

Weekly Town Board Meeting
June 27, 2018 7:00 p.m. Town Hall

AGENDA

1. Executive Session to discuss Essex Green's pending litigation.
2. Resolution adopting the Decision affirming the Conservation Board's denial of the application for a wetlands permit for Homeland Tower, LLC, and New York SMSA Limited Partnership d/b/a Verizon Wireless.
3. Adjournment

TOWN OF PHILIPSTOWN TOWN BOARD

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In the matter of the appeal of:

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

**DECISION ON
APPEAL**

Applicants-Appellants,

Tax Map Parcel:
38-3-24.21

From the Conservation Board's denial of an application
for a Wetlands Permit pursuant to §93-9 of the Town Code.

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The applicants-appellants, Homeland Towers, LLC and New York SMSA Limited Partnership d/b/a/ Verizon Wireless (hereinafter collectively "Homeland Towers"), have appealed to the Town Board pursuant to Town Code §93-10 from the Decision of the Town Conservation Board which denied Homeland Towers' application for a wetlands permit to build an access road through a wetlands buffer zone to access a proposed wireless telecommunications facility (hereinafter "cell tower"). The appeal was heard by the Town Board on April 11, 2018 with proceedings continued through May 2, 2018. For the reasons set forth below, it is the determination of the Town Board that the Conservation Board's denial of the wetlands permit should be affirmed.

THE STANDARD FOR GRANT OF WETLAND PERMITS.

Under Town Code §93-4, the land adjacent to a controlled wetland and that lies within 100 feet of the boundary of a controlled wetland is a "wetlands buffer zone." Pursuant to Town Code §93-4, a wetlands buffer zone is deemed part of a "controlled area." Under Town Code Chapter 93, disturbance, including the construction of improvements, within a controlled area, such as wetlands buffer zone, is a "regulated activity".



Town Code §93-9(A) states that it is unlawful to undertake a regulated activity without first obtaining a wetlands permit from the Town's Conservation Board. Thus, construction of improvements in a wetlands buffer zone requires the grant of a wetlands permit from the Town Conservation Board.

The criteria for granting a wetlands permit to conduct regulated activity, such as construction of improvements in a wetlands buffer zone, is set forth in Town Code §93-8. In order to satisfy the criteria, the applicant for a wetlands permit must demonstrate the following:

- (1) The activity will not have a substantial adverse effect upon the natural function and benefits of a wetland or watercourse as set forth in § 93-2(B);
- (2) The activity will not substantially change the natural channel of a watercourse or substantially inhibit the dynamics of a watercourse system;
- (3) The activity will not result in the degrading or pollution of waters;
- (4) The activity will not increase the potential for flooding;
- (5) Sufficient provision has been made for control of pollution, erosion, siltation and sedimentation during and after conduct of the activity;
- (6) No practicable alternative location is available on the subject parcel; and
- (7) No additional technical improvements or safeguards can reasonably be added to the plan or activity which would minimize the impact on a controlled area.¹

Under Town Code §93, any person aggrieved by a decision of the Conservation Board regarding the grant or denial of wetlands permit may appeal such decision to the Town Board. Upon such an appeal, the Town Board applies the same criteria in its review as the Conservation Board used on the initial application for the permit.

¹ While not relevant to this appeal, an additional consideration on such applications is whether the proposed activity will alleviate or remove a hazard to the public health or safety.

THE RECORD MADE BEFORE THE CONSERVATION BOARD

On or about May 23, 2017, Homeland Towers submitted an application to the Town of Philipstown Conservation Board for a wetlands permit to build an access road through a wetlands buffer zone to access a proposed cell tower. After meeting with Homeland Towers and considering the application, the Conservation Board held a joint public hearing with the Town of Philipstown Zoning Board (which was reviewing Homeland Towers' application for approval of the cell tower).

During the course of the Conservation Board's review and the public hearing, it was established that the property for which the wetland permit was sought is owned by CF Diversified Corp. It is located on the east side of Route 9 (i.e., at Vineyard Road), Philipstown, New York. The subject property consists of approximately 64.29 acres and is identified on the Town of Philipstown Tax Map as Section 38, Block 3, Lot 24.21. In order to construct the access road for the proposed cell tower on the property, Homeland Towers proposes to disturb approximately .22 acres within a wetlands buffer on the property. The proposed access road will be used for ingress and egress of vehicles and machinery to construct the cell tower and, thereafter will be used by service technicians for maintenance visits. Plans and specifications for construction of the proposed access road were submitted and reviewed.

Once the joint public hearing was concluded, the Conservation Board spread upon the minutes of the meeting its decision to deny the application for a wetlands permit. Particularly, the Conservation Board members stated that there was no need for construction of the access road through the wetlands buffer zone because there had been no showing that factors such as lot size, development restrictions and/or topographical obstacles, prevented construction of an access road in another location on the property. It was noted that there were numerous

alternative locations available on the property for the proposed access road, and while such alternate locations might entail constructing a slightly longer access road, there had been no showing that the additional construction costs would be prohibitive. It appears that the applicants' position before the CB was that the proposed location was the only location which CF Diversified Corp. has approved and, therefore, no other location for the access road was possible.

In denying the permit, the Conservation Board also noted that there were some potential negative environmental impacts to the wetlands buffer zone from the access road. These negative impacts included hazards such as falling ice, dislodged equipment and the possibility of a catastrophic collapse of the cell tower itself.

THE RECORD ON APPEAL

At the April 11, 2018 hearing of the appeal, the Town Board considered the full record made before the Conservation Board and heard a presentation from the applicants' attorney who provided a description of the project.

The Town Board also accepted comments from Town residents, all of whom spoke in opposition to the appeal. Many of the residents raised concerns that constructing the access road in the wetlands buffer zone would compromise and damage the wetlands. In support of their statements, the residents cited the existence of pipe apparatus on the property which appears to disperse and channels water from an existing retention pond, and claimed that constructing the access road over these pipes could damage them and, thereby cause and/or exacerbate and drainage problems.

The applicants claimed that it had not received a copy of the Conservation Board's decision. Accordingly, Town Board decided to hold the hearing open to allow the applicants to receive and review a copy of the same.

At the May 2, 2018 public hearing, the Town Board heard additional comments from the applicants' attorney. However, no engineers, surveyors or other expert witnesses were presented by the applicants.

The Town Board also considered comments from Max Garfinkle, - the Town of Philipstown Natural Resource Officer, who urged the Town Board to affirm the Conservation Board's decision. Other Town residents also spoke in opposition to the appeal or submitted correspondence doing so.

FINDINGS AND DETERMINATION ON APPEAL

Based on the record before it, the Town Board finds that the Conservation Board correctly denied the application for a wetlands permit on the grounds that the applicants failed to demonstrate that its project met all of the criteria set forth in Town Code §93-8. Particularly, the applicants failed to demonstrate that it met the requirement of Code §93-8(1) that the access road will not have a substantial adverse effect upon the natural function of the wetland buffer zone, and Code §93-8(4) that the construction of the access road will not increase the potential for flooding (i.e., drainage problems), and Code §93-8 (6) that there is no practicable alternative location on the subject parcel for the access road.

Based upon the foregoing, and the prior proceedings had herein, the Town Board hereby denies the applicants' appeal and affirms the decision of the Conservation Board denying the application for a wetlands permit.

ROLL CALL VOTE

On motion to adopt the Decision on Appeal herein affirming the decision of the Conservation Board which denied the application for a wetlands permit, which motion was made by _____ and seconded by _____, the vote of the Town Board was as follows:

- John Van Tassel, Councilman - Voting _____
- Michael Leonard, Councilman - Voting _____
- Robert Flaherty, Councilman - Voting _____
- Nancy Montgomery, Councilwoman - Voting _____
- Richard Shea, Supervisor - Voting _____

Filed in the Town Clerk's Office this _____ day of June, 2018.

TOWN CLERK