

Original

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MIDDLETON

February 9, 2018

VIA HAND DELIVERY

Patti Weathersby, Chair
Zoning Board of Adjustment
Town of Rye
10 Central Road
Rye, NH 03870

**Re: Application for Special Use Permit and Variance for a Wireless
Telecommunications Facility at 120 Brackett Road by Celco Partnership d/b/a
Verizon Wireless**

Dear Ms. Weathersby and Board Members:

The purpose of this correspondence is to submit the enclosed amended application and supporting materials on behalf of our client, Celco Partnership d/b/a Verizon Wireless ("Verizon"). This shall serve to amend and supplement the previous submissions on December 8, 2017 and January 12, 2018. The prior zoning drawings contemplated an 8' fence and a 40' front yard, with both requiring variances. The fence has been changed to a 6' fence and the front yard has been changed to meet the 50' requirement. Accordingly, Verizon is no longer seeking variances for those two items.

The application is to allow Verizon to install a wireless telecommunications facility in the form of a 125' monopine at 120 Brackett Road, (Map 022, Lot 95A), in the town of Rye, New Hampshire (the "Property"), owned by Dolores F. Lintz, and located in the Single Residence ("SR") district. The application seeks a use variance, as discussed further herein, to accommodate the installation. The proposal will enable Verizon to fill a significant coverage gap.

I. ENCLOSED MATERIALS

In support of the application, Verizon respectfully submits one (1) original and seven (7) copies of the following materials for your review and consideration. These are in addition to the prior submissions:

1. Revised Page 1 of Variance Application Form;

2. 11" x 17" copies of the zoning drawings prepared by Chappell Engineering Associates, LLC, last revised on February 8, 2018, and consisting of the following sheets:
 - T01 – Title Sheet;
 - C01 – Property Plan;
 - C02 – Site Plan;
 - C03 – Part Site Plan;
 - EC01- Erosion Control Plan Details and Notes;
 - A01 – Equipment Compound Plan and East Compound Elevation; and
 - A02 – Site Details.

II. PROJECT NARRATIVE

Verizon proposes to install a wireless telecommunications facility in the form of a 125' monopine at the Property located in the SR zoning district. The Facility shall be accessed by a gravel access road, leading to Verizon's proposed 30' x 40' lease area which shall be enclosed by an 8' tall wood stockade fence. Access to the enclosure shall be via a locked 12' wide double leaf gate to prevent unauthorized access. The facility shall consist of the 125' monopine itself and ground based equipment located on a 12' x 17' concrete pad as more fully detailed on the enclosed plans. Verizon's antenna array will consist of twelve (12) panel antennas, six (6) remote radio heads, and one (1) fiber junction box located at the top of the monopine at a centerline height of 125'. Additional ground-based equipment for Verizon's proposed facility shall consist of two (2) equipment cabinets, a 20 kW back-up propane generator, overhead metal deck rain canopy, a 500 gallon propane tank on a 5' x 12' reinforced concrete pad, along with utility runs to a utility pole located on Brackett Road, all as more fully detailed on the enclosed zoning drawings (collectively, the "Facility").

Because this is an unmanned facility, Verizon is able to provide improved service with no impact on utilities, schools, or traffic. Technicians will visit the Property 1-2 times a month for maintenance purposes. No water, sewer, or other municipal services are required. The equipment will comply with all applicable FCC standards and regulations.

III. COVERAGE OBJECTIVE

The need for this site was determined by Verizon Wireless radio frequency engineers given coverage is spotty or lacking altogether and not optimal or to standard as evidenced by customer complaints and testing. As described later in this letter, Verizon has been trying to find a site to serve northern Rye for more than a decade now. In the time since then, the smart phone was introduced (in 2007) and Verizon knows from customer complaints, its own internal monitoring and modeling, and periodic press coverage, that wireless service in northern Rye is poor to non-existent. The issue was spotlighted in the December 2017 edition of the Town of Rye Newsletter, as follows:

Town wide cell service continues to be an elusive goal. Coastal areas in general and the northern portion of Rye in particular have little to no cellular service. In the past ten to fifteen years, several searches for available property for cell tower installation have been undertaken to no avail. Although the old World War II observation tower at Pulpit Rock might have been ideal; opposition due to proximity to residences has eliminated it from further consideration.

Safety issues related to emergency calls for service or evacuation remain and Senator Innis was advised that there are areas of land in Rye which are owned by the State that might provide a solution to this problem. A private initiative by one of the cell phone companies may be needed to solve this public safety problem.

As detailed in the accompanying RF Report by C Squared Systems, LLC, “the proposed site will fill in coverage gaps and provide additional capacity to northern Rye in order to improve deficient service areas along Route 1A (Ocean Boulevard/Pioneer Road), Sagamore Road, Brackett Road, Rouge 1B (Wentworth Road), and the surrounding roads, neighborhoods, and business/retail/community areas in the proximity of the proposed site.”

IV. RESERVATION OF RIGHTS REGARDING VARIANCE APPLICATION

A. THE INSTALLATION OF A WIRELESS TELECOMMUNICATIONS FACILITY IS PERMITTED BY SPECIAL EXCEPTION PURSUANT TO SECTION 203.2 OF THE ZONING ORDINANCE

Article II, Section 203.2(E) of the Town of Rye Zoning Ordinance (the “Ordinance”) provides a list of uses that are permitted by special exception within the SR district. The list includes “public utility building *or use necessary for the public welfare.*” (Emphasis added). The services Verizon provides are “necessary for the public welfare”. Verizon respectfully reserves the right to proceed via a special exception application, rather than a variance.

The integration of wireless service is critical to connecting our homes, businesses, and communities. The demand for wireless service is growing at an astonishing rate. It is very much in the public interest to provide better wireless service as demand grows. The number of wireless only homes now exceeds 50% according to the Center for Disease Control and Prevention (“CDC”), and mobile data usage nationwide is projected to grow nearly seven-fold within the next two years. *See Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July-December 2016 (May 2017), available at <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201705.pdf>*. More importantly, 64% of all 911 calls are made from wireless devices, with half of those made indoors. *See EMS WORLD, April 24, 2014*. Reliable wireless service is indispensable to residents and visitors in the Town of Rye. Improved wireless service is undoubtedly “necessary for the public welfare.”

B. THE POWER TO GRANT A VARIANCE FOR WIRELESS TELECOMMUNICATIONS FACILITIES BELONGS TO THE PLANNING BOARD

Verizon acknowledges that the Property is located outside of the Wireless Telecommunications Facilities overlay district listed under Section 505.3 of the Ordinance. For that reason, Verizon seeks a use variance to locate the proposed installation in the SR District.

The planning board is named as the authority for permitting and reviewing all wireless telecommunications facilities under Section 505 of the Ordinance. The planning board shall examine whether a wireless telecommunications facility meets the requirements, conduct a site plan review, and require a special use permit even for those facilities proposed outside of the wireless overlay district. Furthermore, Section 505.11 provides an opportunity for wireless carriers to request waiver(s) from the wireless regulations. The waivers section is broad and far reaching. Approval for a waiver is only granted when various requirements, nearly identical to the variance criteria under state law, are met, creating an essentially duplicative process for waivers from the planning board versus variances by the zoning board for the same relief. Such criteria further lend support to the fact that the planning board has been designated the power under the Ordinance to hear and grant waivers with respect to wireless. Accordingly, Verizon reserves the right to maintain that no variance is required and that it should pursue a waiver from the planning board instead.

V. REQUEST FOR VARIANCE DUE TO PROPOSAL’S LOCATION OUTSIDE OF THE WIRELESS TELECOMMUNICATIONS FACILITIES OVERLAY DISTRICT

The Town of Rye has created a wireless telecommunications facilities overlay district (the “Overlay District”), which includes various maps and lots, primarily located in the southern portion of Rye. *See* Section 505.3, Town of Rye Zoning Ordinance and the enclosed zoning map depicting the locations of each permitted location. Verizon’s proposal is located in the SR District in northern Rye, outside of the Overlay District. Verizon respectfully requests a variance from the requirement that wireless facilities be limited to the Overlay District.

**A. FEDERAL PREEMPTION OF CERTAIN VARIANCE CRITERIA BY THE
TELECOMMUNICATIONS ACT OF 1996**

In an effort to promote the ability of wireless service carriers to provide better service to the American population, Congress passed the Telecommunications Act of 1996, codified as 47 U.S.C. sec. 332, et. seq. (the “TCA”). The purpose and legislative intent behind the TCA is “**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.**” (See TCA at 56).

To further that intent, the TCA specifically preempts and prohibits state and municipal governments from, among other things:

- regulating the environmental or health effect of telecommunications facilities operated by federally licensed carriers;
- Imposing any regulation that makes it impractical for a carrier to provide coverage in any area;
- prohibiting the location of telecommunications in specific zoning districts;
- requiring a carrier to conduct an exhaustive search of any area before permitting a proposed telecommunication facility.

(See *Omnipoint Holdings, Inc. v. City of Cranston, et. al.*, 586 F.3d 38 (1st Cir. 2009)).

B. AUTHORITY PRESERVED FOR MUNICIPAL BOARDS

While the TCA and subsequent case law have preempted municipal authority with respect to prohibiting where a telecommunications facility can be placed if a gap in substantial coverage exists, municipal boards retain the authority to evaluate whether a better alternative site exists that can address the identified gap in coverage exists.

Verizon performed an extensive analysis of other alternatives for viability prior to selecting the Property for its proposal. That analysis is discussed in greater detail below under the Site Selection heading.

C. SITE SELECTION

a. Gap in Substantial Coverage

Verizon continuously works to enhance and improve the coverage and performance of its network. The network requires multiple sites covering the nation in a honeycomb like structure to provide seamless voice and data coverage across the areas served. To this extent, substantial coverage is the ability of any given area of the network to handle and off load voice and data traffic to the other sites to which it is connected, and for those sites in turn to reciprocate with all of the sites to which they are connected, thus creating a network. When any given

area does not have a telecommunications facility that can handle and off load the market's voice and data traffic in the manner described above, that area has a gap in substantial coverage¹.

As shown on the coverage maps contained within the enclosed RF Report, dated December 4, 2017, a gap in substantial coverage exists in the areas comprised of the northern portion of Rye, including Sagamore Road, Route 1A, Odiorne Point State Park, and Wallis Sands State Beach.

b. The Proposed Facility is the Most Feasible Alternative

Verizon's network transmitting and receiving facilities require a clear path from the facility to the remote user. This dynamic requires antennas to be placed in a location where the radio frequency signal is not obstructed or degraded by buildings, dense vegetation, or topographical features.

Once Verizon's assigned radio frequency engineer identifies the gap in substantial coverage, a "search ring" is issued to real estate consultants who physically investigate the search ring to find viable sites." The consultants first look for existing telecommunications facilities on towers or other tall buildings, as these facilities are allowed by right in all of the United States under federal law.² If none are discovered in the search ring, the real estate consultant looks to existing structures that can be utilized to accommodate the requisite wireless telecommunications equipment, such as a chimney, smoke stack, rooftop, church steeple, water tower, etc..

With respect to the search ring at hand, Mr. Chip Fredette, the real estate consultant for this project, was unable to identify any existing structures within or near the search ring on which to collocate Verizon's antennas and equipment. Nor was he able to identify any existing structures close enough to the search ring to be considered viable.

Having found no other existing towers or buildings with significant height within the search ring, Mr. Fredette concluded that the only viable alternative is in fact to build the Facility. To that end, Mr. Fredette identified certain raw land candidate properties within the search ring.

¹ This is the reason that "bars" or coverage strength shown on any person's phone or device are not relevant indicators for determining a gap in substantial coverage.

² See Section 6409 of the *Middle Class Tax Relief and Job Creation Act* of 2012, Pub. L. No. 112-96, 126 Stat. 156 ("Act"), to be codified at 47 U.S.C. 1401 et. seq. We provide this reference for informational purposes as the Act has significant impact on a board's powers with respect to regulation of telecommunications facilities and was passed just recently in 2012.

The subject property was chosen due to its size, lack of existing development, and natural buffer of trees surrounding the proposed monopine. The Property is one of the larger parcels in or near the search ring, which is not critically impacted by wetlands. A heavily forested lot is helpful in screening the site from abutter view.

The other sites that were considered prior to the Property include: 1) Pulpit Rock Lookout Tower, 2) Rye Elementary School, 3) Odiorne Point State Park, and 4) two privately owned parcels that ultimately were not feasible due to legal access issues and willingness by the land owners.

In summary, Mr. Fredette logically concluded that the Property was the best viable location for a facility that would adequately address the established gap in substantial coverage because:

- No other existing tower or structure suitable for the Facility exists in the search ring;
- Compared to other viable raw land candidates within the search ring, the Property is heavily wooded and extends inland from the coast; and
- The owner of the Property was willing to lease a portion of the Property to Verizon for use as a telecommunications facility.

D. VARIANCE UNDER RSA 674:33, I(B)

Verizon seeks a variance from the requirements of Section 505.3 of the Zoning Ordinance. Verizon's application proposes to install a 125' monopine, to be located outside of the wireless telecommunications facilities overlay district and Section 505.6(A)(3) for relief from the 120% setback from Residential Building and Section 505.6(A)(4) for relief from the 100' setback from wetlands. In support, we list each of the five (5) variance criteria (in *italics*) below, and address each demonstrating that Verizon's proposal meets the conditions required for a variance.

1. Granting the variance must not be contrary to the public interest.

The Declaration of Purpose which accompanied passage by the state legislature of New Hampshire RSA 326:2 states, "It is in the best interests of the people of New Hampshire to encourage rapid deployment of the broadest range of quality telecommunications services to the public." Additionally, Verizon has selected the Property based on a variety of considerations, as previously discussed, relevant to the public interest, including existing coverage needs in the area, local geography, and topography of the land in the area where the Facility will be located.

Locating the facility on the Property will substantially improve wireless telecommunications capabilities in the area. As Verizon's enclosed RF coverage maps

demonstrate, there is currently a significant coverage gap in northern Rye. This is further demonstrated by the Town of Rye Newsletter, which stated “coastal areas in general and the northern portion of Rye in particular have little to no cellular service.” See TOWN OF RYE NEWSLETTER, Vol. 20. No. 4, p. 3 (December 2017) (a copy of which is enclosed herein). The proposed location allows the Facility to support both current customer requirements and future growth, resulting in immediate and long-term benefits to the public. The Facility will enhance emergency communications that are critical during times of crisis, such as severe wind, car accidents, and ice or snow storms that can cause community-wide power outages. In such circumstances, a robust wireless service infrastructure is invaluable. By improving the coverage in northern Rye, the proposed Facility will also improve public safety.

The Facility will not adversely impact the health and safety of the surrounding neighborhoods or alter the essential character of the locality. The Facility shall comply with all applicable state and federal regulations and the Zoning Ordinance. Once the Facility is completed, there will be no increase in traffic as a result of the Facility. The Facility is a passive use and will not cause any nuisance. The installation of the Facility will not be a threat to public health, safety and welfare.

Furthermore, the number of wireless only homes now exceeds 50% according to the Center for Disease Control and Prevention (“CDC”). See *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July-December 2016* (May 2017), available at <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201705.pdf>. The demand for wireless service is growing at an astonishing rate.

The proposal is not contrary to the public interest, it is the complete opposite. It is very much in the public interest to provide better wireless service to meet the growing demand and the necessity for such service in northern Rye.

2. *The proposed use is not contrary to the spirit of the ordinance.*

The spirit of the Zoning Ordinance is set forth in Article I, Section 102 and Article V, Section 505. The spirit of the Zoning Ordinance is to promote the health, safety, and general welfare of the community, without unduly impacting quality of life, congestion, visual impacts, overcrowding of land and buildings, and municipal resources. Furthermore, it seeks to ensure a proposed telecommunications facility’s compatibility with the visual and environmental features of the Town. The Facility promotes public safety by enhancing the sole means of communication used by residents outside of their homes and, for many, the only means of telephonic communication *inside* their homes. It has no impact on municipal resources, creates no congestion because it is unmanned, and reduces any perceived negative impacts due to its location setback from the coastline while simultaneously providing coverage to northern Rye and the coast. The Facility’s location outside of the wireless overlay district is necessary to maximize the effectiveness

of the antennas and fill the substantial coverage gap. The parcels located within the Section 505.3 wireless overlay district are all located within southern Rye. Such a location at the prescribed parcels would effectively prohibit Verizon from providing adequate coverage within the northern portion of Rye.

Verizon's proposal is modest in impact – a small parcel of leased land, and a structure not much taller than surrounding trees in the area, and disguised as a tree itself. It will not alter the essential character of the location or threaten public health, safety, or welfare. For the same reason that the proposal is not contrary to the public interest, it is not contrary to the spirit of the Ordinance.

3. *Granting the variance would do substantial justice.*

Substantial justice is measured as against the applicant and against the community at large. Granting the requested variance will provide a location for the most effective and efficient installation of equipment to improve and expand the quality of the wireless communications infrastructure in the Rye area. More importantly, the general public will benefit from the granting of the variance: the Facility will help eliminate the significant gap in the wireless communication network in northern Rye; the wireless service in Rye will improve; and the integrity of Rye's communications infrastructure will be improved for times of emergency and continued need. These benefits, however, can only be realized if Verizon is permitted to construct a tower at the Property. Accordingly, substantial justice will be done if the Board grants the requested variance.

4. *The proposed use would not diminish surrounding property values.*

Numerous appraisals and surveys prepared during the build out of wireless networks across the United States in the past two decades have shown consistently that facilities such as the one being considered by the Board have no measurable impact on the values of surrounding properties. In fact, such facilities can have a positive effect on local property values. They increase the local tax base without creating additional demand for local services. They also help attract businesses and jobs in sectors that increasingly rely on wireless capabilities. Furthermore, a recent survey found that cellular service is of major importance to homebuyers – more important to some than schools when looking for a home. *See Root Metrics & Money* (June 2, 2015). And among millennials, 83% said cell service was the most important fact in purchasing a home. *Id.*

To supplement the determination that the proposal will not diminish surrounding property values, please see the enclosed real estate valuation report conducted by Real Estate Consultants of New England, Inc.

5. *Denial of the variance would result in unnecessary hardship to the owner. Hardship, as the term applies to zoning, results if a restriction, when applied to a particular property, becomes arbitrary, confiscatory, or unduly oppressive because of conditions*

of the property that distinguish it from other properties under similar zoning restrictions. RSA 674:33(b)(5) provides criteria for establishing unnecessary hardship:

A. For purposes of this subparagraph, “unnecessary hardship” means that, owing to special conditions of the property that distinguish it from other properties in the area:

i. No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and

ii. The proposed use is a reasonable one.

The New Hampshire Supreme Court declared that on the determination of a property’s special conditions within the context of an application to construct a wireless telecommunications facility is different than in routine cases. *Daniels v. Town of Londonderry*, 157 N.H. 519, 527 (2008). The Court held that “[w]hen an application to build a wireless telecommunications tower is designated to fill a significant gap in coverage, the suitability of a specific parcel of land for that purpose should be considered for purposes of determining hardship.” *Id.* The Court went on to state that factors such as the placement of the parcel in relation to the gap, topography, or the location’s ability to eliminate the gap are all special conditions that may make a certain location unique. *Id.*

Verizon has selected this unique site based on a variety of considerations, including present coverage needs, local geography, the position and availability of existing towers and structures in the Rye area on which telecommunications antennas might be placed, and the refusal of other property owners to lease space. These factors indicate that, given the location of the significant gap in coverage in northern Rye, and the lack of available structures or permitted locations that might be used to fill such gap, a facility located at the Property is necessary in order for Verizon to meet wireless coverage needs in Rye. This distinguishes the Property from surrounding properties.

In light of the special conditions, the Property satisfies the two requirements for unnecessary hardship under RSA 674:33,I(b)(5)(A):

i. No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and

There is no fair and substantial relationship between the general public purpose of the Ordinance and the specific application to the Property. As Section 102 of the Ordinance lays out, its purpose, among other things, is to secure safety from fire, panic, and other danger, and promote the health and safety of the community. Strict enforcement of the location of proposed facilities within the wireless telecommunications facilities overlay district would run contrary to the spirit of the Ordinance. The enclosed map illustrates the locations of the various parcels included in the wireless overlay district. Limiting

facilities to these locations effectively prohibits wireless service from the entirety of northern Rye. Allowing the Facility on the uniquely situated Property would help to limit the risk of injury due to fires and other accidents by eliminating coverage gaps and improving emergency communication capabilities in the area. This would promote the public safety and general welfare of the residents of Rye by securing safety from fires, panic, and other damages in furtherance of the purposes of the Ordinance. Consequently, no fair and substantial relationship exists between the general public purposes of the Ordinance and the specific application of that provision to the Property.

The proposed use is also reasonable pursuant to the Telecommunications Act of 1996 (hereinafter the "TCA"). Pub. L. No. 104-104, 110 Stat. 56 (1996). One of the TCA's goals is to facilitate the rapid deployment of telecommunications infrastructure in the United States. In doing so, a state or local government may not prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. 47 U.S.C. § 253. Verizon identified the most feasible site within Verizon's search ring, and proposes to use the Property to provide telecommunications services.

ii. The proposed use is a reasonable one

The second factor is satisfied because granting the variance continues the reasonable development of Rye's wireless telecommunications infrastructure, which currently consists of only two facilities in the southern half of town. There are currently no existing structures or buildings that can be utilized to support a telecommunications facility in the northern portion of town. The development of the wireless infrastructure, and the expansion of wireless telecommunication services, has increased in importance to the point that over 50% of homes rely exclusively on wireless, and nearly all business rely on wireless networks. The Facility's proposed use is to provide improved support to those private and commercial users. This ubiquity of wireless communications in our society and culture demonstrates that the Facility's proposed use is a reasonable one and that the Board should approve the requested variance.

VI. CONCLUSION

In light of the foregoing and as supported by the accompanying material, Verizon respectfully requests the Zoning Board of Adjustment evaluate the attached application materials and add Verizon to the Board's March agenda as a joint meeting with the Planning Board. Verizon is appearing before the Conservation Commission on March 8, 2018 and requests that the joint meeting with the Zoning Board of Adjustment and Planning Board be set after March 8, 2018. Please do not hesitate to contact me with any questions.

Zoning Board of Adjustment, Town of Rye
February 9, 2018
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Thank you for your assistance and attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Victor Manougian', written in a cursive style.

Victor Manougian

Enclosures

cc: C. Fredette, VSS (w/o enc.)