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March 10, 2017

Tarrytown Office

Honorable Mayor Joseph A. Sack
and Members of the City Council
City of Rye
1051 Boston Post Road
Rye, New York 10580

RE: Proposed Amendments to Chapters 133, 167 and 196
of Rye City Code

Dear Honorable Mayor Sack
and Members of the City Council:

We are the attorneys for New York SMSA Limited Partnership d/b/a Verizon Wireless ("Verizon Wireless") in connection with the proposed amendments to the Rye City Code ("Code") regarding Chapters 133 entitled "Noise", 167, entitled "Placement of Permanent Facilities in the Rights of Way" and 196, entitled "Wireless Facilities Law" (hereinafter referred to as the "Wireless Law").¹

Verizon Wireless is licensed by the Federal Communications Commission ("FCC") to provide wireless communications to the City of Rye ("City") and surrounding areas. Accordingly, Verizon Wireless has a significant interest in the proposed amendments which impact the placement of wireless facilities in the City and the ability of Verizon Wireless to service its customers.

We respectfully submit that many provisions of the proposed Code amendments are contrary to both New York and federal law, including the Telecommunications Act of 1996, as amended 47 U.S.C. § 151 *et. seq.* ("Telecommunications Act"). In connection therewith, we have highlighted many

¹ These comments are based on "Revised Draft Local Laws as of March 1, 2017."

of the most egregious provisions but by no means, are the provisions below the only ones which are problematic and require revision.

DEFINITIONS

Section 196-3 contains the definition of “Base Station.” The second sentence of subsection (3) of said definition states:

“[f]or Supporting Structures that support equipment described in paragraphs (1)-(2), including but not limited to the sides of buildings, water Towers, or utility poles, the term includes **only that portion of a Supporting Structure specifically approved to support the wireless equipment** described in paragraphs (1)-(2), and only relates to activities necessary to permit the installation, maintenance, replacement or collocation of wireless equipment describe in the preceding paragraph.”
(Emphasis added).

With the words emphasized in the quote above, the definition of “Base Station” is inconsistent with the definition of “Base Station” set forth in 47 C.F.R. Section 1.40001(b)(1), which includes any “structure or equipment at a fixed location that enables Commission-licensed or authorized wireless communication between user equipment and a communications network.” 47 C.F.R. Section 1.40001(b) (1) (iii) (hereinafter sometimes referred to as the “FCC Order”) specifically provides that:

“[t]he term includes any structure other than a tower that, at the time the relevant application is filed with the State or local government under this section, supports or houses equipment in paragraphs (b) (1) (i) through (ii) of this section that has been reviewed and approved under the applicable zoning or siting process, or under another State or local regulatory review process, even if the structure was not built for the sole or primary purpose of providing such support.”

As shown above, federal regulation defines the term “Base Station” much broader and not limited to that “portion of a Supporting Structure specifically approved to support the wireless equipment.” Under the federal law, the entire Support Structure is the Base Station, eligible for collocation as provided in 47 C.F.R. Section 1.40001 and therefore the Wireless Law’s proposed definition of “Base Station” must be revised accordingly.

In addition, the definition of “Concealment Element” is inconsistent with federal law as it includes in its definition design features such as “proportions or physical dimensions” in an effort to limit future modifications and future collocators’ use of Base Stations or Towers as “Eligible Facilities Request”

(“Eligible Facilities Request”) in accordance with federal law.²

Furthermore, the definition of “Environmentally Sensitive Area” states that the City Council shall determine what areas qualify as an “ESA”. Environmental Sensitive Areas should not be something added to the Wireless Law to only apply to wireless facilities and if those areas are being added, they should be added to the zoning code in a proper fashion.

Moreover, the definition of “Tower” lacks clarity since it states “Any Supporting Structure” but the definition of “Supporting Structure” excludes Tower. Accordingly, the Wireless Law should be revised to include defined terms that are consistent with federal law.

MUNICIPAL PREFERENCES

Sections 196-5.C.6 and 196-5.E (2).c (which should be revised to 196-5F (2).c based on the current number of subsections) requires the placement of wireless facilities on “property owned or controlled by the City” or “[o]ther municipally-owned property”, respectively. Municipal siting preferences are illegal and will subject the City of Rye to litigation from both the wireless industry and local land owners whose properties are placed at a competitive disadvantage by the proposed unlawful preference. Potential impacts from wireless facilities are the same whether the property is owned by a municipality or a private landowner. Both federal and state courts have struck down municipal siting preferences. *See Sprint Spectrum L.P. v. Borough of Ringwood Zoning Bd. of Adj.*, 386 N.J. Super. E2, 898A.2d.1054 (NJ Supp. Ct. Law Div 2005); *Omnipoint Communications Inc. v. Common Council of City of Peekskill*, 202 F.Supp.2d 210 (S.D.N.Y. 2002); *Countryman v. Schmidt*, 673 N.Y.S.2d 521 (N.Y. Sup. Ct., Westchester Co., 2006) (which all invalidate local government efforts to require location on or granting special preference for wireless facilities located on municipal property).

Based on the foregoing settled body of case law, the municipal siting preference preference must be eliminated from the Wireless Law and the priority system should be revised accordingly.

SPECIAL USE PERMIT EXEMPTIONS

Section 196-5.C should be revised to expressly state that Wireless Facilities that do not require a special use permit shall be given a building permit from the Building Inspector upon submission of a building permit application. Furthermore, the language in Section 196-5.C stating that Wireless Facilities

² It is also unclear as to the meaning of the statement “The exemption of a Supporting Structure from review is not an approval.”

meeting certain criteria may not be exempt from special permit requirements if it “affects a historic property or environmentally sensitive area” is impermissibly vague. Moreover, the 1 cubic foot size of wireless facilities set forth in Section 196-5.C.2 is extremely limiting and effectively not feasible resulting in a prohibition, contrary to the Telecommunications Act. Section 196-5.C.4 has no reason to include carve outs (other than historical properties) since the Wireless Facility is “within” the existing Supporting Structure and not visible from outside said structure. Section 196-5.C.8 should simply state “routine maintenance or replacement of elements of a Wireless Facility” and not provide the qualifier “do not change the dimensions or visibility” since if the replacement is smaller in dimension, it should be readily approved by building permit.

CONDITIONAL SPECIAL PERMIT REQUIREMENTS

To avoid provisions contrary to federal law, the portion of Section 196-5.C.(2) that indicates that applications for conditional special permits contain “such information as the Building Inspector *may* require”, must be removed. Such provision is contrary to 47 C.F.R. Section 1.40001(c) (1) which provides that where the application is an Eligible Facilities Request, a “local government may require the applicant to provide documentation or information only to the extent reasonably related to determining whether the request meets the requirements of [an Eligible Facilities Request].” Additionally, requiring resubmission within 10 days of denial of an EFR violates federal law, which does not contain such a limit.

SPECIAL PERMIT APPLICATION REQUIREMENTS

Section 196-6.E requires a report to be signed by a licensed professional engineer registered in the state (“PE”) and the certification to be by an engineer acceptable to the City. There is no logical justification to require P.E. certification nor one acceptable to the City as much of the information required such as “frequency, modulation and class of service of radio or other transmitting equipment, radiated power of Antenna(s) and direction and maximum lobes and associated radiation of Antennas(s)” is more appropriate for a radio-frequency engineer and not a PE.

In addition, Section 196-6.R provides that where the applicant is proposing “a Tower or installation on an existing building/Supporting Structure, the applicant shall examine the feasibility of designing the installation to accommodate future demand for at least two additional commercial applications, e.g., future collocations.” This requirement is overly burdensome for the applicant, especially where the applicant is locating its Wireless Facility on an existing building/Supporting Structure. There is no way for the applicant to know what equipment future collocating carriers may be locating on the roof making it

impossible to determine with any certainty if said roof, can accommodate same. Due to the uncertainties and ambiguities noted above, that portion of Section 196-6(R) regarding the feasibility of an existing building/Supporting Structure “accommodate... at least two additional commercial application, e.g future collocators” should be removed.

HEIGHT and SETBACK REQUIREMENTS

With respect to height, Section 196-8.B indicates that a Wireless Facility “shall be no higher than the minimum height necessary” and that the “maximum height of facilities located outside the rights of way shall be 90 feet, based on three collocated Antenna arrays and ambient tree height of 70 feet.” The City’s existing Section 196-8.B provides for a maximum height of “100 feet with three collocated Antenna arrays and an ambient tree height of 70 feet.” Reducing the maximum height to 90 feet, as it appears in the proposed Wireless Law is antithetical to locating three collocated antenna arrays on a proposed Tower. With three Antenna Arrays, spaced approximately 10 feet apart, the lowest antenna array will be at and below 70 feet so that it will be unable to provide the necessary coverage due to foliage. Therefore, it is requested that the maximum height of the Tower remain at least at 100 feet, and that the definition of “Height, Tower” in Section 196-3 provide that such height restriction does not include a lightning rod, if any, to be attached to the top of the Tower.

With respect to setbacks, Section 196-12.A provides that all proposed Towers shall be “set back from abutting parcels, recorded rights-of-way and road street lines a distance sufficient to substantially contain on site all ice-fall or debris from a Tower or Tower failure and to preserve the privacy and sanctity of any adjoining properties.” The provisions of Section 196-12.A are arbitrary and capricious as: (i) there is not specific criteria for calculating the distance for ice fall; and (ii) “privacy” and “sanctity” are entirely subjective and void for vagueness. As the provisions of Section 196-12.A are arbitrary and capricious, it is requested that 196-12.A be removed from the proposed Wireless Law.

In addition, Section 196-12.C of the Code requires that any Wireless Facility located on an existing building or Supporting Structure must be set back the distance of the setback requirements of the underlying zoning district. It does not carve out an exemption for non-conforming existing buildings/Support Structures located within setbacks. This provision would require an applicant to obtain a variance to locate its antennas on an existing building parapet, for example, where that building is located within the setback requirement for the district in which it is located. This provision would likely hinder efforts to locate on existing buildings/Supporting Structures and potentially lead to more new Towers since there will be little incentive to use such existing building/Supporting Structures. Accordingly, we request that this provision be revised to provide that

any Wireless Facility located on an existing building/Supporting Structure not be considered an increase to an existing non-conforming setback and shall be permitted.

CONSULTANT REVIEW FEES

Verizon Wireless has no objection to the City retaining a *qualified* consultant and charging *reasonable* fees. The requirement for an effectively unlimited and uncontrolled escrow deposit for use by municipal consultants implicate the more general concern that municipal consultants may obstruct the development of robust wireless infrastructure in the municipality in order to generate fees. Although Section 196-13.B provides at least an initial limit of \$7,500, that illusory cap on potential consultants fees is immediately and somewhat contradictorily negated in Section 196-13.C, which provides that “the amount of the funds set forth in Subsection B of this section may vary” and “the initial amount of the escrow deposit shall be established at a pre-application meeting.” Any such escrow account should be based on:

- 1) A written scope of work;
- 2) A consultant qualification statement;
- 3) Reasonable hourly rates; and
- 4) Consultant oversight by a responsible municipal official.

The municipal official that is responsible for directing the consultant’s work must ensure the consultant does not exceed its written scope of work, and review the invoices to be charged against the applicant’s escrow deposit. Likewise, there must be a review and appeal process in the event an applicant challenges the fees charged by the municipal consultant. The Wireless Law appears to illegally delegate control and decision making authority to the consultant. Experience suggests that in such circumstances consultants will use this excessive authority to delay the processing of the application for the sole purpose of increasing consulting fees.

Under New York State law, fees to be charged by a municipality to an applicant must be “assessed or estimated on the basis of reliable factual studies or statistics.” *Metro PCS New York, LLC v. City of Mount Vernon*, 739 F. Supp. 2d 409 (2010); *Cimato Bros., Inc. v. Town of Pendleton*, 237 A.D.2d 883, 884, 654 N.Y.S.2d 888 (4th Dep’t 1997), quoting *Jewish Reconstructionist Synagogue of North Shore, Inc. v. Incorporated Vill. of Roslyn Harbor*, 40 N.Y.2d 158, 352 N.E.2d 115, 386 N.Y.S.2d 198 (1976). In evaluating the reasonableness of review fees, the Court in *Jewish Reconstructionist Synagogue* placed great emphasis on the “average costs” “grounded in data from similar cases.” Thus, *Jewish Reconstructionist Synagogue* teaches that a municipality may enact a local law requiring an escrow account to recoup review costs, but may only require fees “reasonably” necessary, distinct from those expenses related to its inherent

governmental responsibilities, and fees objectively reasonable, in comparison to other like applications or review services, are recoverable. Thus, the paramount guiding principle is that only “reasonable” review costs are eligible for recoupment via an escrow recovery scheme.

SHOT CLOCK

Section 196-16.A provides that the Council shall undertake a review of an application...in a timely manner”... and “shall act within a reasonable permits of time given the relative complexity of the application and the circumstances.” Please note that federal regulation requires that localities act on applications to site wireless facilities within 90 days from filing for collocations and within 150 days for all other applications. *In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify all Wireless Siting Proposals as Requiring a Variance, Declaratory Ruling, FCC 09-99, WT Docket No. 08-165 (rel. Nov. 18, 2009) (“FCC Shot-Clock Rule”)*. Therefore, it is requested that such time frames be added to the Code where applicable, including, but not limited to Section 196-16, so that the process set forth in the Code will be in compliance with the “Shot Clock” time frames established by the FCC.

Additionally, in connection with Eligible Facilities Requests, Section 6409 of the Federal Middle Class Tax Relief and Job Creation Act of 2012 (“TRA”), as implemented under Title 47 C.F.R Section 1.40001, provides that the scope of the municipal review is limited in scope and the facility must be approved within 60 days of the filing the application. It is therefore requested that such timeframe also be added to the Code.

UNREASONABLE AND DISCRIMINATORY CODE PROVISIONS

pThe following requirements are particularly egregious:
The following requirements are particularly egregious:

Excessive Notification Requirements:

Section 196-15.A requires that public notification be mailed to property owners within 750 feet of the proposed facility. The typical radius mailing is 100 feet. *There is no legal or practical basis for requiring a radius over 7 times greater than usual.*

Excessive Application Requirements:

In its entirety, the Wireless Law requires the submission of documentation that is burdensome, unjustified, excessive and illegal. For example, Section 196-6(E)(6),(7),(8) requires the submission of the location of pedestrian and non-motorized vehicle pathways and crosswalks, and the location in relation to driveways and residential structures on the same right of way and

within 750 feet”, “location of all residential structured within 750 feet”, and “location of all habitable structures within 750 feet”, respectively. This excessive size requirement serves no legitimate zoning function other than to unreasonably burden the applicant.

RECERTIFICATION REQUIREMENTS

Section 196-17.A of the Code provides the recertification requirements for a special permit. Subsections (7), (8) and (9) therein appear to be vague, unenforceable and in violation of vested rights. Therefore, such subsections should be removed to avoid confusion and impinging on vested rights.

NEW ARTICLE VI: FACILITIES IN THE RIGHT OF WAY

In addition to the foregoing objections to the proposed Wireless Law, we respectfully submit that the City’s proposed new Article VI, entitled Placement of Permanent Facilities in the Rights of Way, is contrary to applicable law and is more appropriately addressed in the Right of Way Use Agreement (“RUA”). For instance, Section 167.70(4) provides that “the person for on whose behalf equipment has been installed” acknowledges that “(iii)... shall have no rights or claims against the City of any sort... but shall be jointly and severally liable for any acts or omissions of the holder of the licensee or franchisee, or its own acts and omissions that result in any harms to the City or to the public.” Such section is overbroad and overly burdensome and an attempt to absolve the City from all liability even the City’s own gross negligence or willful misconduct. Moreover, Section 167.71(1) provides that a “person that has facilities in the rights of way” but does not hold a franchise must pay “5% of gross revenues derived from the operation of its facilities within the City.” This provision is double dipping since the City will be receiving revenue under the RUA from the franchisee for equipment in the right of way and whether it is the franchisee’s equipment or the provider’s equipment, the owner of the equipment is irrelevant, the fee is for the use, and in no event shall such fee exceed the City’s cost to maintain the right of way. *See TCG New York v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002), *See also* 47 U.S.C. §253(a),(c).

CONCLUSION

Broad discretion on the part of a municipality to grant or deny access necessary to the provision of telecommunications services “ha[s] the effect of prohibiting [a telecommunications provider] from providing telecommunications service.” *TCG New York v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002). The proposed Code amendments certainly impose permitting hurdles and design requirements that present barriers to wireless telecommunications, including voluminous submission requirements and open-ended discretion on the part of the decision maker, which is preempted by Telecommunications Act.

Based on the foregoing, Verizon Wireless respectfully requests that the

Based on the foregoing, Verizon Wireless respectfully requests that the proposed Code amendments not be adopted and that the City consider working with Verizon Wireless to enact regulation which is consistent with the Telecommunications Act and enables the carriers to provide vital wireless services to the area rather than imposing impediments to same. Please include a copy of this letter in the official administrative record.

Respectfully submitted,


Leslie J. Snyder, Esq.

LJS:ms

cc: Verizon Wireless

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