

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

Petition for Declaratory Ruling to Clarify)
Provisions of Section 332(c)(7)(B) to Ensure)
Timely Siting Review and to Preempt under)
Section 253 State and Local Ordinances that)
Classify All Wireless Siting Proposals as)
Requiring a Variance)

WT Docket No. 08-165

COMMENTS OF THE VILLAGE OF ROSLYN ESTATES (Nassau County,
New York)

These Comments are filed by the Village of Roslyn Estates to urge the Commission to deny the Petition filed by CTIA. As noted below, CTIA's Petition is without merit and without basis in law or fact. Village of Roslyn Estates also joins in the Comments filed by the National Association of Telecommunications Officers and Advisors ("NATOA") in response to CTIA's Petition. Section 253 of Title 47 of the United States Code does not apply to wireless tower sitings. Rather, 47 U.S.C. § 332(c)(7)(B) governs wireless tower sitings to the exclusion of § 253.

Section 332(c)(7)(B)(i) provides:

(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.

Section 253 on the other hand provides that no local government may prohibit or effectively prohibit the provision of telecommunications services. The language in § 332 is specific to wireless service facilities, while § 253 address telecommunications generally.

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Congress does not enact redundant code provisions. Further, the Supreme Court's ruling in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-385 (1992), establishes that specific code sections supersede general code sections. Section 332 is very specific as to the remedies and procedures to be followed with respect to wireless facility applications.

Section 332 (c)(7)(B)(v) provides that any person adversely affected by a local government's final action or failure to act may, within 30 days, file suit in any court of competent jurisdiction. The court must hear and decide the suit on an expedited basis. Further, any person adversely affected by local government act or failure to act that is inconsistent with clause 32(c)(7)(B)(iv) may petition the Commission for relief. The specificity of these remedies shows that § 332 applies to wireless service facilities to the exclusion of § 253.

The Commission should also deny CTIA's Petition with respect to the request that the Commission should supply meaning to the phrase "failure to act." The Commission's authority to interpret language in the Communications Act of 1934 is limited to areas of ambiguity. "Failure to act" is not an ambiguous phrase. The word "failure" means the "omission of an occurrence or performance;" the word "act" means "to carry out or perform an activity." Taken together, the phrase "failure to act" means to omit the performance of an activity. Contrary to CTIA's assertion, there is nothing vague or ambiguous about this statutory language which would entitle the Commission to issue a declaratory ruling on this topic.

In addition, Congress made it perfectly clear that the time frame for responding to applications for wireless facility sitings is determined by reference to the nature of the application. Section 332(c)(7)(B)(ii) provides that local governments act on requests "within a reasonable time period, taking into account the nature of the request." Therefore, even if ambiguity existed in the statute, the FCC would be acting outside its authority by mandating a fixed time period and imposing a remedy for violating that mandate, where Congress clearly intended fluidity.

To assist the Commission in its evaluation, below are details specific to the wireless facilities siting process and experiences in Village of Roslyn Estates.

The Village has multiple antennas sited on an office building within the Village. The permits for the antennas were granted by the Board of Trustees of the Village. Each permit request was granted quickly, probably within less than three months of the filing of the application, after public hearings, not lasting more than two nights nor more than a total of less than 90 minutes.

The pertinent provisions of the Code of the Village of Roslyn Estates are as follows:

Telecommunications Towers

[Added 1-18-2000 by L.L. No. 1-2000]

§ 200-53.1. Purpose and intent.

The purpose of this article is to establish predictable and balanced regulations for the siting and screening of personal wireless services antennas, towers and accessory structures in order to accommodate the growth of such systems within the Village while protecting the public against any adverse impacts on aesthetic resources, avoid potential damage to adjacent properties from tower failure through structural standards and setback requirements and reduce the number of towers needed to serve the community by maximizing the use of existing towers and buildings.

§ 200-53.2. Definitions.

Unless otherwise expressly stated, the following words shall, for the purposes of this article, have the meanings herein indicated:

ACCESSORY STRUCTURES — Accessory buildings and structures, including base stations designed and used to shelter equipment and/or to support personal wireless services (PWS). The term "accessory structures" does not include offices, long-term storage of vehicles or other equipment storage, or broadcast studios.

ANTENNA — A device used to transmit and/or receive radio or electromagnetic waves, including but not limited to directional antennas, such as panels and microwave dishes and omnidirectional antennas, such as whip antennas, as part of, or in conjunction with, a personal wireless services system.

BOARD — Board of Trustees of the Village of Roslyn Estates.

PERSONAL WIRELESS SERVICES (SOMETIMES REFERRED TO AS "PWS") — Commercial mobile services, unlicensed wireless services and common carrier wireless exchange access services as defined by Section 704 of the Federal Telecommunications Act.

TOWER — Any pole, spire, structure, or combination thereof (hereinafter referred to as the "mounting device") taller than 15 feet, including supporting lines, cables, wires, braces, and masts, built for the purpose of mounting an antenna, meteorological device, or similar apparatus, as part of, or in conjunction with, a personal wireless services system. The height of a mounting device shall be measured from the ground, unless such device is mounted upon a

structure the primary purpose and continued use of which was and is not as a base or support for such mounting, such as the roof of an existing building. In the latter case, when the mounting device is not to be measured from the ground, the height shall be measured from the height of the point directly below where the mounting device meets that portion of the structure the purpose of which is not as a base or support for such mounting, as determined by the Building Inspector. [Amended 3-7-2007 by L.L. No. 1-2007]

§ 200-53.3. Special use permit.

- A. No antenna or tower shall hereafter be used, erected, changed or altered except after obtaining a special use permit in conformity with this article.
- B. The Board is hereby authorized to review and approve, approve with modifications or disapprove special use permits pursuant to this article. The Board shall have the authority to impose such reasonable conditions and restrictions as are directly related to and incidental to the proposed antenna, tower or accessory structures and the protection of the health, safety and welfare of the Village, including, but not limited to, the aesthetics thereof.

§ 200-53.4. Collocation requirements.

All towers erected, constructed or located within the Village shall comply with the following requirements:

- A. A proposal for a tower shall not be approved unless the Board finds that the antenna planned for the proposed tower cannot be accommodated on an existing or approved tower or building within a one-mile search radius of the proposed tower due to one or more of the following reasons:
 - (1) The antenna would exceed the structural capacity of the existing or approved tower or building, as documented by a qualified professional engineer, and the existing or approved tower cannot be reinforced, modified or replaced to accommodate the planned or equivalent antenna at a reasonable cost.
 - (2) The antenna would cause interference materially impacting the usability of other existing or planned antennas at the tower or building, as documented by a qualified professional engineer, and the interference cannot be prevented at a reasonable cost.
 - (3) Existing or approved towers and buildings within the search radius cannot accommodate the antenna at a height necessary to function

reasonably, as documented by a qualified professional engineer.

- (4) Other foreseen reasons that make it infeasible to locate the antenna upon an existing or approved tower or building.
- B. Any proposed tower shall be designed, structurally, electrically and in all respects, to accommodate both the applicant's antennas and comparable antennas for at least five additional users. Towers must be designed to allow for future rearrangement of antennas upon the tower and to accept antennas mounted at varying heights.
- C. The applicant shall submit to the Board a letter of intent committing the applicant, and its successors in interest, to negotiate in good faith for shared use of the proposed tower by other PWS providers in the future. The issuance of a permit (assuming the tower is approved according to this article) shall commit the new tower owner and its successors in interest to:
- (1) Respond in a timely, comprehensive manner to a request for information from a potential shared-use applicant.
 - (2) Negotiate in good faith concerning future requests for shared use of the new tower by other PWS providers.
 - (3) Allow shared use of the new tower if another PWS provider agrees in writing to pay charges.
 - (4) Make no more than a reasonable charge for shared use, based on generally accepted accounting principles. The charge may include, but is not limited to, a pro rata share of the cost of site selection, planning, project administration, land costs, site design, Village fees, construction and maintenance financing, return on equity and depreciation, and all of the costs of adapting the tower or equipment to accommodate a shared user without causing electromagnetic interference.
- D. In order to keep neighboring municipalities informed, and to facilitate the possibility of directing that an existing tall structure or existing tower in a neighboring municipality be considered for shared use, an applicant shall submit to the Board an affidavit that it has sent, by registered or certified mail, return receipt requested, at least 15 days prior to the public hearing, a notification to all of the Village clerks of each Village, the fire departments and the water authorities within two miles of the proposed location of the tower. Such notification shall include the exact location of the proposed tower and a general description of the project, including, but not limited to, the height of the tower and its capacity for future shared

use.

§ 200-53.5. Performance, installation and design standards.

- A. Proof of noninterference from antenna. Each application for installation of an antenna shall include either a preliminary or a certified statement that the installation of the antenna, including reception and transmission functions, will not interfere with the radio or television service enjoyed by adjacent residential and nonresidential properties or with public safety telecommunications. In the event that only a preliminary statement is submitted with the application, a final certified statement of noninterference shall be provided, subject to the approval of the Village, prior to the issuance of a permit. The statement shall be prepared and certified by a professional engineer.
- B. Antenna safety. Antennas shall be subject to state and federal regulations pertaining to nonionizing radiation and other health hazards related to such facilities. The owner shall submit evidence of compliance with the Federal Communication Commission's standards on a yearly basis. If new, more restrictive, standards are adopted, the antennas shall be made to comply or continued operations may be restricted by the Board. The cost of verification of compliance shall be borne by the owner and operator of the tower.
- C. Tower lighting. Towers shall not be illuminated by artificial means and shall not display strobe lights unless such lighting is specifically required by the Federal Aviation Administration or other federal or state authority for a particular tower. When incorporated into the approved design of the tower, and approved by the Board, light fixtures used to illuminate ball fields, parking lots or similar areas may be attached to the tower.
- D. Uses, signs and advertising on towers,
 - (1) Towers shall not be used for any purposes other than for the mounting of antennas, meteorological devices or similar apparatus above grade.
 - (2) The use of any portion of a tower for signs other than warning or equipment information signs is prohibited.
- E. Tower height limitations. The maximum height of a tower is limited to 50 feet above the ground upon which the antenna is placed. The ground elevation may not be raised to increase the height of the tower. The height limitation may be waived by the Board when the antenna is mounted on an existing building or structure or to

accommodate collocation.

F. Tower building requirements.

- (1) The use of guyed towers is prohibited. Towers must be self-supporting without the use of wires, cables, beams or other means. The design should utilize an open framework or monopole configuration. Permanent platforms or structures, exclusive of antennas, that serve to increase off-site visibility are prohibited.
- (2) The base of the tower shall occupy no more than 500 square feet, and no portion of the tower shall be larger than the base.
- (3) Minimum spacing between tower locations shall be 1/4 mile.

G. Access to towers. A road and parking shall be provided to assure adequate emergency and service access. Maximum uses of existing roads, public or private, shall be made.

H. Setbacks for towers and accessory structures.

- (1) The tower and accessory structures shall comply with all minimum setbacks of the zoning district.
- (2) A tower's setback may be reduced by the Board to allow the integration of a tower into an existing or proposed structure such as a church steeple, light pole, power line or similar structure.

I. Screening and security of towers and accessory structures.

- (1) Existing on-site vegetation shall be preserved to the maximum extent practicable.
- (2) Towers and accessory structures shall be provided with security fencing to prevent unauthorized entry. Such fencing shall be no less than six feet and no greater than eight feet in height and shall be constructed of either masonry, wrought iron or wire (not wood) and shall meet the requirements for fences set forth in § 171-5 of the Village Code (Swimming Pools, Enclosures).
- (3) The base of the tower and any accessory structures shall be landscaped to the extent feasible to minimize the impact of the tower, the accessory structures and the security fencing from the adjacent residential community and the public streets.

J. Design of antennas, towers and accessory structures. Towers and antennas shall be designed to blend into the surrounding environment through the use of color and camouflaging architectural treatment, except in instances where the color is dictated by federal

or state authorities such as the Federal Aviation Administration. Every antenna and tower shall be of neutral colors that are harmonious with, and that blend with, the natural features, buildings and structures surrounding such antennas and structure; provided however, that directional or panel antennas and omnidirectional or whip antennas located on the exterior of a building that will also serve as an antenna tower shall be of colors that match, and cause the antenna to blend with, the exterior of the building. Accessory structures will be designed to be architecturally compatible with principal structures on the site and the aesthetics of the neighboring structures.

§ 200-53.6. Compliance with other laws.

The operator of every PWS antenna shall submit to the Village Clerk copies of all licenses and permits required by other agencies and governments with jurisdiction over the design, construction, location and operation of such antenna and shall maintain such licenses and permits and provide evidence of renewal or extension thereof when granted. The failure to do so after 30 days' notice, in the discretion of the Board, unless good cause for such failure is shown, shall result in the termination of the special use permit.

§ 200-53.7. Assignment of permit.

No permit granted under this article for any antenna or tower, or accessory structure, shall be assigned or transferred without the prior approval of the Board.

§ 200-53.8. Review.

All permits granted under this article shall be subject to review by the Board at ten-year intervals, to determine whether the technology in the provision of PWS has changed such that the necessity for the permit at the time of its approval has been eliminated or modified and whether the permit should be modified or terminated as a result of any such change.

§ 200-53.9. Fees. [Amended 3-7-2007 by L.L. No. 1-2007]

In addition to the fees set forth in other provisions of the Village Code:

- A. Each owner and operator of a tower shall pay to the Village an annual fee for such tower and an annual fee for each antenna on such tower as established from time to time by resolution of the Board of Trustees.

- B. Each owner and operator of an antenna not located on a tower shall pay to the Village an annual fee for such antenna as established from time to time by resolution of the Board of Trustees.

§ 200-53.10. Termination of permit; abandoned or unused towers.

- A. Upon the termination of the permit granted pursuant to this article, or upon the abandonment or discontinuance of use of any towers or portions of towers or associated facilities, whichever is the first to occur, such towers or portions of towers or associated facilities shall be removed as follows:
- (1) All towers and associated facilities for which the permit granted pursuant to this article has been terminated, and all abandoned or unused towers and associated facilities, shall be removed within six months of such termination, abandonment or discontinuance of use, unless a time extension is approved by the Board. A copy of the relevant portions of a signed lease which requires the applicant to remove the tower and associated facilities upon such termination, abandonment or discontinuance of use at the site shall be submitted at the time of application. In the event that a tower is not removed within six months of the such termination, abandonment or discontinuance of use, the Village may cause such tower and associated facilities to be removed and assess the expense thereof upon the real property involved, and such charge shall constitute a lien and charge upon the real property upon which it is levied until paid or otherwise satisfied or discharged and shall be collected by the Village Treasurer. Such charge shall include, among other things, administrative, legal and actual expenses incurred by the Village, and shall be collected in the same manner provided by law for the collection of delinquent taxes.
 - (2) Unused portions of towers above a manufactured connection shall be removed within six months of the time of antenna relocation, unless a time extension is approved by the Board. The replacement of portions of a tower previously removed requires the issuance of a new special use permit. In the event that said unused portion of the tower is not removed within said six months, the Village may cause said portion of the tower to be removed and assess the expense thereof upon the real property involved, and such charge shall constitute a lien and charge upon the real property upon which it is levied until paid or otherwise satisfied or discharged and shall be collected by the Village Treasurer. Such charge shall include, among other things, administrative, legal and actual expenses incurred by

the Village, and shall be collected in the same manner provided by law for the collection of delinquent taxes.

B. Performance bond.

- (1) No permit shall be issued pursuant to this article until the applicant has delivered a performance bond to the Village, in a form satisfactory to the Village Attorney, in a sum equal to the cost of removing the tower and associated facilities, to secure the applicant's responsibility:
 - (a) To remove the tower and associated facilities within six months of the termination of the permit granted pursuant to this article or the abandonment or discontinuance of use of such tower and associated facilities, unless a time extension is approved by the Board; and
 - (b) To remove the unused portions of towers above a manufactured connection within six months of the time of antenna relocation, unless a time extension is approved by the Board.
- (2) All such bonds shall be issued by insurance companies licensed to do business in the State of New York with Best ratings of A or better.
- (3) Accompanying such bonds shall be an estimate of the cost of the removal of the tower and associated facilities, certified by a professional engineer.
- (4) All such bonds shall be renewed not less than once every three years and shall be accompanied by an updated professional engineer's certification of the cost of removal.

§ 200-53.11. Effect of law on existing towers and antennas.

Antennas and towers in existence which do not conform to or comply with this article are subject to the following provisions:

- A. Antennas and towers may continue in use for the purpose now used and as now existing but may not be replaced or structurally altered without complying in all respects with this article.
- B. If such antennas or towers are hereafter damaged or destroyed due to any reason or cause whatsoever, the antenna or tower may be repaired and restored to its former use, location and physical dimensions without complying with this article; provided, however, that if the cost of repairing the tower to the former use, physical dimensions and location would be 20% or more of the cost of a new tower of like kind and quality, then the tower may not be repaired or

restored except in full compliance with this article.

§ 200-53.12. Procedural requirements.

The Board shall conduct a public hearing within 62 days from the day a complete application is filed with the Village Clerk with the appropriate application fee and deposit. The Board shall issue a decision within 35 days after the conclusion of the public hearing and the recommendations of the Nassau County Planning Commission, whichever is the later to occur.

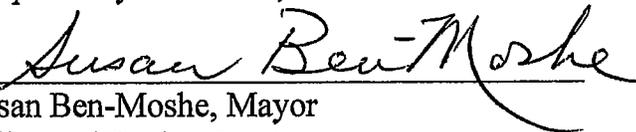
§ 200-53.13. Variances.

The Board shall have the right to vary the provisions of this article, to the extent reasonable or necessary, upon a showing of sufficient evidence by qualified experts that an applicant cannot feasibly provide the services for which it is licensed if it is compelled to conform with all of the foregoing provisions of this article or if it is shown that any of the foregoing provisions of this article are not enforceable by the Village because of a federal or state preemption.

3. CONCLUSION

In conclusion, the Commission does not have the authority to issue the declaratory ruling requested by CTIA because it would be contrary to Congress's intentions. Further, the current process for addressing land use applications ensures that the rights of citizens in our community to govern themselves and ensure the appropriate development of the community are properly balanced with the interests of all applicants. The system works well and there is no evidence to suggest that the Commission should grant a special waiver of state and local law to the wireless industry. Any perceived difficulties experienced by wireless providers can and are adequately addressed through the electoral process in each individual community and the courts. Federal agency intrusion is neither warranted nor authorized.

Respectfully submitted,



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