collectively with other Defendants, the “Town”), allege as follows:

Facts Common to All Claims for Relief
Nature of the Action

1. Plaintiffs bring this action for declaratory and injunctive relief under Section 332 of the Communications Act of 1934 as amended by the Telecommunications Act of 1996 and correspondent federal regulations and orders. That federal law generally prevents and preempts state and local governments from action or inaction that prohibits or has the effective of prohibiting the provision of personal wireless services. Among other things, it is unlawful under Section 332 for a municipality to fail to act on or fail to approve applications to install infrastructure to support wireless services within a certain time period or absent a recognized justification. Here, the Town violated that federal law through its continuing and unjustifiable failure to act on Plaintiff’s application to install a wireless communications facility—a 150 foot tall monopole on an

approximately 48 acre horse farm—to address what the Town’s own wireless consultant confirmed is an area of deficient wireless service for residents and visitors in the Town and neighboring Fishkill.

2. The Town’s failure to act, and the Planning Board’s unlawful and pretextual invocation of state law to delay action, occurred more than 270-days after Tarpon’s application was complete and the Planning Board had received and reviewed a full visual report with photos and photo simulations from vantage points it had pre-approved and in some cases selected.

3. The Town’s actions were contrary to not just federal law, but also local and state law, and were based on solely generalized—and unsupported—“Not In My Back Yard” (NIMBY) opposition from a group of small, but vocal, residents.

4. The Town’s decision to succumb to generalized NIMBY opposition rather than act based on its obligations under federal law, or even follow its own local code and New York’s State Environmental Quality Review Act (SEQRA), is not unique in the context of wireless facilities applications and the Telecommunication Act (“TCA”) lawsuits that can follow. Yet, the Town’s actions were particularly unjustifiable here.

5. Tarpon first met with Town representatives in August 2019 for a pre-application meeting after securing a ground lease option with a property owner and Verizon as the “anchor” tower tenant. There, Tarpon and the Town discussed the need for the tower (the “Facility”) and the permits, variances, and authorizations Tarpon would need to apply for. The Town advised Tarpon that rather than submitting a full visual study in its initial application, it was preferable that Tarpon submit an application and include a map with proposed locations for photos to be included in the visual study which it could discuss with the Planning Board prior to preparing and submitting the study required in the Town’s Code.

6. Per the Town's instructions, in October 2019, Tarpon applied to the Planning Board and ZBA for the various permits and variances it needed to install the Facility. Tarpon's submission included a detailed radiofrequency (RF) engineering report from Verizon explaining the need for the new Facility to improve service in the Castle Point area of the Town and the northwest portion of Fishkill. The submission also included a site selection analysis addressing the various locations that Tarpon and Verizon had identified and evaluated and the basis for selecting the final proposed site. The submission contained a full SEQRA environmental assessment form with a visual addendum. And the submission provided a map of proposed photo locations for the visual study with several of the locations provided by Town staff as part of the pre-application meeting and process.

7. Following a Planning Board meeting in November 2019, at which the Planning Board approved (a) the timing and public notice for the balloon float and (b) the photo locations Tarpon should include in its visual analysis report, Tarpon conducted the balloon float and in December submitted the visual study.

8. Through the course of the next several months, Tarpon addressed comments on its submission from the Town Planner, Engineer, and Fire Prevention Bureau. Tarpon obtained authorizations for the Facility from various federal and state agencies, including the Federal Aviation Administration, the New York Department of State Coastal Commission, and the State Historical Preservation Office, which determined that the Facility would have no visual impact on any historic properties. The Town's RF consultant also concluded that Tarpon's proposed tower was the "best solution" to address the agreed upon coverage deficiencies in the Castle Point area of the community.

9. Per the Planning Board's request, Tarpon submitted renderings of various design

options for the Facility, revised site plans addressing comments from the Planning Board and the Town's professionals, and a stormwater management plan. Tarpon also appeared at multiple Planning Board meetings and participated in various work sessions with the Town's professionals and agreed to a tolling agreement whereby it extended the Town's time to act on the application under the FCC's "shot clock" by 45-days.

10. Starting in May 2020, local NIMBY opposition became more vocal. The opposition was based primarily on generalized aesthetic objections, health and safety concerns regarding RF exposure, and conclusory assertions regarding diminution of property values.

11. In supplemental filings in late May and early July 2020, Tarpon responded to the public comments and filings of the opposition by, inter alia, submitting reports regarding the lack of diminution of property values from wireless facility installations and addressing structural safety of towers. Tarpon also submitted revised zoning drawings and provided a storm water report per the Town Engineer's request and agreed to another 45-day extension of the shot clock.

12. Satisfied with Tarpon's application, the SEQRA Full EAF as originally filed and updated and the way in which it and Verizon had addressed the comments of the Town's professionals and the public, the Planning Board passed a unanimous resolution on July 6, 2020 directing the Town Planner to draft a SEQRA negative declaration (i.e. a finding of no significant environmental impact) with the intention that the Planning Board would review and confirm the written negative declaration at a continued public hearing in two weeks.

13. Between the July 6, 2020 and July 20, 2020 public hearings, Tarpon submitted a noise study verifying that the Facility equipment at grade would emit only very low decibel levels of sound and the Town Planner drafted and circulated the negative declaration, which would clear the way for approval of the Facility. No other materials were added to the administrative record.

14. However, at the July 20, 2020 continued hearing the Planning Board did not act on the negative declaration it had unanimously directed the Town Planner to draft two weeks prior. Instead, for the first time, the Planning Board claimed to take issue with the scope and completeness of Tarpon's visual study—the same study the Planning Board scoped, approved, and had been in possession of for seven months.

15. Then, in a comment letter, dated July 24, 2020, the Planning Board asserted that it had determined that the visual study was “defective” and did not accurately reflect the potential visual impact of the Facility. The Planning Board requested that Tarpon submit additional photos depicting how the Facility will look from areas immediately adjacent to the property. Additionally, though the Planning Board received Tarpon's site selection analysis in early October 2019 and had never taken issue with its thoroughness or requested that Tarpon evaluate any additional sites or re-evaluate any previously considered sites, the Planning Board also requested that Tarpon evaluate two new sites and re-evaluate a site it had previously considered.

16. The Planning Board also requested that Tarpon provide a real estate valuation report specific to the unique nature of the neighborhood. The Planning Board did not identify or cite a single local code provision or any other basis in law to support its assertions that Tarpon's submissions were somehow defective, or that additional information could be required.

17. Nevertheless, at significant cost, Tarpon completed additional visual scopes of work, which included photos from over fifty vantage points and 360-degree drone fly footage. Tarpon also engaged a certified real estate appraiser to conduct a site-specific market study.

18. On August 18, 2020, Tarpon submitted (a) the additional visual study, (b) the site-specific market study, (c) an additional real estate appraisal study conducted in the nearby town of East Fishkill finding no diminution of property values following the installation of a wireless

facility, and (d) an updated site selection analysis addressing the three sites for which the Planning Board had requested additional information.

19. Contrary to its prior position, on September 9, 2020, the Planning Board completed its about-face and directed the Town Planner to prepare a positive declaration under SEQRA, which the Planning Board unanimously adopted on September 21, 2020—the date to which the parties had agreed to toll the shot clock for a final decision on the applications before the Board.

20. Precisely as in *Bell Atlantic Mobile of Rochester L.P. v. Town of Irondequoit*, 848 F.Supp.2d 391, 401 (W.D.N.Y. 2012), here, the Town’s “invocation of SEQRA’s procedures was merely a delaying tactic as a result of vocal opposition to the placement of a monopole in the one location that would address the lack of coverage. The Defendants’ decision to delay final ruling on the application beyond the “shot clock” Order period has the effective of prohibiting the provision of wireless services” in the Castle Point area.

21. Accordingly, in furtherance of Congress’s express intent to promote the rapid deployment of wireless infrastructure to provide service to communities, Plaintiffs seek an order that will allow Tarpon to install the wireless facility to provide wireless services to the public in an area of admitted and acknowledged need.

The Parties

22. Plaintiff Verizon is a New York limited partnership with a place of business at 175 Calkins Road, Rochester New York.

23. Verizon provides personal wireless services and telecommunications services to the public as those terms are defined in the TCA and correspondent FCC regulations, rulings, and orders.

24. Tarpon is a limited liability company authorized to do business in the State of New

York and organized under the laws of Delaware with a principal place of business at 8916 77th Terrace East, Suite 103, Lakewood Ranch, Florida.

25. Tarpon owns and operates personal wireless service facilities across the country that are used in the provision of personal wireless services to the public, as those various terms are used and defined in Section 332 of the TCA.

26. Upon information and belief, the Town is a municipal corporation of the State of New York, located at 20 Middlebush Road, Wappinger Falls, New York 12590.

27. Upon information and belief, the Planning Board is an agency of the Town with authority under federal, New York State and Town laws to review applications for the placement, construction, and modification of personal wireless facilities.

28. Upon information and belief, the ZBA is an agency of the Town with authority under New York State and Town laws to grant variances from the Town's zoning laws.

Jurisdiction & Venue

29. This Court has subject matter jurisdiction over this action pursuant to 47 U.S.C. § 332(c)(7)(B), because Plaintiffs have been adversely affected and aggrieved by Defendants' actions in violation of those provisions, and 28 U.S.C. § 1331 because this is a civil action that presents federal questions arising under the TCA and related FCC rulings, orders and regulations.

30. This Court has personal jurisdiction over the Defendants and venue is proper because the claims stated herein arose in this judicial district and this is the judicial district in which Defendants reside.

Expedited Treatment

31. Pursuant to 47 U.S.C. § 332(c)(7)(B)(v), Plaintiffs are entitled to have this matter heard and decided on an expedited basis.

Verizon & Tarpon's Personal Wireless Services & Infrastructure

32. Verizon is an FCC-licensed provider of commercial mobile services and personal wireless services.

33. Verizon operates a fourth generation (4G) network in and around the Town. Specifically, Verizon provides services using its FCC-licensed 700 MHz and AWS (advanced wireless services) frequency bands in the area.

34. Because of increasing demand for wireless services, primarily driven by increasing use of personal wireless devices, Verizon, and other FCC-licensed carriers, must constantly upgrade and add to its network infrastructure.

35. Based on data from CTIA's most recent annual survey, 37.06 trillion megabytes of data (voice calls are treated as data packets in modern networks) travelled over wireless networks in 2019, an increase of approximately 8.5 trillion MB from the previous year and nearly 10,000% more traffic than in 2010. The one-year increase in data usage from 2018 to 2019 is alone more than double the total wireless traffic in 2014.

36. Wireless networks are designed to reuse scarce FCC-licensed spectrum and coordinate between interlocking cells (or antennas) as a call or data transfer (referred to as a session) moves between cells.

37. Cells must be placed closely enough so that they eliminate coverage gaps and can effectively hand off sessions based on network protocols but cannot be placed too closely together or they will cause interference and decrease spectral efficiency and the quality of service.

38. Increasing wireless usage creates capacity issues where individual cells become overloaded and their coverage area shrinks. The solution for Verizon and other carriers is to add more infrastructure (cells or antennas) with each serving smaller geographic areas. This is referred

to as network densification or cell-splitting.

39. By adding cells and shrinking the geographic area that each cell is required to serve, networks are better able to satisfy increasing demand and provide more reliable service.

40. Higher frequency bands, like the AWS band (approximately 2100 MHz) are particularly important for addressing capacity issues because of their propagation characteristics. Accordingly, being able to provide reliable service at the AWS band is critical to Verizon's overall network performance.

41. Tarpon builds, owns and operates wireless tower sites where tenants install transmitting facilities to provide personal wireless services to the public.

42. Tarpon will often be contacted by FCC-licensed wireless providers such as Verizon to construct a tower facility in a geographic area in which the carrier has identified a need for increased capacity or improved service and a tower is required.

43. Once under contract with the wireless carrier, Tarpon will work with the carrier's RF engineers to identify potential sites taking into consideration the location of existing wireless facilities, topography, foliage, local zoning regulations, and local characteristics.

44. Typically, RF engineers will identify a search ring within which the facility must be based so that it (a) provides service to the needed area and (b) does not interfere with existing infrastructure.

45. Tarpon will identify potential sites within the search ring and then negotiate access to those sites with the property owners. Once a site is procured, Tarpon will apply for all necessary permits and authorizations to construct the facility.

46. Tarpon constructs tower sites that multiple wireless carriers can co-locate their equipment on consistent with federal, state, and local policies to limit the proliferation of wireless

tower infrastructure.

Federal Statutory and Regulatory Framework

47. In 1996, Congress passed the TCA to “provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans...” H.R. Rep. No. 104-458, at 206 (1996) (Conf. Rep.); *see also* 1996 U.S. Code Cong. and Adm. News, p. 10.

48. In passing the TCA, Congress explicitly directed the FCC to “promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.” Preamble, The Telecommunications Act of 1996, P.L. 104-014, 100 Stat. 56 (1996).

49. The TCA preempts any state or local action or inaction that effectively prohibits the provision of personal wireless services and preserves limited municipal authority over the placement, construction, or modification of wireless facilities.

50. Section 332(c)(7) of the TCA provides that state or local requirements that prohibit or have the effect of prohibiting the provision of personal wireless services are preempted.

51. Courts in this Circuit and the FCC have confirmed that a state or local requirement is an effective prohibition if it materially inhibits the ability to provide services in a fair and balanced regulatory environment—including inhibiting the ability to effectively apply for permits associated with required wireless infrastructure.

52. Section 332(c)(7) of the TCA also requires that any actions a locality takes, legislative or on a specific application, be made on a competitively neutral and non-discriminatory basis.

53. Section 332(c)(7) of the TCA further requires a state or local government agency

to act on any application for a wireless facility within a “reasonable period of time.”

54. Section 332(c)(7) of the TCA additionally requires that any decision by a local authority denying a request or application for a wireless facility be in writing and supported by substantial evidence.

55. Section 332(c)(7)(B)(v) grants any entity adversely affected by an action or inaction of a municipality on an application for a wireless facility the right to commence a judicial proceeding, which the “court shall hear and decide...on an expedited basis.”

56. In furtherance of its Congressional mandate to promote competition, reduce regulation, and encourage the rapid deployment of telecommunications technologies, the FCC has issued orders and regulations interpreting Section 332(c)(7)(B)(ii)’s requirement that state or local governments act on requests for authorizations to place, construct, or modify personal wireless facilities within a reasonable amount of time.

57. Specifically, in a November 2009 order (the “2009 Shot Clock Order”), the FCC recognized that “personal wireless service providers have often faced lengthy and unreasonable delays in the consideration of their facility siting applications, and that the persistence of such delays is impeding the deployment of advanced and emergency services.”

58. In the 2009 Shot Clock Order, the FCC set shot clocks of 90 days for applications to collocate facilities on existing structures and 150 days for new structures. The FCC explained that the purpose of shot clock deadlines was to give municipalities “a strong incentive to resolve each application within the timeframe defined as reasonable, or they will risk issuance of an injunction granting the application. In addition, specific timeframes for State and local government deliberations will allow wireless providers to better plan and allocate resources.”

59. Both the Second Circuit and the FCC have recognized that the shot clock applies

to all authorizations necessary for the deployment of personal wireless facilities and runs concurrently. This consistent with the TCA's express intent to encourage the rapid deployment of new telecommunications technologies by reducing impediments imposed by local governments.

60. The FCC shot clocks are codified at 47 C.F.R. § 1.6003.

61. Congress and the FCC's federal statutory and regulatory framework, along with various Presidential Proclamations and Executive Orders,¹ demonstrate a national policy to promote the provision of wireless services and the deployment of new and improved technologies in the United States by preempting various legal requirements and limiting municipal authority over the siting of wireless infrastructure.

Background Facts

Site Selection.

62. Several years ago, Verizon identified a need for new infrastructure to improve coverage and relieve capacity demand in the Castle Point area of Wappinger (i.e. the southwest portion of Wappinger and the northwest portion of Fishkill, New York).

63. Specifically, based on network data, Verizon's RF engineers determined that the three cell towers that were serving the area around Castle Point required capacity relief due to the increase in consumer wireless usage. Verizon's RF engineers concluded that Verizon needed to add a facility to provide relief to those existing sites and provide adequate coverage for its customers within that area of Wappinger and portion of neighboring Fishkill.

64. Based on topography and RF propagation characteristics, Verizon's engineers

¹ See Proclamation No. 8460, 74 Fed. Reg. 234 (Dec. 8, 2009) (recognizing wireless infrastructure as "an essential element of a resilient and secure nation."); Executive Order 13616, Accelerating Broadband Infrastructure Deployment, 77 Fed. Reg. No. 199 (June 14, 2012) ("Broadband access is essential to the Nation's global competitiveness in the 21st century, driving job creation, promoting innovation and expanding markets...")

identified a search ring within which they determined a new facility would need to be sited to provide reliable service.

65. After determining there was no existing infrastructure within the search ring on which Verizon could collocate its equipment (e.g. existing towers, water tanks, tall buildings or other structures), Verizon requested that Tarpon identify and acquire a site for a new tower, obtain all necessary municipal permits and approvals for the facility, and then construct the facility for use by Verizon.

66. Tarpon, in coordination with its site acquisition agent and Verizon's RF engineers identified five parcels, and six locations (two on one parcel), as candidates for a new wireless facility.

67. Tarpon's siting agent contacted the owners of the five parcels regarding their interest in leasing space to Tarpon to construct a wireless facility. Based on these communications, in which several property owners expressed no interest in leasing space for a tower, an analysis of the zoning restrictions applicable to each property, and an analysis of the RF propagation that Verizon would achieve from the various sites, Tarpon selected a site at Hobbit Hills Farm (the "Property"), which was located near the center of the search ring and located in the Town's R-40 zoning district which permits the construction of wireless telecommunications facilities subject to site plan approval and special permit approval. In May 2019, Tarpon entered into an option agreement with the property owner with a 24-month term for a small portion of the nearly 48-acre horse farm, one of the largest properties in the Castle Point area.

68. Where a zoning code permits the construction of a wireless facility in a zoning district subject to a special permit—like the R-40 district where the Property is located here—there is a zoning presumption in New York State that sites within that district are suitable for wireless

facilities and applications involving such land uses should be approved.

Tarpon contacts the Town to initiate the municipal permitting process.

69. On July 19, 2019, attorneys for Tarpon contacted the Wappinger Town Attorney and Zoning Enforcement Officer via email introducing the project and requesting an informal pre-application meeting at which Tarpon and the Town could discuss the project, its viability and the scope the application process.

70. After follow up requests for the meeting from Tarpon, Tarpon representatives met with the Town Attorney and Zoning Enforcement Officer for a pre-application meeting on August 15, 2019.

71. At the pre-application meeting, Tarpon and the Town representatives discussed the project, the local permitting requirements and relevant zoning code provisions, and how to expeditiously move the application forward.

72. The Town advised that Tarpon would need to apply for a special permit, site plan approval from the Planning Board and a variance from a Town Code provision that no tower be located closer than 750 feet to an existing dwelling unit, an exclusionary zone with no specifically identified nexus to safety or other land use considerations.

73. Tarpon confirmed for the Town that under New York law, Plaintiffs' tower and network facilities are considered public utility facilities for zoning purposes because of the essential nature of wireless services and they are accordingly subject to a balancing test in applications for variances that is accommodating to the infrastructure needed to serve the public and less stringent in comparison to typical land uses.

74. The Town also advised Tarpon that, despite exemption and historical agricultural use and disturbance of wetlands in the area of the Facility, a local wetlands permit would be

required from the Planning Board for work in a “regulated area” as applied to the telecommunications use of the Property.

75. The Town representatives also advised Tarpon that the Planning Board was likely to act as the lead agency for purposes of applying SEQRA and procedurally requested that Tarpon first file its formal applications and then meet with the Planning Board to discuss a public balloon float and visual study required as part of the special permit process.

76. Specifically, the Town representatives advised that prior to performing the balloon float and visual study, Tarpon should provide the Planning Board with a map of proposed photo locations for the visual study so that the Planning Board could have input. The Town representatives also suggested some locations that Tarpon should take photos from as part of the visual study at the meeting.

Tarpon applies to construct a 150’ tall monopole on the 48-acre horse farm.

77. On October 9, 2019, Tarpon submitted a combined application to the Planning Board and ZBA for site plan, special permit, wetlands permit, and area variance approvals to install the Facility at the approximately 48-acre horse farm in the Castle Point area.

78. In its cover letter, Tarpon gave an overview of the Property, the proposed Facility, the relevant zoning requirements and considerations, and requested that it be placed on the agenda for the October 21, 2019 Planning Board meeting where it could receive further input from the Planning Board on proposed photograph locations for the visual study.

79. Tarpon’s submission included (a) a SEQRA full environmental assessment form and a SEQRA visual environmental assessment form addendum, (b) a plan map of potential locations for photographs for the visual study, (c) an RF report from Verizon, (d) a site selection analysis report, and (e) site plans.

80. The RF report explained that the Castle Point area is partially served from three sites in the surrounding region, which are all overloaded and require capacity relief. The report further explained that the terrain of the area and impact of foliage on RF propagation combined with capacity issues leads to significant gaps in customer access to Verizon's wireless network in the area.

81. The RF report included various coverage and propagation maps, charts and graphs of capacity utilization, and propagation maps showing the increased coverage and capacity relief that would be provided by the Facility.

82. The RF report included a narrative explaining the various maps and charts and describing how a new dominant transmitting server was technically required in the Castle Point area to offload capacity from the currently overloaded nearby sites.

83. The report explained how Verizon's engineers considered topography, user density, and Verizon's existing network infrastructure in identifying and defining the search ring it used in this case.

84. In the site selection analysis, prepared jointly by Verizon and Tarpon, the Plaintiffs explained that the topography in the Castle Point area made finding suitable sites for a tower particularly challenging.

85. Specifically, the site selection analysis explained that the undulating terrain posed significant challenges for siting a facility and how the Plaintiffs were required to find a location that would work with and around the Ver Planks ridge to the east and also avoid the dramatic drop in elevation as terrain moves towards the Hudson River.

86. The report explained that there were no collocation options available for Verizon in the area and that there were no options to site a tower on municipally owned property.

Accordingly, Plaintiffs were required to investigate privately-owned properties for a new tower in the area.

87. The report went on to describe the six locations that Plaintiffs considered and explained that they ultimately selected the Property because (a) its owner was amenable to leasing space for a tower, (b) it would provide the best RF propagation, (c) it came the closest to meeting the Town's sizeable dwelling setback requirements (i.e. while the site still required a variance, the Facility would be further from existing dwellings than at any other properties where more substantial variances would be required given the size of the Town's exclusion zone and this Property), and (d) the wooded buffers to adjacent properties on the approximately 48-acre Property offered significant natural screening limiting the tower's visibility from neighboring locations.

88. On October 31, 2019, the Town Planner and Town Engineer submitted comment letters responding to Tarpon's application. The Town Planner stated that once the Planning Board believes it has all necessary information to consider the merits of the applications and any environmental effects, it should circulate its intent to serve as lead SEQRA agency.

The Planning Board reviews Tarpon's application materials, discusses and approves the scope of Tarpon's balloon float and visual study.

89. On November 4, 2019, Tarpon appeared at a Planning Board meeting to present its project and discuss the scope of the balloon float and visual study.

90. Specifically, counsel for Tarpon advised the Planning Board that the main item Tarpon wanted to discuss at that meeting was the Board's approval of the timing, notice, and photo locations for the visual studies.

91. Counsel explained how Tarpon and the Town's professionals had identified relevant locations for the visual study and asked the Planning Board if there were any additional locations that, in the Board's opinion, should be included before finalizing the map of proposed

photo locations, submitted October 9, 2019.

92. The Planning Board reviewed the map and proposed locations. Neither the Planning Board nor any Town officials or professionals identified any additional locations from which they believed Tarpon should take photos.

93. The Planning Board agreed to set Saturday, December 7, 2019 as the date of the balloon float and approved the scope of the visual study.

94. Tarpon published notice of the balloon float in the Southern Dutchess News on November 20 and November 27 and mailed notice to all owners of property abutting the Property on November 27, 2019. Tarpon then conducted the balloon float on December 7, 2019.

95. On December 23, 2019, Tarpon made a supplemental submission to the Planning Board and ZBA, which included the results of the balloon float in a Visual Resource Evaluation (VRE).

96. The VRE, which was conducted during leaf-off conditions (i.e. worst-case visual conditions), included photos from 28 locations and included some photo simulations of what the Facility would look like from different vantage points in the community.

97. Tarpon's supplemental submission also included a wetlands permit application form and wetlands analysis reports associated with agricultural use of disturbed wetlands on the Property, a revised EAF based on comments from the Town Engineer, and revised site plans based on comments from the Town Planner and Engineer.

98. Tarpon advised that with this submission, its application was complete, which triggered the 150-day shot clock under federal law. The Planning Board and its professionals did not object or raise any concerns in response.

99. In December 2019, the Planning Board circulated a notice of its intent to serve as

lead SEQRA agency in a coordinated review of the “action” (i.e. project) in accordance with state law.

100. On or about January 7, 2020, the New York State Department of Environmental Conservation (NYSDEC) submitted a reply to the Planning Board’s notice of intent to serve as lead SEQRA agency.

101. The NYSDEC stated that (1) the project was not within a state protected wetland and (2) to avoid any potential effects on a bat species known to migrate in Dutchess County, the NYSDEC’s general tree removal policy that site clearing be conducted from October 1 to March 1 should be implemented.

The Planning Board reviews and accepts the VRE and the Town’s wireless consultant verifies the Facility is needed and is the best option to address coverage deficiencies.

102. At a Planning Board meeting on January 22, 2020, the Planning Board passed resolutions assuming status as the SEQRA lead agency and retaining a wireless consultant to review Verizon’s RF data and conclusions.

103. At the meeting, the Planning Board discussed different aesthetic options for the Facility. Tarpon provided supplemental materials, which included photo simulations of different design options for the Facility—blue monopole or monopine.

104. Tarpon also discussed comments from the Town’s Engineer and Planner, which Tarpon had received the previous day.

105. Neither the Planning Board nor any of the Town’s professionals raised any issue with the scope or completeness of the VRE, nor did they raise any issue regarding the need to supplement it with photos from other locations.

106. The Planning Board had all the information reasonably needed to make a SEQRA determination of significance at the time it was established as the lead agency, and it was legally

obligated to make such a determination under state law within twenty days, in February of 2020.

107. By March of 2020, the Planning Board had failed to take action and make a SEQRA determination of significance within the time allotted to it under state law.

108. On or about March 6, 2020, the Town's RF consultant submitted a report in which he concluded that the Verizon RF report "is thorough and technically proves RF need for the site..." The consultant's report went on to ask whether adequate service could still be provided from a lower tower height and stated he would like to see propagation maps for such heights.

109. On March 9, 2020, in response to the January comment memoranda of the Town Planner and Town Engineer, the Planning Board's comments at the January meeting, and the Town Fire Prevention Bureau's January memorandum, Tarpon made another supplemental submission to the Planning Board addressing the merits of its applications.

110. In that submission, Tarpon provided updated site plans, a noise analysis, stormwater calculations, and a responsive comment memorandum. Tarpon also included updates on its correspondence with the Army Corp of Engineers (ACOE) and the New York State Historical Preservation Office (NYSHPO).

111. On or about April 20, 2020, after receiving the supplemental information he requested from Verizon, the Town's RF consultant submitted a supplemental report in which he concluded: "Allowing the monopole to be constructed as proposed is really the best solution...[and] Reducing the height would not only decrease the efficacy of the site, but will also increase the likelihood of subsequently needing additional sites in the area" (i.e. a cumulative impact to the community from multiple tower locations).

112. The Town consultant's report went on to state that the application is "acceptable from an RF Engineering Standpoint."

Tarpon obtains approvals from various state and federal agencies and agrees to a first shot clock tolling extension with the Town

113. Unrelated to the Town applications and as part of the New York State historic review process, Tarpon was asked to provide additional photos from Stonykill Farm, a location identified as a historic resource by NYSHPO and within half a mile of the Property.

114. On April 23, 2020, Tarpon conducted a balloon float and took more photographs from Stony Kill Farms for NYSHPO. After reviewing the added photos, SHPO determined that the Facility posed no direct or visual effect on any historic properties including Stony Kill Farms.

115. During a separate discussion with the Planning Board about visibility, and notwithstanding the fact that two balloon floats had been completed and the Board had accepted the VRE five months earlier, Tarpon's attorney invited the Planning Board and Town Planner to let him know following the meeting if there were still any additional visual items the Town may want to assist it in rendering a SEQRA determination and voting on the applications.

116. Neither the Planning Board nor any Town officials or professionals identified any photo locations or views with which the Town wanted Tarpon to supplement its VRE.

117. At the May 4, 2020 Planning Board meeting, Tarpon agreed to toll the shot clock 45-days to July 5, 2020, and the Planning Board agreed to set May 18, 2020 for a public hearing.

118. On May 15, 2020, in response to prior Planning Board comments and comment memoranda it had received from the Town Engineer and Town Planner in April and May, Tarpon made another supplemental submission to the Planning Board, which included (a) a copy of the SHPO determination of no visual effect and the photos from the Stony Kill state agency balloon float that was conducted, (b) correspondence explaining that the ACOE was prepared to issue a wetlands permit for the minor work proposed in an already disturbed agricultural area, (c) the updated VRE, which included photo simulations of a monopole, monopine, and blue monopole

from certain views along with an explanation that the proposed monopole creates the least visual impact, and (d) a set of monopole fabrication drawings.

The Planning Board holds a public hearing and NIMBY opposition groups form.

119. On May 18, 2020, via Zoom, the Planning Board held a public hearing on Tarpon's application.

120. Several members of the public spoke in opposition to the application, citing general aesthetic concerns, health and safety concerns regarding RF emissions, concerns about property values, and concerns about the Facility catching on fire.

121. The Planning Board referred Tarpon to the ZBA to start the variance process there before coming back to the Planning Board on July 6, 2020—the date the Planning Board set for the continued public hearing—which was the day after the already extended shot clock would expire.

122. On May 29, 2020, Tarpon made submissions to both the ZBA, in which it requested placement on its June 23, 2020 agenda, and Planning Board, in which it responded to comments from the May 18 public hearing and provided, inter alia, studies showing a lack of diminution of property values following installation of wireless facilities. And since the Planning Board had scheduled Tarpon's continued public hearing for a date after expiration of the shot clock, Tarpon agreed to another 45-day shot clock extension to August 19, 2020.

123. Several residents opposed to installation of a wireless facility in the Castle Point area (the "Opposition") retained an attorney to represent them in opposition to the application at the second hearing.

124. On or about June 11, 2020, the Opposition's attorney submitted a legal memorandum in which he argued that Plaintiffs had not demonstrated a need for the Tower, that

the photographs in the VRE failed to depict important viewpoints, and that property values in the Town would plummet if the Facility was installed.

125. The Opposition's attorney also submitted form letters from real estate brokers asserting, without support, that real estate values would drop drastically if a tower was built at the Property, and refused to acknowledge the evidence of public need for the tower in the record from Verizon and the Town's on RF consultant.

The ZBA and Planning Board identify no issues with Tarpon's application and the Planning Board prepares to issue a SEQRA negative declaration.

126. On June 23, 2020, the ZBA opened a public hearing on Tarpon's application for a variance. The ZBA did not identify any issues with Tarpon's application or request any additional information noting the large size of the Property and the 750' exclusionary zone around residences practically precluded towers in most parts of the Town.

127. The ZBA stated that once the Planning Board concluded its review, the ZBA would continue the public hearing at its July 28, 2020 meeting.

128. The following day, the Town's RF consultant responded to the RF claims in the Opposition's attorney's memorandum. The Town's consultant explained that the data provided by Verizon was thorough and more valuable than any data the Opposition's attorney claimed was "missing."

129. The Town's RF consultant also explained that the Verizon website marketing maps that the Opposition's attorney cited are merely marketing tools and not probative of determining actual coverage and capacity issues in wireless networks and related to the need for new wireless infrastructure.

130. Also, on June 24, 2020, the New York Department of State provided Tarpon a concurrence of consistency with the New York Coastal Management Program related to its

proximity and any views from the Hudson River.

131. On June 26, 2020, the FAA provided Tarpon with a determination of no hazard to air navigation.

132. On July 3, 2020, Tarpon made another supplemental submission to the Planning Board, which, in response to comments from the Planning Board and its professionals and public comments, included (a) revised zoning drawings reflecting a revised stormwater design, (b) a stormwater report, (c) an offer to construct the tower to have a failure hinge point at the mid-point to address concerns about the tower's fall zone on the Property, and (d) information refuting assertions regarding an ice fall distance made by the Opposition's attorney.

133. The Planning Board held a third and continued public hearing on Tarpon's application on July 6, 2020.

134. Just as it had since receiving Plaintiffs' site selection analysis report in early October 2019, the Planning Board did not make any comment or suggestion at the hearing that Plaintiffs had not exercised adequate diligence in selecting the Property nor did it request a review of any other sites let alone suggest there were better alternative properties for a tower.

135. And just as it had since accepting the VRE in December 2019, the Planning Board did not take any issue with the adequacy or scope of the VRE at the July hearing.

136. Consistent with its satisfaction with the materials Tarpon had submitted, including the multiple supplemental submissions on the merits of the applications in which Tarpon addressed numerous comment memoranda from the Town's professionals, the Planning Board passed a unanimous resolution directing the Town Planner to draft a written SEQRA declaration of negative significance, which the Planning Board would review and confirm at the July 20, 2020 public hearing (albeit approximately five months after it was actually due under state law), which would

clear the way for approval of the project.

The Planning Board reverses its course, does not adopt a negative declaration and instead, for the first time, asserts that Tarpon's application materials are deficient.

137. Between the July 6, 2020 public hearing when the Planning Board resolved that the Town Planner draft a written SEQRA negative declaration and the July 20, 2020 continued hearing, Tarpon submitted a noise study confirming the Facility would emit very low levels of noise in compliance with noise codes and the Town Planner drafted and circulated the negative declaration.

138. At the July 20, 2020 public hearing, the Planning Board completely reversed its position.

139. The Planning Board did not take up discussion of the draft written negative declaration at all.

140. Instead, for the first time, the Planning Board asserted that the VRE was not complete and stated it would be requesting additional materials from Tarpon.

141. There is no public record of what occurred in that two-week period to cause the Planning Board members' U-turn in their review of the application which was on the path to approval over the summer.

142. On July 24, 2020, the Planning Board provided a comment letter in which it stated that it had determined that the VRE and supplement were "defective." The comment letter did not explain why the Planning Board was making this determination seven months after it had accepted the VRE based on a scope that it had reviewed and approved in advance.

143. In the comment letter, the Planning Board also requested additional information regarding property values. Specifically, it requested a report specific to the Castle Point neighborhood and monopole being proposed there.

144. The letter did not explain why the Planning Board had not requested this information before.

145. The Planning Board requested that Tarpon review two additional alternative sites for locating the tower as well as more information regarding one of the properties that Tarpon previously reviewed (Chelsea Farms) but did not select.

146. The letter offered no explanation why the Planning Board had not requested this information at any time in the almost ten months since it had received the site selection analysis.

147. None of the information requested by the Planning Board is required by the Town's Code.

148. Upon information and belief, the Planning Board's decision to not act on the SEQRA negative declaration and to assert that Tarpon's submissions were somehow defective was based solely on pressure and lobbying from the Opposition.

Tarpon agrees to an extension of the shot clock and substantively responds to every item raised in the Planning Board's July 24, 2020 letter.

149. Over the next several weeks, at significant cost and effort, Tarpon responded to the Planning Board's July 24, 2020 comment letter.

150. Tarpon engaged a MAI appraiser to conduct a site-specific market study.

151. Plaintiffs evaluated the two new properties that the Planning Board had requested they evaluate.

152. Plaintiffs also commissioned additional work to be included with the VRE already on file.

153. On August 18, 2020, Tarpon made its submission to the Planning Board in response to the July 24, 2020 comment letter.

154. Tarpon provided an amended VRE, which included photos from over fifty vantage

points and 360-degree drone fly footage.

155. Tarpon provided a site-specific market study as well as another appraisal report conducted in the nearby town of East Fishkill finding no meaningful effect on property values following the installation of a wireless tower facility.

156. Tarpon provided a site selection analysis for the two new properties identified by the Planning Board, which explained that they were not within the search ring and would not resolve Verizon's coverage and capacity issues in serving the Castle Point area such that they were neither feasible nor practical alternatives to the project as proposed.

157. Tarpon also provided more information regarding its review of the Chelsea Farms property, explaining that installing a tower there would require greater variances from the Town's Code as any tower there would be closer to dwellings and property boundaries, would require more development, more tree clearing, and more significant work in bringing utilities into the site (i.e. less compliant with Town Code and more environmentally impactful).

158. Tarpon subsequently agreed to extend the shot clock to August 31, and then September 21, 2020, for the Planning Board to make a final decision on its applications.

The Planning Board does not meaningfully consider the supplemental submission it requested Tarpon make and adopts a positive declaration.

159. At the September 9, 2020 meeting, the Planning Board directed the Town Planner to draft a SEQRA positive declaration, which would indefinitely delay any consideration of the application.

160. The Planning Board did not identify any change in circumstance or new information between July 6, 2020 when it unanimously directed that a negative declaration be drafted and September 9, 2020, when it reversed course.

161. In fact, the only substantive materials added to the administrative record in that time

period, save for the Planning Board's July 24 comment letter, were (1) a noise emissions study, (2) the draft negative declaration, and (3) Tarpon's August 24 submission—all of which were consistent with moving the project forward.

162. The Opposition did not submit any information to support a positive declaration. Rather it submitted a short letter, which merely regurgitated in summary form the arguments it had made in its June submission.

163. At its September 21, 2020 meeting, the Planning Board adopted a positive declaration under SEQRA.

164. Upon information and belief, the Planning Board is using SEQRA as a weapon in the hopes that the delay and added expense to this project will result in the Plaintiffs abandoning it altogether.

165. The Planning Board's positive declaration is a pretextual excuse to avoid acting on Tarpon's application.

166. The administrative record overwhelmingly supports approval, and various state and federal agencies have found that the project has no significant adverse environmental effects.

167. The Planning Board has no legitimate good faith basis for its SEQRA positive declaration, which compels a process including state scoping and environmental impact statements that are reserved for projects with the potential for adverse environmental effects and likely will result in close to another a year of delay.

168. The Town is aware that by invoking SEQRA, Plaintiffs will be delayed until at least October 2021 to begin site work because of a general limitation on the commercial cutting of trees in this region of Dutchess County.

169. The Town is aware that by invoking SEQRA to require an Environmental Impact

Statement, Tarpon's option/lease agreement with the Property's owner will likely expire prior to the SEQRA process being complete.

170. The Planning Board's actions and failure to act are arbitrary and capricious and unsupported by any substantial evidence.

171. Accordingly, Plaintiffs seek expedited treatment pursuant to 47 U.S.C. § 332(c)(7)(B)(v) and an order granting them all necessary Town authorizations and permissions to deploy their telecommunications facilities on the Property.

First Claim for Relief

(Violation of 47 U.S.C. 332(c)(7)(B)(ii) and the FCC Shot Clock)

172. Plaintiffs repeat and reallege all prior allegations as if set forth herein.

173. 47 U.S.C. § 332(c)(7)(B)(ii) provides that, “[a] State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.”

174. Pursuant to 47 C.F.R §1.6003(a), “a siting authority that fails to act on a siting application on or before the shot clock date for the application . . . is presumed not to have acted within a reasonable period of time.”

175. Pursuant to tolling agreements between Tarpon and the Town, Defendants were required to act on Tarpon's application by September 21, 2020.

176. Defendants have neither approved nor denied Tarpon's application.

177. Defendants' failure to act within the extended shot clock time frame constitutes a failure to act under Section 332(c)(7)(B)(v) entitling Plaintiffs to seek judicial relief.

178. Defendants have no reasonable excuse for their failure to act.

179. Upon information and belief, Defendants' invocation of SEQRA and failure to act are pretextual and not based on any justifiable grounds under federal, state, or local law.

180. Plaintiffs have suffered and will continue to suffer irreparable harm because of Defendants' failure to act on Tarpon's application.

Second Claim for Relief

(Violation of 47 U.S.C.(c)(7)(B)(i)(II) – Prohibition of Service)

181. Plaintiffs repeat and reallege all prior allegations as if set forth herein.

182. Section 332(c)(7) of the TCA provides that the “regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof...shall not prohibit or have the effect of prohibiting the provision of personal wireless services.”

183. Section 332(c)(7) further provides that “[n]o State or local government instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.”

184. Section 332(c)(7)(B)(v) requires that a court hear and decide an action brought by a party adversely affected by a final action or inaction by a municipality on an expedited basis.

185. By subjecting Tarpon to an unreasonably lengthy application process including information requests not required by local code made more than nine months after Tarpon submitted its application, and issuing a positive declaration under SEQRA on pretextual grounds, Defendants' actions, and inaction, have materially impacted the Plaintiffs and have the effect of prohibiting the provision of personal wireless services.

186. Upon information and belief, Defendants improperly considered generalized

opposition, which was driven by concerns regarding health effects from RF exposure, in issuing the positive declaration and failing to act on Tarpon's application.

187. Plaintiffs have suffered and will continue to suffer irreparable harm because of Defendants' failure to act and prohibition of personal wireless service.

WHEREFORE, Plaintiffs respectfully request expedited review and demand judgment as follows:

1. On all Claims for Relief, an order and judgment granting Tarpon's special permit, site plan, wetlands permit, and variance applications and mandating that the Defendants issue all necessary permits and authorizations for Tarpon to perform site work and construct the Facility.

2. On all Claims for Relief, damages, interests, and attorneys' fees to which Plaintiffs are lawfully entitled, together with such other and further relief as the Court deems just and proper.

Dated: White Plains, New York
October 15, 2020

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