

**MONTGOMERY TOWNSHIP ZONING BOARD**  
**MONTGOMERY TOWNSHIP, SOMERSET COUNTY, NEW JERSEY**  
**REGULAR MEETING**  
**JUNE 26, 2018**

**MINUTES**

Chairman DeRochi called the meeting to order at 7:34 p.m. and read the opening statement which affirmed that adequate notice of the meeting had been posted and sent to the officially designated newspapers.

**BOARD MEMBERS PRESENT:** Chairman DeRochi; Vice Chairman Smith; Mr. Fedun; Mr. Kabis; Mr. Lopez-Lopez, Alternate #1; Mr. Sudol, Alternate #2; Mr. Patel, Alternate #3; Mr. Quraishi, Alternate #4

**ALSO PRESENT:** Mark R. Peck, Esquire; Joseph Palmer, Zoning Officer

**I. SALUTE TO THE FLAG**

**II. APPLICATION DELIBERATION**

**Case BA-05-14**                      **Applicant: New York SMSA Limited Partnership d/b/a Verizon Wireless**

Block 8001 Lot 1 – 694 River Road  
Use Variance and Site Plan Application (On Remand from the Superior Court)

Richard Stanzione, Esquire represented the applicant. Notice was in order.

Mr. Peck read a statement into the record explaining the process so far as well as Judge Miller's decision. The application is before the Board on a remand from the Superior Court. Verizon had sought a 135 foot high telecommunication monopole contained within a stealth silo inside of a 50 by 50 fenced compound. The property is within the R-2 district. Verizon sought site plan, use variance, height variance and bulk variance approval. After nine public hearings which ran from May 24, 2016 through December 13, 2016 the application was denied by the Board. The resolution was adopted May 24, 2017 and Verizon filed suit. On May 3, 2018 Judge Miller ruled in favor of Verizon finding that the Board's decision was arbitrary, capricious and unreasonable. He found that the Board has misapplied the law and the particular analysis that was to be applied. The Judge also made specific findings of fact. Rather than just judicially granting Verizon's application, the Judge sent it back to the Board with strict limitations as to how the Board can proceed. Any Board member who was not present in 2016 had to certify that they either read the transcripts or listened to the recordings of the hearings. The Board is bound to accept Judge Miller's specific findings of fact and law and they are not subject to debate or change. There will be no new testimony that will be taken or exhibits introduced. The matter is to be decided strictly on the existing record. Judge Miller found that Verizon needs a use variance for their proposed facility, that a coverage gap exists in the area, that a facility in this proposed location would fill the coverage gap, that the facility signal strength would be sufficient to fill the gap, that there are no alternative sites that can fill the gap, that there are no alternative wireless technologies available to Verizon in lieu of constructing the proposed tower and that the proposed tower will not have a negative impact on property values. Judge Miller has ordered that the Board apply the test set forth in a case known as Smart SMR v Fair Lawn Board of Adjustment. That case says that in order to obtain a use variance an applicant must satisfy the positive criteria by showing that the application will promote the general welfare and that the proposed site is particularly suited for the proposed use. When considering particular suitability an applicant must first prove the existence of a service gap, then they have to prove that they will have the signal strength required to fill the gap, then they have to show that the proposed antenna placement will provide substantially better than average service and then the Board has to continue whether the same result can be achieved by placing antennas elsewhere. The applicant must also satisfy the negative criteria which asks will the grant of the variance cause a substantial detriment to the public good or the zoning plan. To that end a test must be applied that was elaborated in the Sica v Board of Adjustment of the Township of Wall. This is the test used for inherently beneficial uses. The Board must weigh the positive criteria and the negative criteria and determine whether the grant of the variance would cause substantial detriment to the public good. The first step is to identify the public interest at stake. The second step is to identify detrimental effects that would result from grant of the variance. The third step is to see if the imposition of reasonable conditions can mitigate against the detrimental effect. The fourth step is to balance the positive and negative and determine whether the variances can be granted without causing substantial detriments. Judge Miller found that the proposed facility will have an FCC license and that promotes the general welfare. Case law has determined that if a carrier possesses an FCC license that satisfies the whole promotion of the general welfare. The Judge also found that the site is particularly suitable for the use since there is a coverage gap, that the site is centrally located within and will serve the gap, that there is no alternative sites that can fill the coverage gap, that the signal strength would be appropriate and that there is not practical or feasible alternative technologies available. The Judge found that

the Board used an incorrect legal standard when undertaking its analysis of the first prong. The Board used an effective prohibition standard which requires Verizon to show that the proposed facility is the least intrusive. This is used for Federal cases brought under the Federal Telecommunications Act. Verizon came in under the State Municipal Land Use Law. Judge Miller also found that the Board ignored the weight of the evidence for site suitability and improperly considered negative impacts under this prong such as Verizon's failure to complete the SHPO process. That should have been considered under the negative criteria. The Board used it in the analysis of the first prong. The Court found that Verizon satisfied the first prong under both the Smart and Sica case. The Board has no discretion and has to accept there is a compelling public interest at stake. The Board cited two primary detriments in denying the application – aesthetics and impact on property values. The Court found the Board's finding regarding aesthetics were not substantiated. The Board improperly disregarded expert testimony regarding the aesthetic impact. He also found the Board relied on the incomplete SHPO process for its denial where SHPO had stated there are potential adverse impacts. SHPO will sign off on the project but will require Verizon to mitigate any detriments. Outside agency approval are not proper considerations to deny an application. The Judge did find that aesthetic are a proper consideration but found based on the testimony that there would be a lack of significant visual impact to historic districts. Judge Miller found no significant detriment to property values. He noted that the Board did not have its own expert regarding values and found that Verizon's expert did provide expert testimony. The applicant has to show there is no significant detriment to the zoning ordinance and master plan. The Board found this application was adverse to the zoning plan and Judge Miller disagreed. He found that Verizon proved that the subject site was the only available site and he reversed the Board's identification of detrimental effects. The Board did not consider any conditions because the Board couldn't mitigate against height, which the Judge found that put Verizon in a bad position and he is giving the Board a good faith opportunity to reconsider whether any reasonable conditions could be imposed.

Chairman DeRochi said the tower is going to be there and all the Board can do is try to mitigate the visual impact. He would like to hear if anyone has thoughts about what they would like the tower to be and opened the meeting to the public.

Candy Willis, 72 Knickerbocker Drive, asked why one judge can decide to destroy years of historic preservation effort and why the Township would just give up. Ms. Willis wanted to know when the case was going to be heard so that she could have attended the hearing. She took photos without the deciduous cover to the Judge to show that you can see everything. The real estate appraiser admitted that he had zero experience with historic properties. The Judge had pages of the real estate appraiser's opinion even though the Board had discounted it.

Mr. Peck stated that he argued that point in the trial brief. One of the basis for the Board disregarding Verizon's expert was because he had no experience with the historic districts and the impact of the telecommunication facility but the Judge wasn't persuaded.

Ms. Willis said the Judge did not address the idea of putting the tower 95 feet from a residence regardless of who owns it. The other thing that alarmed her was that there was very minimal talk of historic preservation. She did not think the Board fought hard enough. The historic preservation effort has been going on for decades. She suggested Verizon put it up the hill on the subject property where the T-Mobile resolution said it should be put.

Mr. Peck said the Board does not have the discretion to ask Verizon to move the tower. The Board's discretion is whether Verizon gets 135 foot stealth silo or are there some conditions that can be imposed to mitigate some of the aesthetic impacts; can it be lower, color, silo versus tree, etc.

Ms. Willis stated that it should be a monopole.

Robert Wilmot, 696 Millstone River Road, said he also read the Court's opinion. It mentions there is only one dwelling within 500 feet of the facility being the rental house on the Quick property, when his house is within 500 feet of the facility. The Township had a historical consultant come in to talk about the impact and he found there would be an impact. The Court decision makes a statement that you cannot see the tower from the historic district. His home is in the historic district. When the crane test was going on he walked around his property and he could easily see the top of the crane. The pictures that were taken were from a mile away and his house is right next door. Having read the decision he hopes the Board would impose a height condition since additional carriers can collocate and increase the height. With respect to ground level cover the trees to be installed should be larger to start off with. They should be hardwoods that have a good canopy or there should be a mix of hardwoods and conifers.

Mr. Peck recommended that if there is an interest in a height limitation the, the Board should account for a couple other carries which would circumvent the need for other towers.

Mr. Wilmot said he would prefer a few smaller towers rather than one larger tower. There was testimony during one of the hearings that if Verizon received approval other carriers could make the tower up to 15 feet taller with no additional permits. As part of the approval, the Board could set the height and have it as a condition that they would not be allowed to add height to the tower. It would be better to have two 90 foot towers versus one 120 foot tower to keep the sight line down to a reasonable level. There was testimony that there is ground cover and low brush that would act as a cover. Low brush does not hide a tower. He thinks a monopole at 90 feet would be better than a tree or silo.

Elizabeth Palius said she is terribly disappointed in Montgomery Township. This Board had everything in its favor to legally reject this application. The SHPO office told Montgomery Township in 2015, 2016 and 2017 that it had made a decision that installing this tower would have a major effect on the history. That information seems to have gotten lost. The Township has a cell tower ordinance which could have prevented the tower if used forcefully to move the tower someplace else. Montgomery sees itself as a first rate community but a first rate community does not allow a cell tower to go up in a historic district. The service the community has gotten from this Board was dismal. Ms. Savron was never called to testify and an expert was not called in to testify how a cell tower in a historic district would impact real estate prices. Ms. Palius hopes the Board will be a lot stronger and more forceful in the negotiation on mitigation.

Robert Russo, 530 River Road, said he moved in about 3 years ago and missed the beginning. He wanted to make sure the Board knew that they are a Federal Scenic Byway and wondered if that had any impact on the ability to install the tower.

Mr. Stanzione said it was discussed by the applicant's expert and the SHPO report. It is something that SHPO will take into account. The Section 106 is the Federal process that is assigned to SHPO.

Mr. Russo asked if it requires certain modifications under Scenic Byway designation. Mr. Peck said that would be something SHPO would take into consideration when giving its State permit. That is the Office that reconciles Federal Regulations with the State Regulations.

Barbara Ten Broeke represents the Millstone Valley Preservation Coalition and Millstone Valley National Scenic Byway. Many years have been spent developing the Byway. The cell tower is an intrusion and she is very disappointed on the decision reached. She urged the Board to consider two smaller towers. This development has undermined all the work that they have done.

Lois Pauley, Griggstown Road, asked if the tower is considered a commercial enterprise and as such why should it be in a residential district. Mr. Peck said that the Board can't reopen these questions. The Judge rendered his decision based on the record that was before the Judge and before the Board in 2016. Ms. Pauley disagreed that this is the best place for it. The other applications in the area were rejected. Mr. Peck said this one was rejected too but Verizon appealed the application. The other carriers did not appeal. Ms. Pauley said it should look like what it is.

Leonard Dunbar, 16 Staats Farm Road, said a single pole would be much better than multiple poles.

Ms. Palius asked if a Judge's decision could be appealed to a higher Court. Mr. Peck said the time for appeal has passed. Ms. Palius asked why Montgomery did not appeal. Mr. Peck said it was discussed in executive session and it was determined that an appeal would not be productive. Under the Open Public Meetings Act litigation is discussed in executive session.

Larry Koplik, Harlingen Road, is the Chair of the Shade Tree Committee. Mr. Koplik agreed this is inappropriate for the historic district. He is trying to figure out the best ways to mitigate it. The idea of two smaller towers would be better. He agreed with Ms. Pauley that it should look like what it is and should not be masked. The fake trees are not always maintained. In terms of mitigating with landscaping, shrubs around the base of it are not going to do any good. The two tallest native trees are Tulip Poplars and White Pines. The Tulip Poplar can grow to 100 feet and grows fast. Some disease resistant Elms would be appropriate as well. Planting bigger trees is not always the best thing. It may be better to plant a smaller sized tree that will catch up and overtake the bigger tree.

Kim Galatro, 455 Spring Hill Road, is the Interim President of Van Harlingen Historical Society. The picture that hangs behind the Board is of the historical Bridgepoint district. There will now be a cellular tower in the middle of the field depicted in the picture.

Chairman DeRochi stated that in defense of the Board, the advice they got about any kind of appeal in the face of the decision would be a waste of the Township's money. No one on the Board is happy with the decision. At this point they are at the juncture where the responsible thing is to try to live within the Judge's decision. The Judge has given the Board the chance to mitigate the impact of the tower and that is what the focus should be.

Mr. Stanzione noted that the suggested heights are not supported within the record by both Verizon and the Board expert. Mr. Stanzione referred to the transcript of August 23, 2016 pages 35-41 where there was lengthy discussion about the coverage at 120 foot centerline and 110 foot centerline. In imposing reasonable conditions the Board would have to determine whether leaving part of the gap would be a reasonable condition the Judge would accept. Verizon does not believe it is reasonable. If Verizon is building something the Township doesn't want they should at least build something that would cover the gap so a carrier would not have to come back for another pole. Other carriers are looking for something in this area. Colocation is encouraged by the FCC regulations. The trend is that the other carriers will pick less than the optimum coverage because it is easier. There is currently a merger between Sprint and T-Mobile that may be approved. Nextel has been acquired by Sprint so there are only three carriers; AT & T, T-Mobile and Verizon Wireless. Both experts concurred that three carriers could fit within a 120 foot pole without adding to the height. The other carriers could be accommodated at 110 feet and 100 feet. Verizon is not proposing shorter poles that don't serve the gap. Verizon will come back to the Board and present a site plan including landscaping and the type of tower. What was presented was a concealment silo with the equipment located inside. If the Board determines that a monopole is preferable the equipment would be located within a compound. Verizon can't plant 150 foot trees because it will block the line of sight signal that is needed. A landscape plan can be presented in conjunction with the Shade Tree Committee to see what is most appropriate for the site. Verizon will not accept a height of 100 feet. They do not consider that a reasonable condition based on the record that has been established. It doesn't meet the gap to the west.

Vice Chairman Smith asked if the pole height varies depending on the type of facility. Mr. Stanzione replied that the centerline of the antenna has to be at the 120 foot height but the type of facility will determine the overall height. A tree would require an additional 5 foot canopy. The monopole could be 117 feet or 123 feet as long as the centerline of the antenna is at 120 feet. The silo would be at 135 feet with the dome.

Chairman DeRochi asked what the diameter of a monopole is. Mr. Stanzione said it varies from 36 to 48 inches at the base and tapers up to 24 inches at the top which then has the offset for the antennas which goes out further.

Jessie Havens, Ludlow Avenue, asked if the Township is allowed to disagree with the points that the Judge has raised and was informed that they can't. Ms. Havens said a lot of this is based on a regulation that says that they must provide better than mediocre coverage. Mediocre does not mean universal. If other utilities such as public sewer or water are not available in the area you live then you don't get it. She wondered why cell towers as a public utility must provide to everyone. Ms. Havens asked if SHPO would also have to limit themselves to the record that has been set forth before the Board. Chairman DeRochi responded that they are a completely independent agency. Ms. Havens asked the Board to also condition the approval that when the tower is no longer needed (new technology) it has to be taken down. Mr. Peck said the condition would be when it is no longer in service it will be taken down. Ms. Havens noted that by the time the trees reach the desired height the technology will be obsolete.

Ms. Palius asked if the Judge's decision was that Verizon has a right to construct a cell tower in this location, does Verizon specifically have a right to build a tower at the height that was proposed or is that negotiable.

Mr. Peck said that the Board can impose reasonable conditions to mitigate against the height. The key word is "reasonable". The record shows that Verizon needs 120 feet in order to fill the gap. If a condition is imposed to have the height less than that Verizon would have the option to go back to the Judge and the Judge would be inclined to support Verizon.

Robert Russo asked if the facility has to be 120 feet and the trees can't block the signal what conditions can be placed that would mitigate. Mr. Peck noted that was the dilemma the Board had in 2016 when it was denied.

Ms. Willis stated that the FCC imposes only two conditions for a cell tower to be sited someplace. One is that the local governing body approves it and the other is that it passes the 106 review. If the Board says it isn't going to approve it and the Judge has ordered the Board to do it that is not really like the local government approved it in which case the FCC would look more kindly upon the 106 review. The Board's active approval of this site in the section of the historic area is going to open it up all over the country. Ms. Willis has not been able to find any other case where an obvious cell tower is sited in a historic area. If a local government has not

approved it and a Judge is ordering it how will the FCC view the facility? Mr. Peck said the Judge has ordered the Board. If anyone looks at the record it is clear that the facility was not welcomed into the Township.

Mr. Wilmot said he recalled testimony that the 90 to 100 foot height gave Verizon enough to get coverage when linked with other sites.

A motion to close the public hearing was made by Mr. Fedun and seconded by Vice Chairman Smith. The motion carried unanimously.

Vice Chairman Smith noted that this location is closer to River Road than the T-Mobile facility that was denied. He asked what the objection is to moving it further away from River Road. Mr. Peck said that they proposed a certain spot and the Judge agreed the spot is particularly well suited. Mr. Stanzione said the T-Mobile facility was on a different piece of property. During that denial, the Board said it would be better suited on this site. The only area it can be located on this site is within the exception area to the agricultural restriction. His interpretation of the Judge's decision is this location is particularly suited and is an appropriate location.

Mr. Sudol said the transcripts talked about another carrier coming in the future and having the ability to add 20 feet to the height of the tower. However, it was also discussed that Verizon would agree to a condition that would limit the height to 120 feet and Verizon would not permit an increase in height. Mr. Stanzione said there is a Federal Colocation Statute that allows a carrier to increase height. Verizon had indicated that they would design it for 120 feet which means it couldn't be redesigned without taking it down. Mr. Sudol felt this is an important condition.

Chairman DeRochi asked if the Board prefers a monopole. Mr. Fedun said it would be the shortest. Chairman DeRochi said the tree pole will never look like a real tree. The worst would be the silo.

Mr. Peck said all the engineering has been for a 135 foot silo. If it is going to be a monopole Verizon will have to redesign the engineering. Conditions pertaining to landscaping, etc. should be imposed when they come back for site plan. The resolution will note that there has to be landscaping and buffering to the satisfaction of the Board and Board Professionals. Items such as fencing, layout, emergency lighting and the form of the cabinet will be reserved for the site plan discussion.

Vice Chairman Smith asked if Verizon would consider going any lower than 120 feet to address the concerns of the public. Mr. Stanzione referenced Page 13 of the September 20<sup>th</sup> transcript where Mr. Villecco testifies approximately 600 homes (200 in Montgomery) would not get coverage if the antenna was reduced to 100 feet. When reduced from 120 feet to 110 feet they would lose 302 homes (93 in Montgomery). Mr. Stanzione said the loss is a big deal to their license. It is not only the homes that need service but it is also the people who drive through the area and the people who hike within the D&R Canal Park.

Mr. Peck listed the proposed conditions: 1) height limitation of 120 feet at centerline and that is what will be designed so that it cannot be extended 2) it will be a monopole or tree design 3) the facility gets removed once it is no longer in use 4) the site will be appropriately landscaped to the Board's satisfaction to be determined at site plan 5) the enclosure and cabinets and aesthetic details will be worked out at site plan.

Chairman DeRochi said he would like something a lot more substantial than a chain link fence.

Mr. Stanzione said there is one tree pole that the Board might want to visit. It is on Route 206 in Lawrence Township on the Peterson's Nursery site. That tree pole is anywhere from 125 to 135 feet tall. Route 206 is a National Historic Highway.

The design of the facility was left to the time of site plan to allow the Board time to look at the tree pole at Peterson's Nursery.

Mr. Peck said the motion before the Board is for a D6 height variance of 120 feet at the centerline (top of antenna will be 123 feet), the D1 use variance to permit the cell use in the residential zone and a C2 variance for the front yard setback of the existing shed on the property subject to the conditions discussed.

Vice Chairman Smith made a motion to approve the application which was seconded by Mr. Lopez-Lopez. The motion carried on the following roll call vote:

Ayes: DeRochi, Fedun, Kabis, Smith, Lopez-Lopez, Sudol and Patel

Nays: Nays

**III. MINUTES**

**June 19, 2018 – Regular Meeting**

A motion to approve the minutes was made by Mr. Fedun and seconded by Vice Chairman Smith. The motion carried on the following roll call vote:

Ayes: DeRochi, Smith, Fedun, Kabis, Sudol and Quraishi

Nays: None

There being no further business to come before the Board, the meeting was adjourned at 9:18 p.m.