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PROPOSAL

Applicant: New Cingular Wireless PCS, LLC (AT&T)
1 AT&T Way
Bedminster, NJ

Cingular Site No.: Site W-575

Property: Block 172; Lot 41
316 Tennent Road
Marlboro Township, New Jersey

The applicant, New Cingular Wireless PCS, LLC ("AT&T"), is a federally licensed communications carrier which intends to install telecommunications antennas at the top of a proposed 150 ft. faux-tree pole monopole with related equipment and a generator adjacent to the pole in a proposed fenced compound on the above referenced property. AT&T's antennas will have a centerline height of 142 ft. The property is located in the IOR Zoning District. This use is conditionally permitted in this zone, but the Project does not meet the minimum lot area condition (§220-102E(2)(a) of Marlboro's ordinance). Therefore, the applicant is seeking a conditional use variance (pursuant to NJSA 40:55D-70(d)(3)), an EIS Variance, tower setback, residential setback and landscaping variances (§220-102F(1)(a),(b)&(d)), and preliminary and final major site plan approval.

BACKGROUND

AT&T is in the process of building a nationwide network for wireless communication services ("WCS"). Presently, AT&T is in the process of building its network throughout New Jersey. AT&T has a federal license issued by the Federal Communications Commission ("FCC"). This license mandates that AT&T provide WCS coverage to its customers.

By way of background, WCS telephones, still commonly referred to as cell phones, operate by transmitting an extremely low power radio signal between the handheld unit and antennas operated by AT&T. In order to function, these antennas must be placed in strategic locations and at appropriate heights throughout the area. The antennas are connected to equipment shelters. To provide continuous service to its customers, there must be a continuous interconnected series of antenna sites, which create a grid pattern similar to a honeycomb. Each site must be placed within a limited area, which is not too close or too far from other sites.

In Marlboro Township there is insufficient WCS coverage and inadequate service in the area surrounding the proposed site. Therefore, anyone attempting to use AT&T's WCS service would not be able to do so. Without the proposed site, AT&T is unable to provide coverage in the area, which it is mandated to do pursuant to its FCC license.

LEGAL ANALYSIS

In order to promote competition in the wireless telecommunications industry, Congress enacted the Telecommunications Act of 1996. The Telecommunications Act of 1996 ("TCA") is the federal law which governs the regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government. Specifically, the TCA, 47 U.S.C. § 332(c)(7)(B) provides in part:

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof;

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) Any State or local government or instrumentality thereof shall act on any request for authorization to place, construct or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

The TCA further provides at § 253(a):

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

While there have been many cases relating to the TCA, the seminal case in New Jersey relating to the siting of telecommunications facilities pursuant to the TCA is Smart SMR of New York, Inc. d/b/a Nextel Communications v. Borough of Fair Lawn Board of Adjustment, 152 N.J. 309 (1998). As this Board is well aware, §70 of the New Jersey Municipal Land Use Law governs the granting of variances by land use boards in New Jersey. N.J.S.A. 40:55D-70, et seq. An applicant must satisfy the positive and negative criteria of the statute. To satisfy the positive criteria, an applicant must prove that the use promotes the general welfare because the proposed site is particularly suitable for the proposed use. See Medici v. BRP Co., 107 N.J. 1, 4 (1987). To satisfy the negative criteria, an applicant must demonstrate that the variance can be granted without substantial detriment to the public good and that the variance will not substantially impair the intent and purpose of the zone plan and zoning ordinance. Id. at 21-22.

In Smart, the New Jersey Supreme Court held that in the case of telecommunications facilities, an FCC license established that the use promotes the general welfare. Smart at 336. In order to satisfy the remainder of the positive criteria, an applicant holding an FCC license must demonstrate that the use is particularly suited for the proposed site. Id. at 332. To demonstrate that a site is particularly suited for a telecommunications facility, an applicant must show need for the facility at that location. See, New Brunswick Cellular Telephone Co. v. Borough of South Plainfield, 160 N.J. 1 (1999). Additionally, the New Jersey Supreme Court held that the applicant must demonstrate that the proposed site continues to be an appropriate location for the conditional use notwithstanding the deviations from the conditions imposed by the ordinance in order to establish positive criteria for conditional use variances requested under N.J.S.A. 40:55D-70(d)(3). Coventry Square v. Westwood Zoning Board of Adjustment, 138 N.J. 285, 298-299 (1994).

The Supreme Court in Smart then turned to the negative criteria. As stated, to satisfy the negative criteria, an applicant must demonstrate that the variance can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance. With telecommunications facilities, the Supreme Court held that it would weigh “the positive and negative criteria and determine whether, on balance, the granting of the variance would cause a substantial detriment to the public good”. Smart at 332. This balancing requires the use of the Sica four part balancing test. Sica v. Board of Adjustment, 127 N.J. 152, 165-166 (1992). The prongs of the balancing test are as follows:

1. The Board must identify the public interest at stake. Some uses are more compelling than others.
2. The Board must identify the detrimental effect that will ensue from the granting of the variance.

3. In some situations, the Board may reduce the detrimental effect by imposing reasonable conditions on the use. Mitigating conditions can be imposed, the weight accorded the adverse effect should be reduced by the anticipated effect of the conditions.

4. The Board should then weigh the positive criteria and negative criteria and determine, whether, on balance, the grant of the variance would cause a substantial detriment to the public good.

The beginning impetus for the drive to the next generation of wireless communications began with a Memorandum authored by President William Jefferson Clinton to the heads of all Federal executive departments and agencies which was released October 13, 2000. In his Memorandum, the President established a national priority for a modern wireless telecommunications network in the United States, stating:

[T]he value of wireless communications increased as the number of users and types of use increased. Today's second generation wireless technology increased services and information offered to users and increased competition among providers. Digital "personal communications services" (PCS) provided added messaging and data features, including such services as voice mail, call waiting, text messaging, and, increasingly, access to the World Wide Web. These first and second generation services increased productivity and reduced costs for thousands of businesses as well as Government agencies.

The next generation of wireless technology holds even greater promise. Neither the first nor the second generation of wireless technologies were designed for multi-media services, such as the Internet. Third generation wireless technologies [3G] will bring broadband to hand-held devices. Higher speeds and increased capability will lead to new audio, video and other applications, which may create what many are calling "mobile commerce" (m-commerce) that people will use in ways that are unimaginable today. Moreover, an international effort is underway to make it possible for the next generation of wireless phones to work anywhere in the world.

Memorandum of Advanced Mobile Communications/Third Generation Wireless Systems, 3 Pub. Papers 2171 (Oct. 13, 2000).

In his Memorandum, President Clinton ordered all Federal agencies and departments to take steps to facilitate the development and implementation of modern wireless communications. Id. In a corresponding Press Release, President Clinton declared as the public policy of the government to "allow consumers to enjoy a wide range of new wireless tools and technologies, such as hand-held devices that combine services like a phone, computer, a pager, a radio, a customized newspaper, a GPS locator, and a credit card." Statement on Action to Support the Third Generation of Wireless Technology, 3 Pub. Papers 2170, 2171 (Oct. 13, 2000). President

Clinton's prescient vision was that "time is of the essence. If the United States does not move quickly to allocate this spectrum, there is a danger that the U.S. could lose market share in the industries of the 21st century." Id.

President Clinton's initiative was expanded upon in 2009 when the Federal Government allocated billions of dollars for broadband services. President Barack Obama unveiled his Wireless Expansion Plan declaring that "we can't expect tomorrow's economy to take root using yesterday's infrastructure." President Obama stated in his State of the Union Address, in January 2010, that within the next five years carriers "will be able to deploy high-speed wireless to 98 percent of the population". He addressed the need for "a firefighter who can download the design of a burning building onto a handheld device; a student who can take classes with a digital textbook; or a patient who can have a face-to-face video chat with her doctor".

Further, the facility will provide FirstNet service, which 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 will be built and managed by AT&T. 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.

Finally, the Applicant respectfully submits that reliable wireless service, as well as the above-described FirstNet service, is especially critical for the public good during dangerous times like the current pandemic. When people are required to work remotely by the governor's mandate and/or when hospitals are inundated with COVID-19 cases, reliable telecommunications infrastructure and FirstNet are crucial to supporting the public's health, safety and welfare.

REASONS FOR RELIEF

In this case, AT&T has proposed to place its telecommunications antennas atop a proposed monopoly that is designed to look like a tree in the IOR Zone. As set forth in Smart, AT&T is a federally licensed carrier; therefore, the proposed site promotes the general welfare. However, to satisfy the remainder of the positive criteria, it must demonstrate the particular suitability of this site. This site is particularly suitable because its location will resolve a service deficiency and provide FirstNet service to the area. AT&T will provide radio frequency engineering testimony at the hearing before the Board, which will demonstrate that there is no coverage in the area surrounding the proposed site. Therefore, there is a significant gap in the area and a need for the

proposed site. (See, AT&T v. Borough of Ho-Ho-Kus, 197 F.3d 64, 70 (3rd Cir. 1999), holding that zoning decisions have the effect of prohibiting wireless services if they result in significant gaps in the availability of wireless services). AT&T clearly requires this site to provide coverage pursuant to its FCC license. The property is also appropriate for the use despite the lot size because it can accommodate the tower facility in addition to the existing use on the property and there is a significant vegetative buffer around the rear and sides property.

As for the negative criteria, the proposed site will not be a substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance. The visual impact of the proposed site is mitigated because the antennas will be concealed in a tree-type monopole structure and the equipment compound will be screened by the existing vegetation and building facility. The proposed site will not produce any noise, vibration, smoke, dust, odors, heat, or glare. It will not require any municipal services such as water, sewer, police or fire and will require only infrequent maintenance. The site will not have any adverse impacts on adjoining properties. In fact, the proposed site will provide improved wireless communications in the area. Wireless telephones enhance safety by allowing people to report accidents and crimes. They also provide an enhanced ability for people to communicate on both personal and business matters. On balance, as required by Sica, the public benefit far outweighs any potential detrimental effect of the site.

In summary, AT&T has met both the positive and negative criteria by showing that the proposed facility promotes the general welfare, is particularly suited to the site, and does not result in any impairment to the zoning ordinance and master plan. In light of the foregoing, AT&T respectfully requests that its application be granted.