

**Borough of Highlands
Zoning Board of Adjustment
Regular Meeting
September 1, 2011**

Mr. Braswell called the meeting to order at 7:38 P.M.

Mr. Braswell asked all to stand for the Pledge of Allegiance.

Mrs. Cummins made the following statement: As per requirement of P.L. 1975, Chapter 231. Notice is hereby given that this is a Regular Meeting of the Borough of Highlands Zoning board of Adjustment and all requirements have been met. Notice has been transmitted to the Asbury Park Press and the Two River Times. Notice has been posted on the public bulletin board.

ROLL CALL:

Present: Mr. Fox, Mr. Anthony, Mr. Britton, Mr. Knox, Mr. Cervantes,
Mr. Braswell

Absent: Ms. Ryan, Mr. Gallagher, Mr. Kutosh

Also Present: Carolyn Cummins, Board Secretary
Gregory Baxter, Esq., Board Attorney
Martin Truscott, P.P., Board Professional Planner

**ZB#2011-1 Compagni
Block 28 Lot 16 – 21 Prospect Street
Request to Postpone Public Hearing to October 6, 2011**

The Board briefly discussed the request for the Compagni public hearing to be postponed to the October 6th meeting.

Mr. Fox offered a motion to approve the postponement request for the public hearing for ZB#2011-1 to the October 6th meeting, seconded by Mr. Anthony and approved on the following roll call vote:

ROLL CALL:

AYES: Mr. Fox, Mr. Anthony, Mr. Britton, Mr. Knox, Mr. Cervantes,
Mr. Braswell

NAYES: None

ABSTAIN: None

**ZB#2011-2 SJD Design, LLC
Block 40 Lots 18,19 & 20 – Shore Drive
Application Review & Schedule Public Hearing Date**

Present: Henry Wolff, Esq., Applicants Attorney
Mr. Sasha, Applicant

Conflict: Mr. Fox

The Board reviewed the application and the following was stated:

1. The applicant must provide drainage calculations before the next meeting.
2. Susan Duckwert owner.
3. Applicant must provide proof of payment of the third quarter property taxes.
4. The applicant must provide photographs of site and neighboring sites for hearing.
5. The applicant will be ready for a hearing on October 6th.

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6. Mr. Truscott stated that the application is complete just need drainage calculations.
7. Mr. Braswell as a member of the Historical Society expressed his interest in photographing building prior to demolition. Both the Board Attorney and Applicants Attorney agreed that there would not be a conflict

Mr. Anthony offered a motion to schedule a public hearing for ZB#2011-2 for October 6th, seconded by Mr. Britton and approved on the following roll call vote:

ROLL CALL:

AYES: Mr. Anthony, Mr. Britton, Mr. Knox, Mr. Cervantes, Mr. Braswell
NAYES: None
ABSTAIN: None

**ZB#2010-2 Metro PCS, New York, LLC
Block 108 lot 2.01
Adoption^{9/1/11}**

Mr. Fox offered the following Resolution and moved on its adoption:

**RESOLUTION DENYING USE AND BULK VARIANCES
FOR METRO PCS NEW YORK, LLC
AT 460 STATE HIGHWAY 36**

WHEREAS, the applicant, METRO PCS NEW YORK, LLC, is the contract-tenant for a portion of the property known as 460 State Highway 36, Highlands, New Jersey (Block 108, Lot 2.01); and

WHEREAS, the applicant filed an application for use and associated bulk variances and for site plan approval to extend the existing cellular monopole by 50 feet and install an additional 7' X 14' pad to contain an equipment compound; and

WHEREAS, all jurisdictional requirements have been met, and proper notice has been given pursuant to the Municipal Land Use Law and Borough Ordinances, and the Board has jurisdiction to hear this application; and

WHEREAS, the Board considered the application at public hearings held on September 2, 2010, March 3 and May 5, 2011; and

WHEREAS, the Board heard the testimony of the following witnesses for the applicant: DAVE COLLINS, as to FCC compliance; DAVID DI STEFANO, site locator; HARTI GANDHI, Engineer; DANIEL PENESSO, RF design expert; NOELLE MOELLER, who oversees leasing for the applicant; ROBERT TOMS, engineer; and WILLIAM MASTERS, JR., planner; and

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WHEREAS, the Board heard the testimony of LOUISE DAVIS, President of Eastpointe Condominium Association, who was subpoenaed by the Board; and

WHEREAS, Highlander Development Group, the owner of the Paradise Trailer Park immediately to the north of the subject, initially appeared through counsel as an objector, but subsequently withdrew; and

WHEREAS, the Board heard testimony from JOE MAY, Board Engineer; and MARC LEBER, Board Planner, at the 2010 hearing; and subsequently from ROBERT KEADY, Board Engineer; and MARTIN TRUSCOTT, Board Planner, at the 2011 hearings; and

WHEREAS, the applicant submitted the following documents in evidence:

- A-1 Variance Application (which are attached behind the site plan review application)—total of 6 pages, including consent of property owner
- A-2 Site Plan Review Application (2 pages)
- A-3 6/26/09 Wireless Communications Easement Agreement with Natale & T6 Unison (14 pages)
- A-4 2-Page document from FCC Wireless Telecommunications Bureau—Radio Station Authorization
- A-5 Site Plan Application form filed with Monmouth County Planning Board (3 pages, plus exhibits)
- A-6 Application for Zoning Permit dated 7/8/10 (1 page)
- A-7 9/8/67 Deed from Montani to NJDOT
- A-8 5/7/98 Zoning Board resolution granting preliminary and final site plan approval to subject property
- A-9 7/6/06 Zoning Board resolution of approval for use and bulk variances for Knox (same property)
- A-10 7/31/09 Survey by Chester DiLorenzo, of Midstate Engineering
- A-11 Site plan by MTM Design Group (Louis Meglino); 5 pages (see A-23, which replaces this exhibit)
- A-12 Structural analysis report by Ellen W. Swanson, of Paul J. Ford & Co.
- A-13 Antenna Site FCC RF Compliance Assessment and Report by Daniel J. Collins, of Pinnacle Telecom Group
- A-14 7/12/10 Letter from Monmouth County Planning Board advising approval is not required
- A-15 9/9/08 Email from Rick Clickner (Eastpointe Condominium Management Company)

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- A-16 Various letters from state offices regarding electrical engineers appearing before boards
- A-17 Drawings depicting coverage from surrounding Metro PCS sites, with 2 overlays, on board
- A-18 4/7/05 Zoning Board resolution to permit Verizon to co-locate on Eastpointe Condominium
- A-19 9/21/10 Letter from Drobbin to Beck regarding height of buildings to be built on property across the street, on Ocean Boulevard
- A-20 3/3/11 Aerial photograph with objector's approved buildings superimposed
- A-21 Clear overlay showing coverage for possible 96-foot monopole
- A-22 Large paper exhibit showing drive test data
- A-23 Engineering plans by MTM Design (7 pages) dated 6/28/10, last revised 3/28/11. This replaces Exhibit A-11.
- A-24 6 Photo simulations on board
- A-25 4 Photo simulations on board;

AND WHEREAS, the Board also marked the following exhibit into evidence:

- B-1 Board Engineer (JOE MAY) review letter dated 8/26/10;

AND WHEREAS, the Board also marked the following exhibit by the objector:

- O-1 Drawings of Eastpointe roof (4 pages) by French & Parillo;

AND WHEREAS, the Board has jurisdiction to hear this matter pursuant to N.J.S.A. 40:55D-70(d); and

WHEREAS, the Board, after considering the evidence and testimony, has made the following factual findings and conclusions:

1. The property is located in the HO (Highway Oriented) zoning district.
2. Though wireless communication facilities are not permitted principal uses or permitted accessory uses in the HO Zone, they are permitted as a conditional use in that zone pursuant to Ordinance 21-92.01A(3).
3. The requirements in order to construct a wireless communication facility in the HO Zone are set forth in Ordinance 21-97G. The

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application and subject property do not meet the requirements for this conditional use in the following respects:

A. The monopole will not be located at least one-and-a-half times the height of the tower structure from the distance to any property line, as required by Subsection G2.

B. The monopole will not be painted in either earth tone or sky blue colors, as required by Subsection G3.

C. As required by Subsection G4, the minimum lot size for a freestanding wireless telecommunication tower which is between 100' and 200' in height, as the application requests, is three acres. The subject lot is approximately 27,795 sq. ft., or slightly in excess of one-half acre.

D. Under Subsection G6, all of the conditions (1 through 5) of Ordinance 21-97G apply to this application, because the increase in the height of the monopole will be more than 20% of the original structure's height.

E. Any accessory building to the tower must meet the minimum height and yard requirements of the HO Zone, pursuant to Subsection G10. Where a minimum side yard setback of 10 feet is required, only 5.14 feet is proposed.

F. The area around the base of any tower and accessory building must be secured with a 6-foot chain link fence, pursuant to Subsection G12.

4. Additionally, in the HO Zone a minimum front yard setback of 50 feet is required. The existing equipment structure is only 17.8 feet in setback, or approximately one-third of the required setback.

5. The Board questions the credibility of the applicant's witnesses regarding the potential location of the cell tower and antennas onto the

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Eastpointe Condominium property, where several other cell tower antennas are currently co-located. David DeStefano testified on the first hearing date that he had contacted the management company for Eastpointe Condominium, provided drawings to them, and requested that they enter into a contract with Metro PCS for the co-location of a cell tower with antennas and equipment shed on the roof of Eastpointe, similar to several other co-located antennas. He further testified that, after a lengthy period of contacts back and forth, the condominium association did not approve Metro PCS's request. Mr. DeStefano further testified that Metro PCS prefers to co-locate. Harti Gandhi also testified regarding site selection and, in particular, that the Eastpointe site would work quite well for the coverage needs of Metro PCS. He further testified that the Eastpointe site is higher than the proposed 130' monopole. Daniel Penesso also testified that the Eastpointe site was sufficient and, in fact, a preferred candidate for location. Mr. Penesso also testified that mounting the antennas on the side of Eastpointe might also be better, and that locating the antennas on the Eastpointe structure would increase the coverage footprint (over the proposed site's coverage footprint).

6. As a result of the testimony of the applicant's witnesses, the Board determined to subpoena the President of the Eastpointe Condominium Association. The Board did so, and Louise Davis, the President, testified on May 5, 2011. She discussed the initial contacts by Metro PCS being in April 2008, and then again being contacted in September 2010. She testified that Eastpointe had space on their roof, and that the roof warranty people had come to make sure there would be no difficulty. In February 2011 a new site plan was submitted for Metro's placement on the roof, with a new proposed lease. She further testified that Eastpointe was currently in lease negotiations with Metro PCS.

7. The testimony of Ms. Davis stood in stark contrast to the testimony of the applicant's witnesses. As a result, the applicant had additional witnesses testify. Noelle Moeller testified to the history of negotiations dating back to August 2007, and running through September 2008; then picking up again in September 2010. Notably, none of that information had been supplied to the

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Board until after the Board subpoenaed the condominium board President and heard her testimony. That chronology, plus the fact that Metro PCS testified that it had been paying rent for the proposed site since January 2011 caused credibility concerns among the Board as to what actually was going on between Metro PCS and Eastpointe.

8. Anyone who offered any testimony on the subject stated that the best site for Metro PCS would be on the roof of Eastpointe, and the condominium president certainly had no objection to such location. The Board felt the same, yet, for reasons that do not appear to the Board, no resolution was reached with Eastpointe. It is the credibility issue here that concerns the Board, even more so than what was or may have been going on between Metro PCS and Eastpointe.

9. The applicant has secured the required license from the FCC, which action meets the general welfare requirement under the positive criteria as set forth in Smart SMR of New York, Inc. v. Fair Lawn Bd. of Adj., 142 NJ 309 (1998).

10. The applicant has the burden, in this type of case, to meet the 4-part test set forth in Sica v. Bd. of Adj. of Wall Twp., 127 NJ 152 (1992). Those tests, and the Board's consideration of each, follow:

A. **Identify the public interest at stake.** The applicant has proven that it has a gap in service along the Route 36 corridor in Highlands; but, correspondingly, there is also a gap in service through much of the balance of the Borough of Highlands. The proposed cell tower, in the location and at the height requested by the applicant, will not address much of the lack of coverage throughout the borough, but really only the Route 36 corridor and the areas immediately along the Route 36 corridor. Mr. Penesso testified that, effectively, the only coverage being provided by the monopole on this site would be "in-vehicle coverage", and that

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Metro PCS's coverage in buildings would not be reliable, as a result of which they would need an additional site. He also testified that there would be no coverage near Henry Hudson Regional High School.

B. Identify the detrimental effects of granting a variance. The most significant detrimental effect in this application is the visual impact of the additional height (i.e., extending the current monopole height of 80' to 130'; plus an additional 2.4' at the top of the highest antenna, for a total of 132.4'). The borough is a seashore and resort community, bordering on the Shrewsbury River; and then, almost immediately thereafter to the east, by the Atlantic Ocean. The subject lot is in the first block entering the borough from the west, as a result of which, the first visual marker in the borough which a motorist would see, if the application was granted, would be a monopole of over 130', including the antennas. The Board considered the simulations submitted by the applicant (Exhibits A-24 and A-25), and has determined that a tower of this size, in this location, would be an eyesore. As one or more Board members remarked, it would be like saying, "Welcome to Highlands. Look at our eyesore." Similarly, motorists heading westerly, coming from Sea Bright over the Highlands-Sea Bright bridge on Route 36, would have the same visual impact heading westbound. As a result, the last thing they would see in leaving the borough is the eyesore of a 130' pole almost adjacent to the highway. Since one of the major, if not most positive, features of the Borough of Highlands are its extraordinary views of the Shrewsbury River, Sandy Hook, Atlantic Ocean and New York, having an eyesore of this nature will significantly and detrimentally impact the view line. Nothing has been proposed by the applicant to make the tower any more

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attractive, or less obtrusive, than it currently is or would be if constructed in accordance with the application. The overwhelming sentiment of the Board was that the aesthetic appearance of increasing the monopole's height by 50', plus a few more feet for the highest point of the antenna, is a major detrimental effect of granting this requested variance. Also noted were that approximately 70 or 75 homes that face this tower. It would be an eyesore to them as well, affecting their view. Perhaps, as noted by at least one Board member, if the lot were substantially larger, and met or even came significantly closer to the conditional use requirements as to lot size, the deviation would not be as great as it is. Further, an increase in the existing height of over 60% is a substantial increase in the current height and, therefore, a substantial further deviation from the ordinance requirements. The overall height (132.4') would be a substantial (almost a third) deviation from the height requirement.

C. Consider the imposition of reasonable conditions to minimize potential negative impacts.

Firstly, there is little that could be done, nor was anything suggested to be done, regarding the excessive height or the significant detriment that height would cause to the Highlands landscape and its attractive views. No proposal regarding texture, design, coloration or compliance fencing was offered by the applicant. In addition, the borough ordinance requires a 6' decorative wood fence on any property line or front setback line within or abutting a residential zone or on the opposite side of the street from a residential zone; and a 6' chain link fence around all accessory building (structures). The applicant proposed an 8'-high board on board fence, which would be higher than the ordinance allows, and of a different type than the ordinance allows.

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D. Weigh the positive and negative criteria

to determine whether granting relief would cause “substantial detriment to the public good”; or whether the positive benefits of the proposal, together with the deviations from the conditional use standards, outweigh the negative. The only positive criteria here is the completion of the Route 36 gap in coverage for Metro PCS subscribers. There are no other positive criteria accepted by the Board. The negative criteria are, as previously stated, the substantial increase in height and, therefore, further substantial variation from the ordinance requirements; the unsightliness of the excessive height and its detrimental impact on the Highlands landscape and views; the failure to provide any alternative to the ordinance violations concerning setbacks; the failure to paint the pole in a color as required by ordinance 21-97G(3); the failure, and inability, of the applicant to come anywhere close to the 3-acre requirement for conditional use permitted monopoles in the HO Zone; and the fencing deficiencies.

11. The Board, therefore, finds that the applicant has not met the negative criteria required in order to grant the variance relief requested. In addition, the proof of gap coverage that supports the positive criteria is weak, at best, since a substantial portion of Highlands would still not be provided coverage if the application was granted for this site.

12. The Board further finds that if it were to have approved the proposed use, such approval would violate the purpose of the zone plan and zoning ordinance, and impair the intent of the Master Plan of the Borough of Highlands. Since the Planning Board, through the Master Plan, and the governing body, through its ordinances, have specifically provided for cellular tower coverage within the borough via conditional use requirements, and since this applicant has been unable to meet those use requirements, those inability on the part of the applicant clearly violate the zone plan and zoning ordinance.

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WHEREAS, the application was heard by the Board on the meeting dates set forth earlier in this resolution, and this resolution shall memorialize the Board's action taken at its meeting on August 4, 2011;

NOW, THEREFORE, BE IT RESOLVED by the Zoning Board of Adjustment of the Borough of Highlands that the application of METRO PCS NEW YORK, LLC for a use variance, bulk variances and site plan approval to extend the existing cellular monopole by 50' and install an additional pad to contain an equipment compound at 460 State Highway 36 (Block 108, Lot 2.01), in Highlands, New Jersey is denied.

Seconded by Mr. Knox and adopted on the following roll call vote:

ROLL CALL:

AYES: Mr. Fox, Mr. Britton, Mr. Knox, Mr. Braswell

NAYES: None

ABSTAIN: None

Mrs. Cummins – motion carried

Approval of Minutes:

Mr. Fox offered a motion to approve the August 4, 2011 Zoning Board Minutes, seconded by Mr. Britton and approved on the following roll call vote:

ROLL CALL:

AYES: Mr. Fox, Mr. Britton, Mr. Knox, Mr. Braswell

NAYES: None

ABSTAIN: None

Mr. Fox offered a motion to adjourn the meeting, seconded by Mr. Anthony and all were in favor.

The Meeting adjourned at 7:50 P.M.

Carolyn Cummins, Board Secretary