

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
NEW YORK SMSA LIMITED PARTNERSHIP d/b/a/
VERIZON WIRELESS, and HOMELAND TOWERS, LLC,

Plaintiffs,

-against-

THE VILLAGE OF NELSONVILLE, THE VILLAGE OF
NELSONVILLE VILLAGE BOARD, THE VILLAGE OF
NELSONVILLE ZONING BOARD OF APPEALS, THE
VILLAGE OF NELSONVILLE PLANNING BOARD, MINDY
JESEK, FOIL OFFICER AND VILLAGE CLERK (in her
official capacity) and WILLIAM BUJARSKI, BUILDING
INSPECTOR (in his official capacity),

18-cv-5932

Defendants.

-----X
-----X
NEW CINGULAR WIRELESS PCS, LLC
d/b/a AT&T MOBILITY,

Plaintiff,

-against-

18-cv-5888

THE VILLAGE OF NELSONVILLE,

Defendant.

-----X
STIPULATION OF SETTLEMENT AND CONSENT ORDER

WHEREAS, the plaintiffs New York SMSA Limited Partnership d/b/a Verizon Wireless, Homeland Towers, LLC and New Cingular Wireless PCS, LLC d/b/a AT&T Mobility (collectively, “Plaintiffs”), commenced these actions on June 29, 2018, against defendants the Village of Nelsonville, the Village of Nelsonville Village Board, the Village of Nelsonville Zoning Board of Appeals, the Village of Nelsonville Planning Board, Mindy Jesek, Foil Officer and Village Clerk (in her official capacity) and William Bujarski, Building Inspector (in his official capacity) (collectively, “Village” or “Defendants”), seeking *inter alia* a Judgment and Order finding that Defendants’ denial of Plaintiffs’

request to install and maintain a telecommunications facility at 15 Rockledge Road, Nelsonville, New York (“Property”) violated Plaintiffs’ rights under the Telecommunications Act of 1996 (“TCA”), as codified at 47 U.S.C. § 332(c) and § 253(a) and directing Defendants to immediately issue any and all local approvals necessary for Plaintiffs to install and operate the facility that is the subject of this action;

WHEREAS, the Village denied Plaintiffs’ request to build a 120-foot-tall cellular communications facility because, among other reasons, the Village concluded that (i) the Plaintiffs failed to comply with the Village Zoning Code requiring that the proposed installation be minimized to a level of insignificance; (ii) the proposed installation would result in a negative aesthetic impact in an area of scenic and historical significance; (iii) the Plaintiffs failed to demonstrate a significant gap in cellular call coverage in the Village of Nelsonville; and (iv) the Plaintiffs failed to locate the proposed tower where the visual impact is least detrimental;

WHEREAS, the Village denies all of the allegations in the Complaints and First Amended Complaint, and denies that it has any liability relating to these allegations and Plaintiffs deny that the Village had a basis to deny the applications and that they have any liability to the Village;

WHEREAS, this Stipulation of Settlement and Consent Order (“Consent Order”) is not an admission by the Defendants or the Plaintiffs of any liability or wrongful conduct;

WHEREAS, to avoid the delay, expense, inconvenience, and uncertainty of protracted litigation, Plaintiffs and Defendants have agreed to settle this action, pursuant to the terms and conditions set forth herein; and

WHEREAS, Plaintiffs and Defendants, intending to be legally bound, have consulted with their counsel and the undersigned counsel herein have the requisite authority and approval to enter into this Consent Order.

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED BY PLAINTIFFS AND DEFENDANTS, AND ORDERED BY THE COURT THAT:

1. Within 60 days of the date the Court “So Orders” this Consent Order, Plaintiffs will submit a complete application for a building permit to install a 95-foot-tall monopine tower (plus branches) and telecommunications facility at the Property as described and shown on the drawings attached hereto as Exhibit A (the “Facility”).

2. Plaintiffs agree that: (i) the Facility will be surrounded by a 8-foot-height cedar privacy fence; (ii) the Facility’s security and other lighting systems will be designed, installed and maintained in such a manner (through motion detection, automatic shut-off, projecting downward, shielding, and minimum wattage) as to minimize or eliminate light pollution; (iii) the Facility will be designed, installed and maintained in such a manner as to minimize or eliminate noise pollution; (iv) the color of the monopine tower, the retaining wall design and appearance, the fencing about the retaining wall, the sizing for the level spreader and stone rip-rap at the pipe outlets, and the layout/geometry of the site access driveway will be subject to the reasonable approval of the Village at the building permit stage; (v) the monopine tower will simulate a pine tree to the greatest extent that is commercially reasonable, including high-density branches with needles from the top of the tower to approximately 40 feet above finished grade as measured from the top of the foundation and as shown on Exhibit A, with non-uniform branch lengths, and with the height of the branches being consistent with the drawings attached hereto as Exhibit A; (vi) the vegetative screening, netting and fencing used at the Facility will be camouflaged in color for woodland environments (*i.e.*, green, brown or black); (vii) Plaintiffs will maintain during the life of the Facility the cedar privacy fence, vegetative screening and all other elements of the Facility to function and appear in substantially the same manner as when the certificate of compliance is issued by the Village; (viii) in order to ensure that government and emergency service vehicles have access to the Facility, Plaintiffs will keep the access drive on the

Property in good order and repair, and free of impediments to access; (ix) no other towers or telecommunications facilities shall be permitted anywhere on the Property (however, subject to all necessary approvals, other telecommunications antennas and equipment shall be permitted to be collocated on the monopine and within the fenced compound associated with the Facility); (x) no other structures shall be permitted on the Property except for within the fenced compound or on the monopine tower; and (xi) the remainder of the Property shall be preserved from future development beyond the limits of the Facility compound and access drive. It is understood by the parties hereto that Homeland Towers holds an option to purchase the Property and intends to complete the purchase of the Property upon the full execution of this Consent Order. It is also understood that, if Homeland Towers does not become fee simple owner of the Property, the Village shall have no obligation to issue a building permit to construct the Facility. Within seven (7) days of the issuance of a building permit for the construction of the Facility, Homeland Towers shall record a restrictive covenant against the Property embodying the limitations set forth in paragraph 2(ix), (x) and (xi) in a form approved by the Village (“Restrictive Covenant”). Homeland Towers will provide the Village with proof of the filing of the Restrictive Covenant within 2 days of its recordation. In the event the Facility is not constructed on the Property or a court of competent jurisdiction prevents the construction of the Facility, including access and/or utilities thereto, or requires the removal of the Facility from the Property, the provisions of paragraph 2(x) and 2(xi) shall not be applicable and the Property may be developed for any lawful purpose, subject to all necessary approvals.

3. Defendants shall issue Plaintiffs a building permit for the Facility within 15 days of the receipt of a complete application. The Building Permit application shall consist of the drawings attached hereto as Exhibit A, the contractor’s insurance certificates, the customary Nelsonville Building Permit Application form and fee, under Village Zoning Code § 188-71(F), a \$25,000.00 bond in a form reasonably acceptable to the Village for decommission and removal of the Facility and a

\$50,000.00 bond in a form reasonably acceptable to the Village for repair and maintenance of Facility site improvements, a calculation of the Facility's worst-case Maximum Permissible Exposure ("MPE") levels for human radio frequency exposure, proof that Homeland is sole fee simple owner of the Property, and any other information requested by the Village in its reasonable discretion and customarily required for building permit applications.

4. Defendants shall issue a certificate of compliance within 15 days of Plaintiffs' complete request (including, third-party inspection reports, engineering reports evidencing compliance with the prescribed manner of construction, as-built drawings, proof of the filing of the Restrictive Covenant, elevation certificate showing compliance with height limitations and such other documents as may be reasonably requested by Defendants) for such issuance and upon proper and complete construction of the Facility. Upon issuance of the certificate of compliance, the Facility will be deemed a permitted use as if it had all necessary permits required by the Village including any necessary variance pursuant to New York State Village Law Section 7-736. However, nothing in this Consent Order shall be construed to mean that the Facility does not need to comply with all applicable existing laws. Plaintiffs shall comply Village Code §§ 188-70(A)(5), 188-70(A)(7), 188-70(B)(2)(b), 188-70(B)(3) (Decommission and removal shall be performed by the Plaintiffs, at their sole cost and expense, within 6 months of the cessation of operations of the tower for the transmission of wireless communications). In addition, if Plaintiffs add or make an application to add additional radio frequency carriers to the Facility, or make any other material change to the Facility, Plaintiffs agree to provide an updated calculation of the Facility's worst-case MPE levels for human radio frequency exposure.

5. Plaintiffs hereby forever waive and relinquish any rights they may have under any law whatsoever (*e.g.*, Section 6409 (codified as 47 U.S.C.S. 1455(a)) of the Middle Class Tax Relief and Job Creation Act of 2012, and its implementing regulation 47 C.F.R. §1.6100, Nelsonville Zoning Code

Art. VII, etc.) to raise (or apply to raise) the height of the Facility (except as set forth in paragraph 12 herein).

6. Although Exhibit A already includes proposed landscaping, Plaintiffs shall establish a \$30,000.00 fund, to be held by and distributed by the Village to property owners near the Facility for the installation of landscaping. Plaintiffs shall have no responsibility to maintain any such landscaping. Such property owners that request in writing such funds for the installation of landscaping will execute in advance of the distribution of such funds a release of liability and waiver of claims related to the funds and the Facility and access thereto in a form reasonably acceptable to the Plaintiffs. The funds shall be delivered to Bleakley Platt & Schmidt, LLP in the form of a bank check made payable to the Village within 30 days of the date the Village issues all necessary certificates of completion for the Facility. The funds must be used specifically for landscaping purposes and any unused funds that are not distributed by the later of: (1) 6 months of the submission of the funds to Bleakley Platt & Schmidt, LLP, or (2) 3 months from the Village's issuance of the certificate of compliance, shall be returned to Plaintiffs to be used, within 12 months of return, to enhance the visual mitigation of the Facility. The appropriate enhanced visual mitigation measures will be proposed by the Village and reasonably agreed to by Plaintiffs. None of the landscaping funds can be distributed to any property owner that has a pending lawsuit related to the Facility, Property or easements or rights-of-way to the Property in any way whatsoever.

7. This Consent Order shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Order. For the avoidance of doubt, the "property owners near the Facility" referenced in paragraph 6 are not third-party beneficiaries under this Consent Order and have no rights or causes of action created by this Consent Order.

8. By entering this Consent Order, the Village makes no representation whatsoever whether the ability or authority to construct or maintain the proposed improvements in Exhibit A are

within the rights Plaintiffs claim under the “Existing Rockledge Road Access Easement” (Liber 667, pg. 615) referenced therein.

9. Within 30 days of the date the Court “So Orders” this Consent Order, Plaintiffs will reimburse the Village for the expenses it incurred in reviewing Plaintiffs’ special use permit, variance and site plan approval applications in an amount of \$35,758.14. The reimbursement will be deemed full satisfaction of the expenses the Village incurred. The reimbursement shall be delivered to Bleakley Platt & Schmidt, LLP in the form of a bank check made payable to the Village and shall be in full satisfaction of any sums owed to the Defendants in connection with the underlying special use permit, variance and site plan applications submitted by Plaintiffs that were denied by the Village.

10. Plaintiffs and Defendants acknowledge that this Consent Order was the product of negotiation by all parties through their counsel, including negotiation as to the language set forth herein, and as such, to the extent there is any issue with respect to any alleged, perceived or actual ambiguity in this Consent Order, the ambiguity shall not be resolved based on who drafted the Consent Order. The obligations of this Consent Order apply to and are binding upon the parties, and any successors and assigns or other entities or persons otherwise bound by law.

11. Plaintiffs knowingly and voluntarily release and forever discharge Defendants of and from all actions, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims, and demands whatsoever, in law, admiralty or equity, which against the Defendants, the Plaintiffs ever had, now have or will ever have for, shall or may have for, upon, or by reason of this action, the Facility, the Property, and any matter related in anyway whatsoever to this action, from the beginning of time to the date the Court “So Orders” this Consent Order, including those claims that were asserted by Plaintiffs in this lawsuit.

12. Upon request of the Village, Plaintiff, Homeland Towers, shall make space available to the Village and local emergency service entities at no cost for the placement of three noncommercial emergency services antennas on the tower at a location, at the Village's option, either: (1) at, or below, 50 feet above ground level ("Bottom Mount"), (2) on the top of the tower provided no such emergency service antenna shall be any closer to the Verizon Wireless or AT&T Mobility antennas than twelve (12) feet (and with no unreasonably harmful interference to the signal transmission of other antennas on the tower) ("Top Mount"), or (3) at some combination of Bottom Mount and Top Mount; as well as related noncommercial equipment within a ten-foot by ten-foot space adjacent to the equipment compound. Homeland Towers shall not be responsible for the cost to purchase, install, or maintain any such antennas or equipment.

13. This Consent Order shall be deemed a Type II action under the New York State Environmental Quality Review Act, as it is the action of a court. 6 N.Y.C.R.R. § 617.5(c)(46).

14. Upon the execution of this Consent Order by or on behalf of all parties and the "so ordering" of this Consent Order by the Court, this action will be dismissed with prejudice, and without fees, costs, disbursements, damages, interest or attorneys' fees against any party, except as otherwise set forth herein. Any party may, upon notice, seek to enforce this Consent Order.

DEFENDANTS:

PLAINTIFFS VERIZON & HOMELAND:

Adam Rodriguez, Esq.
BLEAKLEY PLATT & SCHMIDT, LLP
Attorneys for Defendants
One No. Lexington Avenue
White Plains, NY 10601
T. (914) 287-6145

Robert D. Gaudio, Esq.
SNYDER & SNYDER, LLP
Attorneys for Plaintiffs Verizon & Homeland
94 White Plains Road
Tarrytown, NY 10591
T. (914) 333-0700

PLAINTIFF NEW CINGULAR:

Andrew B. Joseph, Esq.
DRINKER BIDDLE & REATH, LLP
Attorneys for New Cingular
1177 Avenue of the Americas
New York, NY, 10036-2714
T. 973-549-7264

Dated: _____, 2020

SO ORDERED:

The Honorable Vincent L. Briccetti
United States District Judge