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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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T-MOBILE NORTHEAST LLC,

Plaintiff,

v.

BOROUGH OF WANAQUE and BOROUGH OF WANAQUE PLANNING BOARD,

Defendants.

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Civil Action No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND EXPEDITED REVIEW PURSUANT TO 47 U.S.C. § 332(c)(7)(B)(v)

Plaintiff T-MOBILE NORTHEAST LLC, a wholly-owned subsidiary of T-Mobile USA, Inc. ("T-Mobile") by its attorneys Snyder & Snyder, LLP, as and for its Complaint against defendants Borough of Wanaque (the "Borough") and Borough of Wanaque Planning Board (the "Planning Board") (collectively, "Defendants"), respectfully alleges as follows:

Nature of the Action

1. The nation's wireless infrastructure is a critical communications pathway extensively employed and heavily relied on by the public—including residents and businesses, the traveling public, emergency service providers, hospitals and healthcare professionals, law enforcement personnel, government officials, and the 911 North American emergency system—and it is increasingly replacing traditional wireline phones altogether. Both Congress and the

Federal Communications Commission ("FCC") have emphasized the importance of a seamless nationwide wireless network and the need to allow wireless carriers to move quickly to construct needed facilities.

2. This action arises from the Defendants' unreasonable and unsupportable denial of T-Mobile's applications for preliminary and final site plan approval from the Planning Board (the ("Application") for the installation of T-Mobile's wireless telecommunications facility including an unmanned 120-foot monopole (130 feet to the top of a lightning rod) with a 25-foot by 30-foot fenced equipment compound (the "Facility"), to be located on the more than twenty-one acre property identified as Lakeland Regional High School, 205 Conklintown Road, Wanaque, New Jersey 07465, and shown on the Borough Tax Assessment Map as Block 210 Lot 1.01 (the "Property").

3. The Facility is a personal wireless services facility that will provide personal wireless services ("Personal Wireless Services") and telecommunication services ("Telecommunications Services"), as those terms are defined in 47 U.S.C. §§ 332(c)(7)(C) and 153(53), respectively.

4. The Facility is necessary to remedy a significant gap in reliable wireless service and to meet demand for Personal Wireless Services and Telecommunications Services.

5. The Facility is the least intrusive means to remedy the significant gap in service and to meet demand for Personal Wireless Services and Telecommunications Services.

6. The Defendants' denial of the Application materially inhibits the provision of Personal Wireless Services and Telecommunications Services.

7. Defendants have violated Section 704 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act") and codified at 47 U.S.C. §

332(c)(7)(B) and § 253(a). Specifically, Defendants have prohibited and effectively prohibited T-Mobile's Personal Wireless Services and Telecommunications Services, unreasonably denied the Application without substantial evidence contained in the administrative record, failed to support Defendants' denial of the Application with a written decision within a reasonable period of time, and illegally based their decisions upon the environmental effects of radio frequency emissions, all of which warrant injunctive relief mandating that Defendants issue all required approvals for the construction of the Facility pursuant to the Act.

8. T-Mobile respectfully requests that this Court enter a declaratory judgment that the Defendants' denial of the Application violates 47 U.S.C. § 332 and § 253(a), is preempted by the Act and by the regulations and orders of the FCC, and is unlawful under New Jersey State law. T-Mobile further requests that this Court issue permanent injunctive relief: (a) reversing the Defendants' denial of the Application and directing Defendants to grant site plan approval along with any other necessary approvals to construct and operate the Facility; and (b) prohibiting Defendants, and any officer, employee, or agent of Defendants, from taking any further action that would prohibit or have the effect of prohibiting T-Mobile from constructing and operating the Facility. T-Mobile also requests expedited review of the matters set forth in this Complaint in accordance with 47 U.S.C. § 332(c)(7)(B)(v).

9. This action is ripe for determination under the Act and was timely filed.

The Parties

10. Plaintiff T-Mobile Northeast LLC is a Delaware limited liability company and is a wholly-owned subsidiary of T-Mobile USA, Inc., a Delaware corporation which has its principal place of business in Bellevue, Washington. T-Mobile Northeast LLC and T-Mobile USA, Inc. are registered to do business in the State of New Jersey and maintain an office at 4 Sylvan Way,

Parsippany, New Jersey 07054. T-Mobile Northeast LLC is the operating entity for T-Mobile USA, Inc. in the Northeast region of the United States including the State of New Jersey. T-Mobile Northeast LLC owns and operates assets including personal wireless services facilities to provide Personal Wireless Services including Personal Communications Services (PCS) and Advanced Wireless Services (AWS), as defined by federal law. T-Mobile USA, Inc. and its related entities such as T-Mobile Northeast LLC have been issued licenses by the FCC to provide wireless telephone and telecommunications services throughout the Northeast and Mid-Atlantic states, including New Jersey and specifically the Borough, in order to provide Personal Wireless Services and Telecommunications Services to the public.

11. Defendant Borough is a municipal corporation of the State of New Jersey with an address at the Borough Municipal Building, 579 Ringwood Avenue, Wanaque, New Jersey 07465.

12. Defendant Planning Board is the duly constituted planning board of the Borough that has been delegated with the authority to, among other things, issue site plan approvals for all development within the Borough. The Planning Board has an address at the Borough Municipal Building, 579 Ringwood Avenue, Wanaque, New Jersey 07465.

Jurisdiction and Venue

13. This Court has subject matter jurisdiction over this action pursuant to: (i) 47 U.S.C. § 332(c)(7)(B)(v) of the Act, because T-Mobile has been adversely affected and aggrieved by the Defendants' actions in violation of 47 U.S.C. §§ 332(c)(7)(B) and 253(a); and (ii) 28 USC § 1331 because this is a civil action that presents federal questions arising under the Act.

14. This Court has supplemental jurisdiction over any and all New Jersey State law claims asserted herein pursuant to 28 U.S.C. §1367.

15. This Court has authority to issue declaratory and injunctive relief pursuant to 28

U.S.C. §§ 2201, 2202.

16. This Court has personal jurisdiction over Defendants because Defendants are domiciled within the State of New Jersey and because the claims stated herein arise out of the acts and/or omissions committed by Defendants in the State of New Jersey.

17. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because: (1) the property that is the subject of this action is located in the judicial district for the United States District Court, District of New Jersey (the "District"); (2) a substantial part of the events or omissions giving rise to this action occurred in the District; and (3) Defendants reside in the District.

BACKGROUND

The Important Federal Interests at Issue in This Case

18. Section 332 of the Act, 47 U.S.C. § 332(c)(7), governs federal, state, and local government regulation of the siting of personal wireless service facilities, such as the Facility.

19. The Act, while preserving state and local authority over the placement, construction or modification of wireless facilities, expressly preempts state or local governments from effectively prohibiting the provision of personal wireless services and from implementing decisions that are not supported by substantial evidence.

20. The Act further provides that any person adversely affected by a state or local government's act, or failure to act, that is inconsistent with Section 332(c)(7) of the Act may seek review in the federal courts and the court "shall hear and decide such action on an expedited basis." 47 U.S.C. § 332(c)(7)(B)(v).

The Wireless Service Sought to be Provided

21. T-Mobile provides commercial mobile services, personal and advanced wireless services, as well as other Telecommunications Services, as those terms are defined under federal law, to its customers in the Borough and throughout the State of New Jersey.

22. T-Mobile constructs telecommunications services and personal wireless service facilities, such as the Facility, that allow T-Mobile to create and maintain a network of "cell sites," or wireless facilities, each of which consists of antennas and related electronic communications equipment designed to send and receive radio signals.

23. T-Mobile strives to maintain a nationwide wireless network with the coverage and capacity to support reliable voice and data services, as well as evolving fifth-generation ("5G") mobile services and services facilitating Internet of Things ("IoT") technologies. T-Mobile's customers include local businesses and residents, as well as the general public.

24. A cell site or wireless facility normally consists of several antennas, which may be attached to a tower, monopole, or other existing structure in the public rights-of-way or in private utility easements, along with ancillary equipment necessary for the operation of that facility. T-Mobile uses its wireless facilities to transport communications via radiofrequencies to and from its customers and the public telephone network and the internet.

25. Each wireless facility services a specific geographic area, which varies depending in part upon the surrounding topography such as trees, buildings, and other obstructions that may affect the propagation of the radiofrequency signals used to transport wireless communications.

26. T-Mobile cannot provide reliable coverage and capacity without adequate wireless facilities. Too few cell sites and insufficient capacity in a geographic area creates gaps in service.

The Applicable Borough Zoning Regulations

27. On or about December 29, 2008, the Borough enacted comprehensive zoning regulations pertaining to wireless telecommunications facilities at Article XV, §114-94 to §114-106 of the Code of the Borough.

28. Pursuant to §114-98, the Facility, as a wireless telecommunications facility, is a permitted use on the Property.

29. This section provides in pertinent part that:

> wireless telecommunication antennas or towers located on property owned, leased or otherwise controlled by the Lakeland Regional High School, or Wanaque Borough Schools [are permitted uses], provided that a license authorizing such antenna or tower has been approved by the Borough of Wanaque.

Defendants' Prior Approval of T-Mobile's Telecommunications Tower Facility

30. On or about September 9, 2009, the Lakeland Regional High School (the "School") Board of Education (the "BOE"), pursuant to N.J.S.A. 18A:20-8.2, solicited sealed bids for lease rights to a portion of the Property for the installation and operation of a telecommunications tower facility.

31. On or about December 3, 2009, T-Mobile, as the successful bidder, and the BOE entered into a Land Lease and Monopole Agreement Lease Agreement (the "Lease"), approved by the New Jersey State Commissioner of Education, with a term of up to twenty-five (25) years, for the installation and operation of T-Mobile's telecommunications tower facility.

32. On or about September 16, 2010, the Planning Board issued site plan approval for the facility. Shortly thereafter, the Borough issued building permits for the facility.

33. However, the facility was not constructed at that time due to a variety of factors, including funding priorities and the BOE's request that the location of the facility be changed to allow for improvements to the school's athletic fields.

34. Despite this, T-Mobile has continued to fulfill its payment obligations under the Lease.

The Subject Application and Hearing Process

35. On March 30, 2023, T-Mobile filed the Application with the Planning Board seeking site plan approval to construct the Facility.

36. As part of its Application, T-Mobile submitted, *inter alia*, the following:

a. A check in the amount of $550.00, representing the application filing fee required by the Borough;

b. A check in the amount of $2,050.00, representing the initial escrow fee required by the Borough;

c. An Independent Radio Frequency Report Regarding the Proposed Facility, dated April 18, 2022 (the "RF Justification Report"), prepared by PierCon Solutions;

d. An Evaluation of the Radiofrequency Environment in the Vicinity of the Proposed Facility, dated August 16, 2022 (the "RF Emissions Compliance Report"), prepared by PierCon Solutions;

e. A Structural Verification Letter, dated March 10, 2023, from Tectonic Engineering Consultants Geologists & Land Surveyors DPC, Inc.;

f. A Visual Analysis and Photosimulations of the Facility; and

g. Site Plans for the Facility.

37. On or about May 8, 2023, the Borough Engineer, Michael Cristaldi, P.E., of Richard A. Alaimo Engineering Associates, issued a review report to the Planning Board.

38. Based upon his review of the Application, the Borough Engineer: (1) concluded that "[t]he [Facility] is a permitted use and the maximum permitted height is 130 feet where 130 feet is proposed as per the site plans" and that "[a]ll setbacks are satisfied[;]" and (2) recommended that the Application be considered by the Planning Board for completeness.

39. Pursuant to the Borough Engineer's recommendation, the Planning Board scheduled a public meeting on the Application for May 18, 2023.

40. On or about May 12, 2023, T-Mobile's counsel received a call from a financial

consultant for the Borough, Robert Beneche.

41. During the call, Mr. Beneche stated that the Borough had municipal sites that it wanted T-Mobile to consider for the Facility pursuant to the Zoning Code.

42. T-Mobile's counsel advised Mr. Beneche that such a municipal preference requirement is invalid under *Sprint Spectrum L.P. v. Borough of Ringwood Zoning Bd. of Adj.*, 386 N.J. Super. 62, 69 (Law Div. 2005) (holding a zoning ordinance provision requiring the consent of the municipality for a proposed telecommunications facility is invalid).

43. On May 18, 2023, T-Mobile and its witnesses appeared before the Planning Board; however, just prior to the start of the public meeting, the Planning Board Chair: (1) informed T-Mobile that the public meeting would not be held that night; and (2) handed to T-Mobile a May 8, 2023 Borough Council resolution requiring that T-Mobile appear before the Borough Mayor and Council to obtain their approval of the Lease prior to a hearing by the Planning Board.

44. T-Mobile's counsel stated on the record, *inter alia*, that:

a. It was ready to proceed with its witnesses;

b. The Council's resolution was not provided to T-Mobile at any time prior to the scheduled Planning Board meeting, despite the fact that the Council adopted same ten days prior;

c. The requirement that T-Mobile come before the Council to receive approval of the Lease, which had already been in effect for more than thirteen years, was based upon an impermissible preference in violation of the Act and New Jersey State law (*see Sprint Spectrum L.P. v Borough of Ringwood Zoning Bd. of Adj.*, 386 N.J. Super. 62, 69 (Law Div. 2005) (holding a zoning ordinance provision requiring the consent of the municipality for a proposed telecommunications

facility is invalid); and

d. T-Mobile had incurred significant costs, both monetarily and with respect to time, in preparation for the public hearing, which could have been avoided if the Borough had informed T-Mobile of its decision prior to that night.

45. On May 24, 2023, T-Mobile submitted a letter to Paul Carelli, the Borough Administrator, requesting a list of the municipal sites that the Council demanded that T-Mobile review.

46. On June 6, 2023, T-Mobile submitted a letter to Katherine J. Falone, the Borough Clerk, requesting that the matter of the Lease be placed on the Council's agenda.

47. On June 26, 2023, more than 31 days after T-Mobile requested a list of municipal sites, the Borough Attorney provided T-Mobile with a list of the following three (3) sites that the Council wanted T-Mobile to consider: Memorial Field, Addice Park, and Fox Den Road lot.

48. On August 1, 2023, T-Mobile submitted a response letter to the Borough Attorney, informing him that the municipal sites proposed by the Council were not suitable for several reasons.

49. Specifically, based upon a radio frequency coverage analysis performed on each of the sites:

a. none of the municipal properties would provide the extent of the needed coverage that would be provided from the Facility at the Property;

b. the Memorial Field property would provide the best alternative coverage; however, a facility at that property would leave a significant gap to the north and northeast;

c. the Fox Den Road property was too far outside of the service gap, and thus, was

not a feasible solution to the existing service deficiencies.

50. Furthermore, both the Memorial Field and Addice Park properties are encumbered with Green Acres restrictions that prohibit the use of such properties for commercial purposes.

51. Based upon the foregoing, T-Mobile requested that:

> the Borough immediately provide its consent to the use of the Lakeland Regional High School property so that this application is not further delayed. This is especially true given the fact that the preference for the use of municipal properties relied upon by the Borough is contrary to the Municipal Land Use Law, *Sprint v. Ringwood*, 386 N.J. Super. 62 (Law Div. 2005) and any further delay would materially inhibit T-Mobile's right to compete in a fair marketplace and result in an actionable prohibition of service contrary to Section 332(c)(7) of the Telecommunications Act. *Cellco Partnership v. White Deer Township Zoning Hearing Bd.*, No. 22-2392 (3rd Cir. July 14, 2023); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76-77 (2d Cir. 2002).

52. On October 2, 2023, at the request of the Council, T-Mobile submitted a formal written summary of findings and radio frequency plots, prepared by PierCon Solutions, which confirmed that the alternative municipal sites were not feasible alternatives to the Facility for the reasons that T-Mobile presented in its August 1, 2023 response letter to the Borough.

53. On October 6, 2023, the Council adopted a resolution consenting to the Lease.

54. On October 7, 2023, T-Mobile submitted a letter to the Planning Board informing it of the Council's resolution and requesting that the Application be scheduled for a public meeting.

55. On December 21, 2023, the Planning Board held a public meeting on the Application.

56. At the beginning of the public meeting, the Borough Mayor recused himself from serving as a member of the Planning Board because he owned a property within 200 feet of the Property.

57. During the public meeting, T-Mobile's radio frequency expert, Frances Boschulte

of PierCon Solutions, presented the RF Emissions Compliance Report and RF Justification Report and testified to confirm the findings of her analyses.

58. Specifically, her analyses found that the RF emissions from the Facility would not only comply with, but would be "at least 50.5 times below the applicable [FCC exposure] limit." RF Emissions Compliance Report, p. 9.

59. Further, based upon her "analysis of T-Mobile's existing network[,]" Ms. Boschulte concluded that "a significant gap in wireless service exists (due to a lack of coverage and poor signal strength) within the Borough[,]" that the "proposed [Facility] will provide reliable service . . to the residences and business[es] in Passaic County and to remedy the identified service gap[,]" and that "the [F]acility is essential to T-Mobile's network design for the Borough[.]" RF Justification Report, p. 6.

60. Despite such evidence and his earlier recusal, the Mayor recommended that prior to the Planning Board voting on the Application, that the School superintendent and/or BOE be required to, *inter alia*: (1) hold an open public meeting on the Lease to answer the concerns of all residents of the Borough and Ringwood regarding the cell tower, despite the fact that the Lease had been approved and entered into more than ten years ago; (2) provide at least ten days' notice of such meeting to the approximately one thousand students of the school; (3) provide at such public meeting proof regarding the health and safety impacts of the Facility, despite the fact that T-Mobile submitted such proof as part of the Application; (4) submit a resolution from such a public meeting stating that the BOE is in favor of the Facility and disclosing how each Board member voted; and (5) appear before the Planning Board to answer questions on the Application.

61. Based upon the Mayor's recommendations and the public's unfounded and preempted concerns regarding the health and safety of the Facility, the Planning Board voted to

close the public meeting without taking a vote on the Application and continued the public meeting to January 18, 2024.

62. On January 9, 2024, T-Mobile submitted a legal memorandum to the Planning Board explaining that the issue of health impacts from the Facility was preempted by both state and federal law.

63. On January 17, 2024, the School held a sparsely-attended and uneventful public information meeting regarding the Lease and the Facility.

64. On January 18, 2024, the Planning Board held the continued public meeting on the Application.

65. Towards the end of the public meeting, Robert Berg, an attorney representing a group of objectors to the Facility: (1) stated that he sent a 31-page letter to the Planning Board on or about January 2, 2024; and (2) requested the opportunity to call an expert to testify as to the impact on public safety.

66. T-Mobile objected on the grounds that: (1) the Planning Board is federally preempted from considering the health impacts of the Facility; (2) T-Mobile had not been provided a copy of Mr. Berg's letter until after he mentioned it during the public hearing; and (3) Mr. Berg had not submitted a letter of representation at the prior public meeting on the Application.

67. Mr. Berg assured the Planning Board that he wanted to call an expert to discuss alternative technologies and that he would not call an expert on health impacts.

68. Given such assurances, T-Mobile consented to the carrying of the public meeting to February 15, 2024.

69. However, following the public meeting, T-Mobile learned that Mr. Berg's proposed witness, Kent Chamberlin, is a professor who has recently published articles about the health

impacts of RF emissions.

70. As a result, on February 12, 2024, T-Mobile submitted a supplemental legal memorandum advising the Planning Board that: (1) based upon "Mr. Chamberlin's curriculum vitae, it appears that the objectors may have been somewhat disingenuous and may attempt to introduce health concerns despite their statements to the contrary[;]" and (2) "the . . . Act . . . has preempted local consideration of EMF radiation emissions" and as such "the Board is preempted from further consideration of this issue and should not permit Mr. Chamberlin to testify on same."

71. T-Mobile further advised the Planning Board that:

> objectors' plan to discuss alternative technologies . . . is irrelevant to the matter before the Board. Here, [T-Mobile is] proposing a permitted use. While the issue of alternative technology is relevant in a use variance case, it is simply irrelevant where, as here, the use is permitted. Moreover, even in a use variance case, an alternative such as a network of small wireless facilities, is not a less intrusive alternative to the type of facility proposed by [T-Mobile] as each such antenna facility would require its own use variance because they are not listed as permitted uses in the Wanaque Code. *See Sprint Spectrum, L.P. v. Zoning Bd. of Adjustment of Paramus N.J.*, 606 Fed. Appx. 669 (3rd Cir. 2015) (ZBA's denial of use variance application to build a wireless monopole tower, based on the possibility of implementing a distributed antenna system (DAS) instead, was not supported by substantial evidence, as the DAS was not a feasible alternative to the monopole; therefore, the district court correctly found that the ZBA's ruling constituted an effective prohibition of wireless service in violation of 47 U.S.C.S. § 332(c)(7)(B) of the Telecommunications Act of 1996.)

72. On February 15, 2024, just prior to the continued public meeting on the Application, T-Mobile obtained a PowerPoint from Chamberlin that was almost entirely related to RF health issues.

73. T-Mobile promptly submitted an email to the Planning Board objecting to Chamberlin's proposed presentation and informing the Planning Board that it would withdraw its consent to the adjournment and call for a vote on the Application if Chamberlin attempted to

present his proposed presentation.

74. During the February 15, 2024 public meeting, Chambelin submitted a scaled down Powerpoint and mostly avoided the discussion of health issues.

75. At the close of the meeting, the Planning Board verbally voted 4-3 to approve the Application.

76. In response to each of the four (4) votes to approve the Application, members of the public, during repeated "Audience Outburst[s,]" as indicated in the transcript, admonished the approving Planning Board members. Specifically, the members of the public, *inter alia*, repeatedly stated "shame on you[,]" called one Board member "uneducated[,]" and threatened that "[y]ou were voted in, you can be voted out . . . [s]ame with the Mayor."

77. Planning Board member Slater voted to deny the Application, stating, "I don't see a need in the high school for cellphones."

78. Planning Board member Leonard voted to deny the Application, stating, "I will not rely on T-Mobile's coverage maps. It didn't give me sufficient . . . information to say yes . . . And my answer is no, I don't think it's a good idea. I worry about the kids . . . They don't want to talk about health issues, and I can understand why, because the FCC set these standards, which is . . . It's horrible."

79. Planning Board Chairman Gilbert Foulon voted to deny the Application, stating, "I feel that T-Mobile has not demonstrated clearly the need for such. I also feel that this is very detrimental to the neighborhood . . . There is no benefit to the Borough."

80. On February 26, 2024, Mr. Berg submitted a letter requesting that the Planning Board reconsider and vacate its approval of the Application due to one of the approving Board member's "fundamental misunderstanding of the law" based upon the Borough Attorney's "pre-

vote instruction to the Planning Board to 'keep in mind' the Planning Board's 2010 granting of final site plan approval to T-Mobile[.]"

81. In a response letter dated March 15, 2024, T-Mobile advised the Planning Board that it would be improper for the Board to disturb its approval and reopen this matter for the following reasons:

a. there is no basis for the Board to reconsider the Application as it was correctly decided. [T-Mobile is] proposing a permitted use under the Wanaque Zoning Ordinance. No variances are required in connection with the application. In such -circumstances the Municipal Land Use Law is clear: a 'planning board shall, if the proposed development complies with the ordinance and this act, grant preliminary site plan approval." N.J.S.A. 40:55D-46(b) (Emphasis added).

b. the Board correctly noted the prior approval of the communications facility when it considered the Application. As noted by Mr. Veltri, that is required by the Wanaque Zoning Code. Sec. 114-93. ("Board shall, upon application, hear and consider the application, taking into consideration any previous approvals given .. "). There was no error in Mr. Veltri's instructions.

c. although the objectors argue that the application that the Board approved in 2010 is different than the current application, that is irrelevant. When that issue was discussed, the project engineer confirmed that the current location of the facility is placed in the treed area, further from the school - and the Board agreed that this is a better location than the previously approved location.

d. with respect to the design of the tower, this is consistent with the Wanaque Zoning Ordinance that requires towers to have a galvanized finish. ("Towers shall either maintain a galvanized steel finish or, subject to any applicable standards of the FAA or the Borough, be painted a neutral color so as to reduce visual obtrusiveness." Sec. 114-97.C.(1). [T-Mobile] had offered a stealth tree "monopine" but this option was not supported by the Board. As noted in the attached letter from Ms. Boschulte, a stealth flagpole has significant operational deficiencies and is not appropriate in this context. It also limits the ability of collocation, which is strongly encouraged in the Wanaque Zoning Code. Sec. 114-94.B.(3).

e. there is no fraud and no mistake that goes to the question or whether or not site plan approval should have been granted. As a conforming use

with no variances, there is simply no basis for the Board to deny the application.

f. the Board lacks procedures for reopening a hearing that has been concluded . . . [T]here are no standards in the Zoning Code for the Board to reconsider its vote.

g. "any new hearing must be on full statutory notice and follow all procedural requirements of the first hearing." *Cox & Koenig, New Jersey Zoning and Land Use Administration at Ch. 19-3,3, page 279 (GANN, 2023). See Garofalo supra* at 465; *Protomastro v. Bd. of Adjustment of city of Hoboken*, 3 N.J. 494, 500 (1950). Therefore, unless Mr. Berg sent certified letters to all property owners within 200 feet and published a notice of the hearing in the official newspaper, the Board may not reopen the hearing that was concluded in February.

82. During the March 21, 2024 Planning Board meeting, one of the Planning Board members made a motion to rescind the prior vote; however, the motion was not acted upon because several of the Planning Board members were not in attendance at the meeting.

83. During the April 18, 2024 Planning Board meeting, the Planning Board voted in favor of the motion to rescind the approval but did not take a new vote to either approve or deny the Application.

84. During the May 16, 2024 Planning Board meeting, the Planning Board verbally voted 4-3 to deny the Application.

85. Vice Chairman Graceffo voted to approve the Application, acknowledging that "the [A]pplication meets the ordinances as described[.]"

86. Based upon his consideration of all the information presented to the Planning Board and his consideration of "what is the role of the planning board on this subject, which is to ensure the site plan satisfies Borough ordinances[,]" Councilman Cortellessa voted to approve the Application.

87. Planning Board member Platt again simply voted "yes."

88. Chairman Foulon again voted to deny the Application on the sole ground that he "cannot believe that this is safe and . . . healthy for the children of our town."

89. Planning Board member Slater voted to deny the Application, stating: (1) "I have concerns on health issues with the RF spread[;]" (2) "I don't see a need based on the computer model that they should have gone out with an RF meter . . . there's better options[;]" and (3) "somebody is going to criticize us, the community doesn't want it. And we're fighting a federal government that's made major screw-ups in everything right on down the line. And they're . . . all of a sudden 40 or 50 years later, they go back and say, you know I think we blew it. Well, I think they blew it on the regulations for this[.]"

90. Planning Board member Leonard again voted to deny the Application on the sole ground that "it's [not] safe for the children. And I think we owe it to this town to listen to its residents . . . and think about the students."

91. Planning Board member Crilly, who originally voted to approve the Application, changed his vote to deny the Application, stating, "I don't think that this is the best location[.]"

92. As of the present date, the Planning Board has yet to issue a written decision setting forth its basis for denying the Application.

93. Accordingly, the Planning Board has failed to issue a contemporaneous written decision in violation of the Act. *T-Mobile S., LLC v. City of Roswell*, 574 US 293, 294 (2015) (holding "[t]he City failed to comply with its statutory obligations under the [TCA]. Although it issued its reasons in writing and did so in an acceptable form, it did not provide its written reasons essentially contemporaneously with its . . . denial when it issued detailed minutes 26 days after the date of the . . . denial").

94. T-Mobile's written submissions and presentations at the numerous public meetings

on the Application provided substantial and uncontroverted evidence demonstrating that the Application satisfies the criteria and requirements for the requested site plan approval under both state and federal law, as well as the Zoning Code.

95. The administrative record is devoid of substantial evidence refuting T-Mobile's evidence that the Application meets the criteria for the requested site plan approval.

96. Accordingly, the Defendants' denial of the Application is not supported by substantial evidence in the written record.

97. The Defendants' denial of the Application was based on the environmental effects of radio frequency emissions.

98. Without the Facility, a significant gap in service will remain in the areas surrounding the Facility and T-Mobile is materially inhibited from providing telecommunications service and personal wireless services to the Borough and surrounding areas.

Irreparable Injury, Public Interest, and Balance of Hardships

99. T-Mobile has demonstrated the need for the injunctive relief requested herein, including an order directing the Borough to issue all necessary approvals for T-Mobile to construct the Facility.

100. As a result of the Defendants' actions, T-Mobile, its customers, and the public have been and will continue to be damaged and irreparably harmed absent the relief requested herein.

101. The injury to T-Mobile affects: (i) its ability to provide its customers with the high-quality, reliable services they need and rightfully expect; (ii) its ability to compete with other providers of telecommunications services in a fair and balanced regulatory environment; (iii) the full use of its existing FCC licenses and business investments; and (iv) the goodwill of its customers and its business reputation.

102. The harm that T-Mobile has suffered and continues to suffer is not reasonably susceptible to accurate calculation and cannot be fully and adequately addressed through an award of damages.

103. Moreover, the public interest in promoting competition in the telecommunications arena and the rapid deployment of this evolving technology—the express goal of the Act—has been and will continue to be irreparably harmed by the Defendants' unlawful acts.

104. In addition, wireless telecommunications are an important component of public safety and emergency response systems and provide a vital alternative to traditional land lines during times of public crisis. By preventing T-Mobile from installing its Facility necessary to provide reliable wireless services, Defendants' unlawful actions are causing irreparable harm to the public with deprivation or delay of reliable emergency communications.

105. In contrast to the immediate and irreparable injury being suffered by T-Mobile, its customers, and the public interest, Defendants will suffer no significant injury if the Court issues the requested injunction. Moreover, T-Mobile has met all of the requirements for the approvals it seeks under controlling local codes, state and federal laws and/or precedent.

Allegations Supporting Declaratory Relief

106. A present and actual controversy has arisen and now exists between the parties regarding their respective legal rights and duties. T-Mobile contends that Defendants' actions are in violation of the Act and New Jersey State law and that T-Mobile is entitled to all of the approvals necessary to proceed with the construction and operation of the Facility at the Property.

107. T-Mobile and the public have been and will continue to be adversely affected by Defendants' unlawful acts and any further delay in approval and construction of the Facility.

108. Accordingly, declaratory relief is appropriate and necessary to adjudicate the extent

of T-Mobile's rights and Defendants' duties and authority.

COUNT I

Violation of 47 U.S.C. § 332(c)(7)(B)(iii) – Defendants' Denials of the Applications Are Not Based on Substantial Evidence in the Written Record

109. T-Mobile realleges and incorporates by reference all preceding paragraphs.

110. Pursuant to 47 U.S.C. §332(c)(7)(B)(iii), "[a]ny 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.*" (Emphasis supplied).

111. The evidence in the record demonstrates that the Application satisfies the criteria specified in the Zoning Code, state law, and federal law for the requested site plan approval for a permitted use.

112. The Defendants' denial of the Application is inconsistent with the criteria specified in the Zoning Code, state law, and under federal law.

113. The Defendants' denial of the Application eschews the actual factual evidence in the written record and rests instead on claims unsupported by any credible evidence and in contradiction to the abundant evidence presented by T-Mobile and its experts.

114. The written record does not contain substantial evidence that would lead an objective and reasonable person to deny the Application.

115. Accordingly, Defendants' denial of the Application is not supported by substantial evidence in the written record.

116. Moreover, "Section 332(c)(7)(B)(iii) [of the Act] requires localities to provide [their] reasons [for] deny[ing] applications to build cell phone towers" either "in the denial notice . . . or other written record issued essentially contemporaneously with the denial." *T-Mobile S.,*

LLC v. City of Roswell, 574 U.S. 293, 293.

117. As of the present date, the Planning Board has failed to issue a written denial of the Application or any other written record setting forth the Planning Board's reasons for denying the Application.

118. Accordingly, the Defendants' denial of the Application is, by definition, not supported by substantial evidence in the written record.

119. For the foregoing reasons, the Defendants' denial of the Application is in violation of and preempted by 47 U.S.C. § 332(c)(7)(B)(iii) and must be set aside and enjoined by the Court. Further, this Court should exercise its equitable power to issue an order directing the Borough to issue all local permits and approvals required to construct and operate the Facility.

COUNT II

Violation of 47 U.S.C. § 332(c)(7)(B)(i)(II) — Effective Prohibition

120. T-Mobile realleges and incorporates by reference all preceding paragraphs.

121. Pursuant to 47 U.S.C. §§332(c)(7)(B)(i)(II), "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." (Emphasis supplied).

122. Federal district courts review "effective prohibition" claims under the Act on a *de novo* basis, and such review is not limited to the record below.

123. The FCC has confirmed that a state or local legal requirement constitutes an effective prohibition under Section 332 of the Act if it "materially limits or inhibits" a provider's

ability to engage in any of a variety of activities related to its provision of a covered service.[1] 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."[2]

124. Adopting the FCC's materially inhibit standard, the Third Circuit further explained that "not only does insufficiency in coverage ordinarily entitle a provider to [zoning approvals] but so does insufficiency in network capacity, 5G services, or new technology." *Cellco P'ship v. White Deer Twp. Zoning Hearing Bd.*, 74 F.4th 96, 106 (3d Cir. 2023).

125. The Facility is needed and the least intrusive means for T-Mobile to fill the significant gap in coverage, densify its network, introduce new services, and improve service capabilities in the Borough and surrounding areas.

126. The Defendants' denial of the Application violates Section 332 of the Act because it materially inhibits T-Mobile from providing Personal Wireless Services in the Borough and surrounding areas, and materially inhibits T-Mobile's ability "to provide existing services more robustly, or at a better level of quality, all to offer a more robust and competitive wireless service for the benefit of the public."[3]

127. The Defendants' denial of the Application effectively prohibits the provision of Personal Wireless Services in violation of § 332(c)(7)(B)(i)(II) of the Act. Accordingly, the Defendants' denial of the Application must be set aside and enjoined on that basis. Further, this

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[1] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.* ("Third Report and Order"), 33 F.C.C.R. 9088, ¶ 40 n. 95 (2018), *aff'd in relevant part sub nom, City of Portland v. U.S.*, 969 F.3d 1020 (9th Cir. 2020), *cert. denied sub nom. City of Portland, Oregon v. Fed. Commc'ns Comm'n*, 141 S. Ct. 2855 (2021).
[2] *Id.* at ¶ 37 (internal citations omitted).
[3] Third Report and Order at ¶ 40 n. 95.

Court should exercise its equitable power to issue an order directing the Borough to issue all local permits and approvals required to construct and operate the Facility.

COUNT III

Violation of 47 U.S.C. § 253(a) — Prohibition of Service

128. T-Mobile realleges and incorporates by reference all preceding paragraphs.

129. 47 U.S.C. § 253(a) provides that "[n]o 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." (Emphasis added).

130. Section 253 also prohibits state or local authorities from erecting barriers that may prohibit or may have the effect of prohibiting the ability of any entity to provide telecommunications services, including taking action or inaction that results in an unreasonable delay in the deployment of the provider's facilities and provision of telecommunications services.[4]

131. The FCC has confirmed that a state or local legal requirement constitutes a prohibition under Section 253 of the Act if it "materially limits or inhibits" a provider's ability to engage in any of a variety of activities related to its provision of a covered service.[5] 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."[6]

132. The Third Circuit has further explained that "not only does insufficiency in coverage ordinarily entitle a provider to [zoning approvals] but so does insufficiency in network capacity, 5G services, or new technology." *Cellco P'ship v. White Deer Twp. Zoning Hearing Bd.*, 74 F.4th 96, 106 (3d Cir. 2023).

[4] 47 U.S.C. § 253(a).
[5] Third Report and Order at ¶¶ 34-40.
[6] *Id*. at ¶ 37 (internal citations omitted).

133. The Facility is needed and the least intrusive means for T-Mobile to fill the significant gap in coverage, densify its network, introduce new services, and improve service capabilities in the Borough and surrounding areas.

134. The Zoning Code and application review processes and criteria, as applied by Defendants, and the resulting denial of the Application violate Section 253 of the Act because they materially inhibit T-Mobile from providing Telecommunications Services in the Borough and surrounding areas, and materially inhibit T-Mobile's ability "to provide existing services more robustly, or at a better level of quality, all to offer a more robust and competitive wireless service for the benefit of the public."[7]

135. Moreover, the Zoning Code and application review processes and criteria, as applied by Defendants, and the resulting denial of the Application obstructed, prevented, and barred entry to the deployment of T-Mobile's Telecommunications Services in the Borough and surrounding areas.

136. The Borough's prohibitive Zoning Code, processes, and legal requirements, and Defendants' resulting denial of the Application are in violation of, and preempted by, Section 253(a) of the Act and must be set aside and enjoined on that basis. Further, this Court should exercise its equitable power to issue an order directing the Borough to issue all local permits and approvals required to construct and operate the Facility.

COUNT IV

Violation of 47 U.S.C. § 332(c)(7)(B)(iv) – Defendants' Denial of the Application Was Improperly Based on Perceived Environmental Effects of Radio Frequency Emissions

137. T-Mobile realleges and incorporates by reference all preceding paragraphs.

[7] *Id.* at ¶ 40 n. 95.

138. Pursuant to 47 U.S.C. §332(c)(7)(B)(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."

139. T-Mobile submitted with its Application uncontroverted evidence that the Facility would be completely compliant with, and would be far below, the limits and rules set by the FCC regarding RF emissions.

140. Strident community opposition to the Facility was based on the unfounded concerns of RF exposure.

141. Despite T-Mobile's showing, Defendants capitulated to community opposition and denied the Application based upon the federally preempted issue of RF exposure.

142. Specifically, Defendants relied upon the residents' unfounded concerns regarding the environmental effects of RF emissions.

143. The Defendants' denial of the Application illegally regulates the placement, construction and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions in violation of 47 U.S.C. §332(c)(7)(B)(iv) of the Act. Accordingly, the Defendants' denial of the Application must be set aside and enjoined on that basis. Further, this Court should exercise its equitable power to issue an order directing the Borough to issue all local permits and approvals required to construct and operate the Facility.

COUNT V

Defendants' Denial of the Application Was Arbitrary, Capricious, and Unreasonable in Violation of New Jersey State Law

144. T-Mobile realleges and incorporates by reference all preceding paragraphs.

145. "Municipal action will be overturned by a court if it is arbitrary, capricious or unreasonable." *Bryant v. City of Atlantic City*, 309 N.J. Super 596, 610 (App. Div. 1998).

146. The indisputable evidence presented by T-Mobile and the findings of T-Mobile's experts demonstrated that T-Mobile is entitled to the requested site plan approval because the Application and Facility satisfied all of the applicable requirements of the Zoning Code, and state and federal laws.

147. Neither the Planning Board nor anyone else presented any evidence to the contrary.

148. Accordingly, the Defendants' Denial of the Application exceeded Defendants' limited authority and is arbitrary, capricious, unreasonable, and unlawful under New Jersey State law, and must be set aside and enjoined on that basis. Further, this Court should exercise its equitable power to issue an order directing Defendants to issue all local permits and approvals required to construct and operate the Facility.

WHEREFORE, T-Mobile respectfully demands judgment of this Court on the Counts set forth above as follows:

1. On Count I, an order and judgment finding and declaring that Defendants' denial of the Application was not based on substantial evidence in the written record in violation of § 332(c)(7)(B)(iii) of the Act, and mandating that the Borough immediately issue to T-Mobile all permits and approvals required to construct and operate the Facility.

2. On Count II, an order and judgment finding and declaring that Defendants have effectively prohibited the provision of Personal Wireless Services in violation of § 332(c)(7)(B)(i)(II) of the Act, and mandating that the Borough immediately issue to T-Mobile all permits and approvals required to construct and operate the Facility.

3. On Count III, an order and judgment finding and declaring that the Defendants have

prohibited the provision of Telecommunications Services in violation of § 253(a) of the Act, and mandating that the Borough immediately issue to T-Mobile all permits and approvals required to construct and operate the Facility.

4. On Count IV, an order and judgment finding and declaring that Defendants' denial of the Application was improperly based on the environmental effects of radio frequency emissions in violation of § 332(c)(7)(B)(iv) of the Act, and mandating that the Borough immediately issue to T-Mobile all permits and approvals required to construct and operate the Facility.

5. On Count V, an order and judgment finding and declaring that Defendants' denial of the Application is arbitrary, capricious, and unreasonable in violation of New Jersey State law, and mandating that the Borough immediately issue to T-Mobile all permits and approvals required to construct and operate the Facility.

6. On all Counts, an order: (1) granting permanent injunctive relief prohibiting Defendants from taking any further action that would prohibit or have the effect of prohibiting T-Mobile from providing Personal Wireless Services and Telecommunications Services to the Borough and surrounding areas; and (2) awarding T-Mobile its costs, expenses, and attorney fees, and any and all other damages and interest to which T-Mobile is lawfully entitled, together with such other and further relief as the Court deems just and proper.

Dated: Tarrytown, New York
June 13, 2024

SNYDER & SNYDER, LLP

By: */s/ Robert D. Gaudioso*

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L. CIV. R. 11.2 CERTIFICATION

Pursuant to Local Civil Rule 11.2 and 28 U.S.C. § 1746, the undersigned member of the bar of this Court hereby declares that the matter in controversy is not presently the subject of any other action pending in any other Court, or of any pending arbitration or administrative proceeding.

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