

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-

**STIPULATION OF
SETTLEMENT AND
ORDER**

TOWN OF PHILIPSTOWN, THE TOWN BOARD OF
THE TOWN OF PHILIPSTOWN, THE TOWN ZONING
BOARD OF APPEALS OF THE TOWN OF PHILIPSTOWN,
GREG WUNNER, BUILDING INSPECTOR (in his official
capacity), MAX GARFINKLE, NATURAL RESOURCES
REVIEW OFFICER (in his official capacity) and THE TOWN
CONSERVATION BOARD OF THE TOWN
OF PHILIPSTOWN,

18-cv-1534 (VB) (PED)

Defendants.

X

WHEREAS, the plaintiffs New York SMSA Limited Partnership d/b/a Verizon Wireless and Homeland Towers, LLC (collectively, "Plaintiffs"), commenced this action on February 20, 2018, against defendants Town of Philipstown, the Town Board of the Town of Philipstown, the Town Zoning Board of Appeals of the Town of Philipstown, Greg Wunner, Building Inspector (in his official capacity), Max Garfinkle, Natural Resources Review Officer (in his official capacity) and the Town Conservation Board of the Town of Philipstown (collectively, "Town" or "Defendants"), seeking *inter alia* a Judgment and Order finding that Defendants' denial of Plaintiffs' request to install and maintain a telecommunications facility within the Town 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 Town denied Plaintiffs' request to build a 180-foot cell tower because, among other reasons, the Town concluded that (1) Plaintiffs had failed to establish a sufficient gap or compromise in wireless service coverage sufficient to support the construction of the proposed facility; (2) the proposed facility would cause significant adverse aesthetic impacts to numerous residential areas and important scenic viewsheds in the area; and (3) the proposed facility would lead to a diminution of property values in the area;

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

WHEREAS, this Stipulation of Settlement and Order ("Stipulation") 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 Stipulation.

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 Stipulation, Plaintiffs will submit a complete application for a building permit to install a 120-foot-tall monopine tower (plus branches) and telecommunications facility (the "Facility") at 50 Vineyard Road ("Property") as described and shown on the drawings attached hereto as Exhibit A. Notwithstanding anything to

the contrary in Exhibit A, Plaintiffs further agree that: (1) the Facility will be surrounded by a 8-foot-height cedar privacy fence; (2) 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; (3) the color of the monopine tower will be subject to the reasonable approval of the Town; (4) the monopine tower will simulate a pine tree to the greatest extent that is commercially reasonable, with the length and height of the branches being consistent with the drawings attached hereto as Exhibit A; (5) the vegetative screening, netting and fencing used at the Facility will be camouflaged in color for woodland environments (i.e., green, brown or black); and (6) Plaintiffs will maintain during the life of the facility the cedar privacy fence, vegetative screening and other elements of the Facility to function and appear in substantially the same manner as when the certificate of compliance is issued by the Town. 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 (along with any modifications or additions required herein), the contractor's insurance certificates, the customary Philipstown Building Permit Application form and fee, all the requirements of the Town Code (including §§ 175-46(E), 175-46(P), 175-46(S), 175-46(T)(in the form of a \$25,000.00 bond in a form reasonably acceptable to the Town)), and any other information requested by the Town in its reasonable discretion.

2. 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, 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 Town. However, nothing in this Stipulation shall be construed to mean that the Facility does not need to comply with all applicable existing laws.

3. 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, Philipstown Zoning Law § 175-46) to raise (or apply to raise) the height of the Facility.

4. Although Exhibit A already includes proposed landscaping, Plaintiffs shall establish a \$20,000.00 fund, to be held by and distributed by the Town 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 (but not claims regarding any damage caused to Vineyard Road by Plaintiffs or their agents) 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 Town within 30 days of the date the Court “So Orders” this Stipulation. The funds must be used specifically for landscaping purposes and any unused funds that are not distributed by the later of: (1) 12 months of the submission of the funds to Bleakley Platt & Schmidt, LLP, or (2) 3 months from the Town’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 Town and

reasonably agreed to by Plaintiffs. ~~Plaintiffs shall have no responsibility to maintain any such landscaping.~~

5. This Stipulation shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Stipulation. For the avoidance of doubt, the “property owners near the Facility” referenced in paragraph 4 are not third-party beneficiaries under this Stipulation and have no rights or causes of action created by this Stipulation.

6. Within 30 days of the date the Court “So Orders” this Stipulation, Plaintiffs will reimburse the Town for the expenses it incurred in reviewing Plaintiffs’ special use and wetlands permits applications in an amount of \$21,260.70. The reimbursement will be deemed full satisfaction of the expenses the Town incurred. The reimbursement shall be delivered to Bleakley Platt & Schmidt, LLP in the form of a bank check made payable to the Town and shall be in full satisfaction of any sums owed to the Defendants in connection with the underlying special use and wetland permit applications submitted by Plaintiffs that were denied by the Town.

7. Plaintiffs and Defendants acknowledge that this Stipulation 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 Stipulation, the ambiguity shall not be resolved based on who drafted the Stipulation. The obligations of this Stipulation apply to and are binding upon the parties, and any successors and assigns or other entities or persons otherwise bound by law.

8. 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 Stipulation including, but not limited to, those claims that were asserted by Plaintiffs in this lawsuit.

9. Plaintiff, Homeland Towers, shall make space available to the Town 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 Town's option, either: (1) at, or below, 70 feet above ground level ("Bottom Mount"), (2) on the top of the tower (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 within the equipment compound. Homeland Towers shall not be responsible for the cost to purchase, install, or maintain any such antennas or equipment.

10. Upon the execution of this Stipulation by or on behalf of all parties and the "so ordering" of this Stipulation 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 Stipulation.

DEFENDANTS:

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Dated: June ____, 2019

SO ORDERED:

The Honorable Vincent L. Briccetti
United States District Judge