

APPLICATION ADDENDUM
NEW YORK SMSA LIMITED PARTNERSHIP d/b/a VERIZON WIRELESS
T-MOBILE NORTHEAST LLC
NEW CINGULAR WIRELESS PCS, LLC

Union County College
1033 Springfield Avenue
Twp. of Cranford, Union County, New Jersey
Block 121, Lots 1, 2.01, 2.02, 3, 4 & 5
Block 122, Lot 25
E-1 Education Zone

Introduction

Union County College (the "College") recognized the need for improved communications service on its Cranford campus to augment its public safety response capabilities and to support the growing use and reliance on cell phones, tablets, laptops, computers and other wireless communications devices. In November 2017, it issued a request for proposal for solutions necessary to address this need. New York SMSA Limited Partnership, d/b/a Verizon Wireless ("Verizon Wireless") was awarded the contract because it proposed the most robust communications solution. The Verizon Wireless proposal included both an in-building small cell system and a macro site that would provide reliable signal throughout the entirety of the campus, covering all interior and exterior portions of the Cranford campus. The solution included a monopole upon which the other wireless communications providers, T-Mobile Northeast LLC ("T-Mobile") and New Cingular Wireless PCS, LLC ("AT&T") (collectively the "Applicants") will be mounting their own antennas so that the entire College community can have reliable communications no matter which carrier is the service provider for a particular student, visitor, or employee.

Each of the Applicants are licensed by the Federal Communications Commission ("FCC") to provide wireless communications services and each have significant gaps in their wireless communications networks in the Township of Cranford, on the Union County College Cranford Campus and in neighboring Westfield. The network deficiencies are addressed in this application (the "Application") with the construction of the facility to be used by each of the Applicants. The facility will require the construction of a new monopole upon which the Applicants will place their antennas, and an equipment compound located at the base of the tower. Electric and telephone service will be brought to the equipment compound from an existing utility pole located on the property. In recognition of the fact that the Cranford Campus is adjacent to residential homes on the north and south, with Nomahegan Park being across Springfield Avenue to the east and Fairview Cemetery to the west, the College selected an existing area on the western side of its campus near the cemetery for the proposed facility. It also determined that a faux tree would be the most aesthetically pleasing design and required the facility to be designed as a faux tree to reduce any visual impact on its neighbors.

The facility will be an unmanned facility which will be operated 24 hours per day, 7 days per week, and inspected by a technician approximately once every four to six weeks per carrier. The technicians generally utilize SUV type vehicles to make their site inspections. The facility will

be constructed in accordance with all construction codes and in compliance with all FCC requirements, including the radio frequency emissions standards.

Application & Variance Relief

The Applicants have submitted two alternative proposals to the Board for its consideration. The first proposal is for a facility consisting generally of an approximately 140-foot-tall monopole designed as a faux tree with branches extending to approximately 148 feet, located within a 48 foot by 48 foot fenced compound which will house the Applicants' radio and emergency power equipment. In this proposal, the Applicants shall each seek the following variances: use variance to permit the telecommunications use which is not permitted in the E-1 Zone (Cranford Code §255-37I(5) & (6)), height variance to permit the tower to have a height of approximately 140 feet to the top of the tower and 148 feet to the top of the proposed concealment branches, with the top of the Verizon Wireless antennas proposed at approximately 143 feet, the top of the AT&T antennas to be approximately 133 feet and the top of the T-Mobile antennas to be approximately 124 feet above grade where a height of 70 feet is permitted in Code §255-37I(10)(a); variance for the setback of the tower to the closest property line to permit a setback of approximately 112 feet 9 inches, rather than 185 feet permitted by Code §255-37I(10)(b)(1); variance for the separation from the nearest residential unit to permit a separation of approximately 229 feet seven inches to the dwelling on Block 119, Lot 17, rather than 444 feet required by Code §255-37I(10)(c); and if so required, variances to permit more than one principal use on a lot, for the continuation of an existing non-conforming lot area (Code §255-37G(1)(c)) and open space ratio (Code §255-37G(1)(e)).

The second, alternative proposal, is for a facility consisting generally of an approximately 135-foot-tall monopole designed as a faux tree with branches extending to approximately 143 feet, located within a 40 foot by 60 foot fenced compound which will house the Applicants' radio and emergency power equipment. In this proposal, the Applicants shall each seek the following variances: use variance to permit the telecommunications use which is not permitted in the E-1 Zone (Cranford Code §255-37I(5) & (6)), height variance to permit the tower to have a height of approximately 135 feet to the top of the tower and 143 feet to the top of the proposed concealment branches, with the top of the Verizon Wireless antennas proposed at approximately 138 feet, the top of the AT&T antennas to be approximately 128 feet and the top of the T-Mobile antennas to be approximately 119 feet above grade where a height of 70 feet is permitted in Code §255-37I(10)(a); variance for the setback of the tower to the closest property line to permit a setback of approximately 59 feet 3 inches, rather than 178 feet 9 inches required by Code §255-37I(10)(b)(1); variance for the separation from the nearest residential unit to permit a separation of approximately 362 feet 10 inches to the dwelling on Block 119, Lot 17, rather than 429 feet required by Code §255-37I(10)(c); and setback variances to the interior property line to permit the equipment compound to have a setback of 43 feet 6 inches, the AT&T generator to have a setback of 47 feet 8 inches, and the Verizon Wireless generator to have a setback of 48 feet 1 inch, where a setback of 50 feet is required by Code §255-37G(1)(b).

The second alternative proposal is also located on Block 121, Lot 2.01 with access thereto utilizing Campus Road which is on Block 121, Lot 3.

In either proposal, and if so required, variances to permit more than one principal use on

a lot, for the continuation of an existing non-conforming lot area (Code §255-37G(1)(c)) and open space ratio (Code §255-37G(1)(e)), and any additional variances, waivers or other relief required by the Board after its review of this application.

With respect to applications involving use variances, the courts have found that the "c" variances are subsumed within the grant of the use variance.

"Generally application for a "c" variance and a "d" variance cannot coexist. If the application is for a use not permitted in the zone, the bulk regulations designed for that zone cannot be applicable to the intended use. For example, an application for a gasoline service station in a residential zone should not be held to the bulk requirements of the residential zone. Lot area requirements and front and side yard setbacks for a residence were not contemplated to be made applicable to a service station. A Zoning Board, in considering a "use" variance, must then consider the overall site design. In essence, the "c" variances are subsumed in the "d" variance."

Puleio v. North Brunswick Tp. Bd. of Adjustment, 375 N.J. Super. 613, 621 (App. Div. 2005).

In Price v. Himejl, LLC 214 N.J. 263 (2013), the Supreme Court reviewed the analysis as follows:

"There is little doubt about the fact that a use variance, by its nature, carries with it the implication that the ordinary bulk and density requirements of the zone will not be applied. Indeed, we observed long ago that, in reviewing a use variance, "it is obvious that the height and front yard restrictions are intended to apply to single-family residences" which was the only permitted use in the zone, rather than to the proposed use. [citation omitted]. That does not mean that a zoning board can ignore the ordinarily applicable limits on height, for example, when evaluating an application for a use variance. It does mean that the board can, as part of granting a use variance, consider the other requested variances as ancillary to the principal relief being sought.

Indeed, this Board treated the application in just such a fashion. As part of the analysis of the use variance, the Board did not focus simply on the use, but on the overall project design, including its height and density. Although both were inconsistent with the ordinarily applicable limitations in the zone, the Board addressed each as part of deciding to grant the use variance. Nor did the Board simply authorize the height and density that Himeji requested. On the contrary, the Board required that the building be lowered in height and reduced in regard to the number of living units, thus limiting the extent to which the project varied from the zone and bringing it into conformity with nearby existing buildings to retain consistency with the overall zone plan.

Plaintiff would have us instead require that the Board demand that the applicant demonstrate separate special reasons for the proposed height and density as a prerequisite to being granted those additional variances. Our analysis of the meaning and intent of the MLUL is that no such particularized showing is required, especially in light of the record before this Court of the way in which the Board in fact addressed the implications of the additional variance requests. It would make little sense to expect that the Zoning Board, faced with a request for a use variance that would result in a high-rise

apartment building, would also demand that the applicant separately demonstrate that it should be higher than what is permitted in the zone for single-family dwellings. Rather, the role of a zoning board, as part of its evaluation of the application for the use variance, is to consider the height and density requested in that context.”

Id., 214 N.J. 263, 299-301. As a result of this direction provided by the Court, the applicants have provided an expansive notice to the public that sets forth all variations from the Cranford Zoning Code, but each of them would be subsumed within the request for “(d)(1)” use variance relief. Notwithstanding, the applicants will demonstrate through expert testimony and evidence that they are entitled to each of the enumerated variances.

The Board’s review of this Application implicates both New Jersey State law as well as federal law. The relevant State law is the Municipal Land Use Law, 40:55D-1, et seq. and the most significant federal laws are the Telecommunications Act of 1996, 47 U.S.C.A. §332(c), the Public Safety Act of 1999, 47 U.S.C. §615 and the Clery Act, 20 U.S.C. §1902.

To obtain a use variance under the Municipal Land Use Law, the Applicants must demonstrate that there are “special reasons” for the grant of the variance and that there will not be a substantial negative impact if the variance is granted. N.J.S.A. 40:55D-70d. The “special reasons” are often referred to as the positive criteria and can be demonstrated if the use is inherently beneficial, or the site is particularly well suited for the use. In Smart SMR v. Fairlawn Bd. of Adj., 152 N.J. 309 (1998), the court held that with telecommunications facilities, an FCC license generally establishes that the use promotes the general welfare. Id. at 336. For a new monopole, the court held that an applicant must demonstrate that the site is particularly suited for a telecommunications facility.

“To demonstrate that a site is particularly suited for a telecommunications facility, the applicant initially must show the need for the facility at that location.” New Brunswick Cellular Tel. Co. v. Borough of South Plainfield Zoning Bd. of Adjust., 160 N.J. 1, 14 (1999). Here, there is a significant and critical need for the proposed facility on the College’s Cranford Campus. The Clery Act mandates that the College enhance its communications capabilities so that it can “immediately notify the campus community upon the confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or staff occurring on the campus, . . .” 20 U.S.C. §1902(f)(1)(J). Union County College has determined that a necessary component of its ability to most effectively implement the requirements of the Clery Act is by improvements to the wireless networks as proposed in the Application so that all students, faculty, staff and administration personnel can receive immediate text messages of a threat to their health or safety. Currently, such text alerts are inadequate because the wireless communications services of all carriers are deficient on the campus. In light of the surge of horrific incidents targeting schools, the College determined that it was imperative that it seek ways to reduce the impacts of a tragic incident and be able to notify its constituents with immediacy and efficacy.

The United States Department of Education has described the requirements of the Clery Act as follows:

Under the Clery Act, every institution is required to immediately notify the

campus community upon confirmation of a significant emergency or dangerous situation occurring on the campus that involves an immediate threat to the health or safety of students or employees. An “immediate” threat as used here includes an imminent or impending threat, such as an approaching forest fire, or a fire currently raging in one of your buildings.

Some other examples of significant emergencies or dangerous situations are

- outbreak of meningitis, norovirus or other serious illness;
- approaching tornado, hurricane or other extreme weather conditions;
- earthquake;
- gas leak;
- terrorist incident;
- armed intruder;
- bomb threat;
- civil unrest or rioting;
- explosion; and
- nearby chemical or hazardous waste spill

U.S. Department of Education, Office of Postsecondary Education, *The Handbook for Campus Safety and Security Reporting*, Ch. 6, 2016 Edition, Washington, D.C., 2016.

In addition, AT&T operates the FirstNet network. The FirstNet service will establish, operate, and maintain an interoperable public safety broadband network in this area. Currently, most police, firefighters and emergency medical services personnel often lack the interoperable communications capabilities needed to coordinate and communicate across agencies and jurisdictions when disaster strikes. FirstNet is designed to correct this problem. FirstNet is a nationwide high-speed broadband wireless network providing a single interoperable platform dedicated to first responders. FirstNet was created by the federal Middle Class Tax Relief and Job Creation Act of 2012. In July 2017, the State of New Jersey opted in to accept the FirstNet plan for deploying the nationwide public-safety broadband network that is being built and managed by AT&T (the FirstNet nationwide contractor selected by the federal government). The FirstNet network will strengthen and modernize public safety's communications capabilities, enabling them to coordinate and respond more quickly and effectively during day-to-day operations, as well as man-made and natural disasters. The ability to share data, videos and photos - and to access apps - can provide life-saving insights even before emergency personnel arrive on the scene. Law enforcement, firefighters, paramedics and other public safety officials in every state, county, locality and tribal area will benefit from the FirstNet network

In addition, the Wireless Communications and Public Safety Act of 1999, was enacted “to encourage and facilitate the prompt deployment throughout the United States of a seamless, ubiquitous, and reliable end-to-end infrastructure for communications, including wireless communications, to meet the Nation’s public safety and other communications needs.” 47 U.S.C. §615. These specific public safety statutes and directives are in addition to the Telecommunications Act of 1996 which mandates that wireless carriers be allowed to construct

the facilities necessary for them to provide their services. As noted by the New Jersey Supreme Court in Smart, “[r]elevant to the determination of the suitability of a telecommunications site is the Telecommunications Act’s mandate 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.’” 152 N.J. 309 at 332 citing 47 U.S.C. §332(c)(7)(B)(i)(II).

Each of the Applicants have significant gaps in coverage in their networks in and around the Union County College Cranford Campus which are proposed to be rectified by the construction of the facilities proposed in this Application. The specific needs of each carrier are explained in the radio frequency report submitted with the Application which will be supplemented and explained by expert testimony during the public hearings.

It is respectfully submitted that the campus of Union County College is particularly well-suited for the proposed use. Important factors which support a grant of variance relief include the following: 1) The site is centrally located in the area of deficient coverage, permitting each of the Applicants to provide service where there is currently a deficiency in service; 2) the subject premises is a large, over 48 acre, non-residential property; 3) there is a specific need for improved service on the college campus to address public safety and security concerns, in addition to improvements in communications services generally; 4) the proposed location at the rear of the campus abuts a cemetery and is one of the most remote locations in the Township; 5) the proposed location takes advantage of natural buffers which helps to screen the facility from surrounding properties; 6) there is a lack of any tall structures to which the antennas could otherwise be attached; 7) there are a lack of alternative locations which are more suitable than what is proposed; and 8) there are a lack of alternative technologies which could effectively and reliably resolve the gaps in coverage.

In addition to proving the positive criteria, an applicant requesting a use variance must also demonstrate the negative criteria, i.e., that the variance can be granted without substantial detriment to the public good and that it will not substantially impair the intent and the purpose of the zone plan and zoning ordinance. N.J.S.A. 40:55D-70. As noted above, the proposed monopole will be located near the rear of the campus, adjacent to a cemetery, in a heavily wooded area that has substantial setbacks to residential structures, and which provides good natural cover for the proposed facility. In addition, the tower will be designed as a faux tree and the compound landscaped to further reduce any aesthetic impact. The facility will be constructed in accordance with all applicable codes, operated well within applicable emissions standards and will not produce any objectionable noise, fumes, glare, traffic or other adverse elements. As a result, the facility will not have a significant negative aesthetic impact on the surrounding community. The equipment compound required to house the radio equipment will be located at the base of the tower, within a fenced compound with enhanced landscaping to keep it out of public view.

As noted above, the variance related to the height of the tower would be subsumed within the grant of the (d)(1) use variance relief. Puleio v. North Brunswick Tp. Bd. of Adjustment, 375 N.J. Super. 613, 621 (App. Div. 2005); Price v. Himejl, LLC 214 N.J. 263 (2013). Note also

that the court in New Brunswick v. Old Bridge, 270 N.J.Super. 122, 130-134 (Law Div. 1993) found that although the telecommunications facility may be a principal use requiring a use variance, the 160-foot tall tower was an accessory structure that did not need to meet the heightened standards for a (d)(6) variance for a principal structure. See Grasso v. Bor. Of Spring Lake Heights, 375 N.J.Super. 41 (App. Div. 2004).

The courts have found that such monopole heights do not substantially impact the community. For instance, in Sprint Spectrum L.P. v. Upper Saddle River, 352 N.J. Super. 575 (App. Div. 2002), the applicants proposed a 155-foot-tall tower within 33.5 feet from the nearest private residence. Id. at 583. In NY SMSA v. Mendham, 366 N.J. 141 (App. Div.), a 148-foot tall tower was proposed on a residential property. Id. at 147. In Smart, a 90-foot monopole was replaced by a 140-foot monopole adjacent to a residential zone, which the Supreme Court referred to as “merely a 50-foot increase in height.” 152 N.J. at 333. In Kingwood Tp. Volunteer Fire Co. v. Board of Adjustment, 272 N.J. Super. 498, 509 (1993), the court held that the replacement of a 75-foot tower with a 197-foot tower would impose, at most, minimal intrusion on the surrounding community. Here, the carriers propose to install a faux tree monopole on the property. It will be demonstrated that the height of the tower is the minimum height necessary for the Applicants (operating at separate RAD centers) to be able to provide reliable service to the area, and that the setbacks, which are related to the tower’s height, although not meeting the zoning ordinance requirement, are substantial and combined with the existing treed buffer, would not result in a substantial negative impact to the community.

It is therefore clear that the proposed facility, if approved, would not have a negative impact on the public good, or the intent and purpose of the zone plan and zoning ordinance. Based on the lack of alternative locations, the Union County College campus is most appropriate location for the proposed use as it will allow the carriers to address the individual network deficiencies and meet their own individual service goals without causing a substantial negative impact on the community.

In addition to prohibiting the provision of wireless service, the TCA sought to correct the “impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers.” City of Rancho Palos Verdes, Cal. v. Abrams, 544 U.S. 113, 115 (2005). To reduce these impediments, Congress enacted Section 332(C)(7) of the TCA, striking a balance between federal and state power over wireless facility siting. This section imposes important limits on the authority of state and local governments over wireless facility siting. The Supreme Court has described the limitations on state and local authority as follows:

Under this provision, local governments may not . . . take actions that ‘prohibit or have the effect of prohibiting the provision of wireless services,’ § 332(c)(7)(B)(i)(II) They must act on requests for authorization to locate wireless facilities “within a reasonable period of time,” § 332(c)(7)(B)(ii), and each decision denying such a request must “be in writing and supported by substantial evidence contained in a written record,” § 332(c)(7)(B)(iii).

Id. at 116. The Federal Communications Commission (“FCC”) recently clarified that “that a state or local legal requirement constitutes an effective prohibition if it “materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.” Declaratory Ruling & Third Report & Order, FCC 18-133, ¶35 citing California Payphone, 12 FCC Rcd at 14206, para. 31. The FCC explained that “[t]his test is met not only when filling a coverage gap but also when densifying a wireless network, introducing new services or otherwise improving service capabilities.” Id. at ¶37 (internal citations omitted). The FCC expressly rejected “[d]ecisions that have applied solely a “coverage gap”- based approach under Section 332(c)(7)(B)(i)(II) reflect both an unduly narrow reading of the statute and an outdated view of the marketplace.” Id. at ¶40 (internal citations omitted). A land use board will effectively prohibit under this “materially inhibit” standard if the Applicants demonstrate that they have service goals that are not being met in the area and the proposed facility address the identified issues.

Notwithstanding the foregoing and without waiving any rights to advance the FCC’s “definitive interpretation of the effective prohibition standard,” the Applicants will also demonstrate that they meet the applicable showing under the more narrow significant gap test rejected by the FCC. Under that test a land use board will effectively prohibit the provision of wireless services where the carriers demonstrate that (1) its facility will fill a significant gap in service, and (2) the manner in which it proposes to fill the significant gap in service is the least intrusive method of doing so. APT Pittsburgh Ltd. v. Penn Twp. Butler Cnty. of Pennsylvania, 196 F.3d 469, 480 (3d Cir. 1999); see also, New York SMSA LTD v. Township of Mendham Zon. Bd. of Adjust., 366 N.J. Super. 141 (App. Div. 2004). As set forth in the expert radio frequency report submitted with the Application and which will be further supplemented and explained during the hearing, each of the carriers have a significant gap in the coverage of their respective networks in the area and that the proposed facility is the least intrusive method of addressing the gap and that no alternative technologies exist that could do so.

Unfortunately, even with passage of Section 332(c)(7), and implementing FCC regulations, wireless companies have continued to face long delays in deployment of wireless facilities because of systematic impediments to local zoning approval. See, e.g., City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1867 (2013) (noting that the FCC has found that “the record evidence demonstrates that unreasonable delays in the personal wireless service facility siting process have obstructed the provision of wireless services” and that such delays “impede the promotion of advanced services and competition that Congress deemed critical in the [TCA].” (quoting In re Petition for Declaratory Ruling, 24 FCC Rcd. 13994, 14001)). As a result, the FCC has determined that a presumptively reasonable period of time to review an application that involves the construction of a new tower is 150 days. As a result, there is a 120-day deadline for action by the Board under the New Jersey Municipal Land Use Law and a 150-day deadline for action under the TCA.

Conclusion.

The Applicants each have significant gaps and other deficiencies in their networks in the area that includes the Union County College Cranford Campus. It will be demonstrated that the proposed monopoly is the most effective means of addressing those gaps and deficiencies. The

proposed project is also the least intrusive method of providing the needed service. For these reasons and those to be adduced during the public hearing, the Applicants respectfully request that the Board act favorably upon this Application.

Waivers

The applicants request waivers from the following checklist items:

Check List #1

Item 3: Site Survey Scale

Due to the size of the subject parcel the applicant has supplied a site survey of the entire parcel at a scale of 1" = 100 feet and an enlarge site survey at a scale of 1"-40 feet of the immediate area of the proposed improvements.

Item 9: Approved Site Plan

A waiver from the submission of an approved site plan is requested because a current property survey has been supplied, the communications compound is relatively small and the location of the proposed communications facility is in a remote location on the college campus.

Check List #9

Item 5: Parking and circulation plan.

Due to the size of the subject parcel the applicant has supplied a site survey which includes the general layout of parking and circulation, but has not provided a detailed analysis of the same because there no change or impact is proposed to the same.

Item 8: Landscape Plan

The landscape plan was prepared by a licensed architect, rather than an engineer or certified landscape architect. Ord. #255-37(5). Given the fact that the purpose of the landscape plan is to add visual screening, a plan prepared by an engineer or certified landscape architect is not required.

Check List #10

Item 3: Stream Encroachment

The Applicants' environmental consultant has determined that a Stream Encroachment Permit is not required for this application because a stream is not proximate to the proposed development.

Item 4: Soil and Sediment Control Plan

The application requests a waiver for completeness only and as a condition of approval agrees to submit an application for a soil and sediment control permit or waiver.

Item 6: Profiles, Specifications, curbing and Driveway Aprons

The application does not propose any of these improvements

Item 7: Permits or Waiver from NJDOT

The application does not propose any new roads or curb cuts that would be regulated and/or

required to receive a permit or waiver from NJDOT

Item 8: Final Site Plan Compliance

If required, a waiver is requested for completeness only as the application is for both preliminary and final site plan approval.