STATE OF NEW YORK
TOWN OF THOMPSON

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In the Matter of the Application of

Tarpon Towers II, LLC
For a Special Use Permit §250-63(c) and
Site Plan Approval §250-69(A)

MEMORANDUM
IN OPPOSITION

Premises:	In Close Proximity to Pine Tree Street (Billboard Site)
Section:	35
Block:	1
Lot:	27.1
Zone	HC-2

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MEMORANDUM IN OPPOSITION

Respectfully Submitted,

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Kelly Sicari, 62 North Shore Road
Adam Elfant – 89 South Lake Road
Karen Hunt DiGioia, 92 North Shore Road
Laura Wanderling, 135 South Lake Road
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Mark DeMuro, 93 South Lake Road
Judy King, 121 South Lake Road
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Preliminary Statement

Tarpon Towers II, LLC, (hereinafter *"Tarpon"*) seeks a Special Use Permit and site plan approval to install a massive two hundred thrifty-nine (239) foot Cell Tower, equivalent to twenty-three (23) stories, within the Town of Thompson upon a site situated on Pine Tree Street.

As set forth herein below, *Tarpon*'s Application for a Special Use Permit under Sections §250-60 and §250-61 of the Zoning Code and for Site Plan approval under Section §250-50 should be denied because:

(a) the applicant has failed to show that granting the application would be consistent with smart planning requirements under the Town of Thompson Zoning Code;

(b) the applicant has failed to establish that it meets the requirements of Section §250 of the Zoning Code;

(c) granting the application would violate both the Town of Thompson Zoning Code and the legislative intent of the Zoning Code, and

(d) the irresponsible placement of such a massive tower at the proposed location would inflict upon the nearby residential properties the precise type of adverse impacts which Sections §250-60 and §250-61 of the Zoning Code were specifically enacted to prevent.

(d) there are far less intrusive alternative locations where the desired facility could be built, in greater conformity with the requirements of the Town Zoning Code; and

(e) the irresponsible placement of the tower proposed by the application would not provide a safe fall zone around the proposed tower.

As such, we respectfully submit that the Planning Board Deny *Tarpon*'s application and that it be denied in a manner that does not violate the Telecommunications Act of 1996.

POINT I

Granting *Tarpon* Permission to Construct a Massive twenty-three (23) Story Cell Tower at the Location it Proposes Would Violate Both the Requirements Under the Zoning Code and Legislative Intent Based Upon Which Those Requirements Were Enacted by the Town

As set forth herein below, *Tarpon's* application for a Special Use Permit and Site Plan Approval to construct a two hundred thrifty-nine (239) foot Cell Tower, equivalent to twenty-three (23) stories, at the site it proposes must be denied, because granting the application would violate both the *requirements* of the Zoning Code, as well as the *legislative intent* behind those requirements.

As is explicitly set forth within its text, the very purpose for which the Town of Thompson enacted Section §250 of the Zoning Code was, among other things, "to promote the health, safety and general welfare of the residents of the Town," to "*minimize the total number of telecommunications towers in the community*" and "*to minimize adverse visual effects from telecommunications towers by requiring careful siting.*" *See* §250-62

More specifically, Article X of the Town Zoning Code applies directly to Telecommunications Towers and was intended to regulate the placement of such facilities to, among other things, minimize the adverse aesthetic impact of such facilities. Section §250-61 defines a Telecommunication Tower as "any structure greater than 35 feet in height which is capable of receiving or transmitting signals for the purpose of communications." Thus, *Tarpon's* proposed tower falls within the Town's Zoning Code definition of a Telecommunications Tower.

The obvious intent behind Sections §250, and §250-62, of the Town's Zoning Code, was to promote "smart planning" of wireless infrastructure within the Town.

Smart planning involves the adoption of zoning provisions which require the strategic placement of Cell Towers, so that, collectively, the towers provide complete wireless coverage

in the Town, while contemporaneously: (a) minimizing the number of towers which are needed to provide that coverage, and (b) avoiding any unnecessary adverse aesthetic or other impacts upon homes and communities situated in close proximity to such towers.

The smart planning provisions in the Town of Thompson's Zone Code include both:

(i) The *legislative intent* provisions set forth within §250, which clearly state that the intent of the Zoning Code is to: (a) guide the orderly development of the Town §250-1(A), to prevent inappropriate uses of land §250-1(B), to prevent abuses that would offend the eye or cause unfavorable reaction §250-1(F), and to preserve the beauty of the community and economic value of land §250-1(I), and

(ii) The smart zoning *requirements*, which mandate that an application for a new Cell Tower within the Town cannot be granted, unless the applicant can: (a) justify the height it proposes for the new tower §250-69(B), (b) establish that there are no less intrusive alternative sites available §250-69(B), (c) establish that the proposed siting will preserve the privacy of any adjoining properties §250-70, (d) establish that the proposed siting will best preserve the aesthetic and natural character of the neighborhood §250-71(E).

As the Zoning Code makes crystal clear, the burden rests squarely upon the applicant to establish that it meets each and every one of these requirements.

In the present case, not only has *Tarpon* wholly failed to establish that it meets ***any*** of the criteria specified within subparagraph (ii) hereinabove, it hasn't even made an effort to provide a modicum of the most basic evidence provided by Cell Tower applicants across the Country to establish: (a) the *actual location of* gaps in personal wireless services within the Town, and (b) why or how their proposed installation is the best and/or least intrusive means of remedying those gaps.

A. *Tarpon's* Failure to Provide Evidence of The Location and Extent of Gaps in Wireless Coverage Within the Town Renders it Impossible for *Tarpon* to Prove That it's Application Meets the Requirements of Section §250 of The Zoning Code

Glaringly absent from *Tarpon's* application are any evidentiary submissions which are ordinarily and customarily provided by applicants seeking to construct wireless facilities within virtually any jurisdiction within the State of New York or elsewhere.

As logic would dictate, the Town is incapable of determining whether or not the Cell Tower proposed by *Tarpon* is the "least intrusive site" available to remedy gaps in personal wireless services within the Town *See* §250-69(B), or if the proposed height for *Tarpon's* massive tower can be justified *See* §250-69(B), unless and until *Tarpon* first provides *actual evidence* showing both the precise locations of gaps in personal wireless services within the Town, and the geographic extent of those gaps.

(i) Standard Evidence in Cell Tower Applications

Within the context of zoning applications such as the current application that has been filed by *Tarpon*, the applicant is required to prove [1] that there are gaps in a specific wireless carrier's service, [2] that the location of the proposed facility will remedy those gaps, and [3] that the facility presents a "minimal intrusion on the community." *See* T Mobile Northeast LLC v. Town of Islip, 893 F.Supp.2d. 338 (2012).

As logic would dictate, it is critical that the Planning Board make factual determinations regarding these specific issues, and that it issues a written decision setting forth those determinations, and citing the evidence based upon which it makes its factual determinations.

In the absence of same, any determination which the Board ultimately makes could easily be challenged by the applicant, by the filing of a complaint based upon the Board's failure to make such determinations.

As has been clearly enunciated by the Court in T-Mobile, if a local zoning board denies a cell tower application, it must do so within a written decision which sets forth its factual determinations, and cites the evidence based upon which it made those determinations:

> "[E]ven one reason given for the denial is based upon substantial evidence, the decision of the local zoning body cannot be disturbed [by a federal court]"

T Mobile Northeast LLC v. Town of Islip, 893 F.Supp.2d. 338, 354 (2012).

Moreover, across the entire State of New York and the rest of the Country, Cell Tower applicants are required to submit competent proof of the geographic location of gaps in personal wireless services or areas suffering from deficiencies in capacity, and the most common forms of such evidence produced by applicants are: (a) drive test results,[1] and (b) dropped call records.

Significantly, the reason these specific types of evidence are customarily provided by applicants is that they are the most accurate, and extremely inexpensive to compile.

Drive test data is not based upon "computer modeling" or hypothetical propagation maps, but instead, is based upon real-time testing of the actual signal strengths which exist at the precise locations being considered. Dropped called data is similarly based on actual, and not "estimated" data.

Where *gaps* in coverage are the problem which an applicant seeks to remedy, the drive test data is the evidence most commonly presented, because such evidence shows the existence of an actual gap or gaps in personal wireless service, as well as their precise location and extent.

By contrast, where *capacity* is the problem, applicants will provide dropped call records as evidence that their system lacks sufficient capacity to handle the volume of personal wireless

[1] Perhaps the most common tool employed to ascertain the existence, location and extent of gaps in personal wireless services, the drive test consists of attaching a recording device to a cell phone, which records actual wireless signal strengths every few milliseconds. The tester then drives through a geographic area, while the device records the signal strengths through the area. In a one to two hour drive, the device can record hundreds of thousands of signal strength records, thereby providing an accurate record of any gaps in service, and the precise location and extent of each such gap.

communications, making a new proposed installation necessary to remedy such deficiency in capacity.

As is reflected with *Tarpon's* own submissions, *Tarpon* is a site development company which does not provide any personal wireless services.[2] As such, *Tarpon* does not, and cannot claim that *it* needs the facilities it proposes to remedy any gaps in *Tarpon's* personal wireless services, simply because it doesn't provide any such services.[3]

Instead, *Tarpon* has proffered an utterly baseless claim, without any proper evidentiary support, that *Verizon* needs the proposed two hundred thirty-nine (239) foot tower "*in order (for Verizon) to render adequate and reliable wireless telecommunication service*" within the Town. *See* Exhibit "F" annexed to *Tarpon's* original application which is entitled "Project Description." *Tarpon's* amended application for the new proposed site does not provide any evidentiary support the proposed tower is needed by *Verizon*.

Not only has *Tarpon* wholly failed to provide the evidence which is ordinarily and customarily submitted by applicants seeking zoning approvals of the type being sought by *Tarpon* herein, but *Verizon's* own data conclusively establishes that *Tarpon's* claims that *Verizon* needs the proposed twenty-three (23) story tower to remedy alleged gaps in its wireless services are patently false and without factual basis.

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[2] As is reflected on its internet website, *Tarpon* is not a "carrier" and does not provide personal wireless services. It is a site development company which is engaged in the business of constructing and leasing "space" upon wireless facilities to those companies *which do* provide personal wireless services. See a true copy of a page from *Tarpon's* website submitted herewith as Exhibit "A."

[3] Where, as here, the respective applicant is a *site developer*, and not a *wireless carrier*, a careful review of the application for a Cell Tower will often reveal that: (a) granting the application would be inconsistent with smart planning because it would, in no way, minimize the number of towers which will ultimately be required to saturate the Town with wireless coverage, (b) the proposed Cell Tower will unnecessarily inflict upon nearby homes and the community the precise types of adverse impacts which the provisions of the Zoning Code were deliberately enacted to prevent, and (c) there are potential less intrusive alternative locations which could better provide wireless coverage within the Town, but the applicant does not wish to install their tower at such less intrusive location, simply because the landowner who owns the other property was seeking to charge the applicant a higher rent.

Incredulously, instead of providing the above-referenced types of evidence which most applicants across the Country provide, *Tarpon* has provided a document entitled "Engineering Necessity Case – Louise Marie" (*See* Exhibit "F" annexed to *Tarpon's* original application) and the document regarding "Louise Marie – Alternative Location 'R'" (*See* Exhibit "QQ" annexed to *Tarpon's* amended application).

Among the multitude of defects in such virtually meaningless submission are the facts that: (a) the document contains absolutely no actual hard data, whatsoever, (b) the document does not identify any source of any alleged data upon which the document was purportedly based, and (c) the document does not identify any carrier which suffers from any specific coverage gap or deficiency in capacity, nor specifies the geographic location of any claimed gaps or deficiencies which would require the installation of a massive twenty-three (23) story tower.

Since (as is apparent) no drive test was ever conducted, there would be no way to obtain an accurate recording of the "signal strengths" which are purportedly relied upon, in reaching the "conclusions" proffered, without any evidentiary basis, whatsoever, by *Tarpon.*

Simply stated, *Tarpon* has wholly failed to provide any credible evidence and has failed to identify any alleged source of the data it purports to display with the otherwise meaningless depictions contained in both its original application and amended application.

Not only is such submission entirely void of evidentiary value, its conclusory findings (of what *Tarpon* purports *Verizon's* coverage to be), are directly contradicted by *Verizon's* own data, as is documented within Exhibit "B," being submitted herewith.

(ii) *Verizon's* Own Data Contradicts *Tarpon's* Claims Regarding *Verizon's* Coverage

As is a matter of public record, *Verizon* maintains an internet website at the internet domain address of http://www.verizonwireless.com.

In conjunction with its ownership and operation of that website, *Verizon* contemporaneously maintains a database which contains geographic data points which cumulatively form a geographic inventory of *Verizon's actual current* coverage for its wireless services.

As maintained and operated by *Verizon*, that database is linked to *Verizon's* website, and functions as the data-source for an interactive function, which enables users to access *Verizon's* own data to ascertain both: (a) the existence of *Verizon's* wireless coverage at any specific geographic location, and (b) *the level, quality and/or capacity of such coverage.*

Verizon's interactive website translates *Verizon's actual coverage data* to provide imagery whereby areas that are covered by *Verizon's* service are depicted in red, and areas where *Verizon* has a lack (or gap) in coverage, are depicted in white.

Contemporaneously, the website further translates the data from *Verizon's* database to specify the actual *service level* at any specific geographic location. As categorized by *Verizon*, *Verizon's* service levels ranging from worst to best are: Service Not Available, Fair, Good and Excellent.

Exhibit "B" which is being submitted together with this Memorandum is a true copy of a record obtained from *Verizon's* website[4] on April 20, 2020.

This Exhibit depicts the specific geographic location at which *Tarpon* seeks to install its twenty-three (23) story Cell Tower under the claim that *Verizon* "needs" such wireless facility to

[4] http://www.verizonwireless.com.

remedy a gap in *Verizon's* 4G personal wireless service at such location.

As reflected within Exhibit "B," *Verizon's* own data reflects that there is no significant coverage gap in *Verizon's* 4G service at that precise location, or anywhere around or in close proximity to it.

Of perhaps greater import, Exhibit B additionally reflects that the quality and/or strength of *Verizon's* 4G coverage at that location is "excellent," meaning that the level of *Verizon's* coverage at that location is the best level of coverage *Verizon* has at any location, whatsoever.

Exhibit "B" additionally reflects that such coverage data is current as of April 20, 2020 (*See* the upper left corner of Exhibit "B"), and the ledger on the bottom left of the page confirms that its source was, in fact, *Verizon's* internet website.[5]

Since the only basis upon which *Tarpon* claims that its proposed twenty-three (23) story Cell Tower is *necessary*, is to remedy an alleged deficiency in *Verizon's* service, and *Verizon's* own data conclusively establishes that no such deficiency exists, there is no need for the proposed facility, no public benefit would be derived from the installation of the facility, and concomitantly *Tarpon's* application for a Special Use Permit to construct such a facility should be denied.

[5] The attorney representing the homeowners listed on the cover page of this Memorandum personally visited *Verizon's* website and personally printed out the web pages he found there. Further authentication is found by the website address recorded on the bottom left of each of the respective exhibits.

B. *Tarpon* has Wholly Failed to Establish Why it Cannot Site a Tower at a Less Intrusive Alternative Location, or Even at a Lesser Height

As is explicitly provided under Chapter 250 of the Zoning Code, an application for a Special Use Permit cannot be granted, unless and until the respective applicant: (a) affirmatively establishes that there are no potentially less intrusive alternate sites available *See* Section §250-69(B) and (b) justifies the height that it proposes for the new tower *See* §250-69(B).

Tarpon's application to install its proposed twenty-three (23) story tower must be denied because *Tarpon* has failed to establish that it meets either of these criteria.

It is respectfully submitted that there are not less than three (3) potential alternative sites for a Cell Tower, each of which would inflict substantially less significant adverse impacts upon nearby homes and the community at large, and at least one of which, *Verizon* has conceded is a suitable alternative candidate for the proposed tower.

Those potential alternatives include Crystal Run (Section, Lot and Block 35.1-1-9.1), BBF (Section, Lot and Block 35.1-1-4.1), and RHH (Section, Lot and Block 35.1-1-7.4).

With respect to at least one of these potential alternative sites, Crystal Run, *Verizon* has already determined that it would be a suitable alternative site to meet the same needs for which *Tarpon* is seeking to build its 184 foot tower, and the occupant of the Crystal Run property, Crystal Run HealthCare, has indicated a willingness to offer space for a tower.

Annexed hereto as Exhibit "C" is a "Supplemental: Alternative Candidates" list prepared by *Verizon*. At list item "D", *Verizon* listed the property site at Crystal Run and affirmatively indicated that *Verizon* found the site to have been "Approved as alternate candidate."

Annexed hereto as Exhibit "D" is a letter from the CEO and Managing Partner of Crystal Run Healthcare indicating that they are willing to accommodate a Cell Tower upon their site.

As such, there is at least one alternative, less intrusive site, which could host a Cell Tower that would be a suitable replacement to satisfy the needs of *Verizon*, and as such, *Tarpon's* application to construct its Cell Tower on the more intrusive location must be denied, as a matter of law.

In a similar vein, having failed to show the exact location and extent of the actual gaps in wireless services within the Town, *Tarpon* has wholly failed to justify the installation of a massive twenty-three (23) story tower, as opposed to a tower of a substantially lower height.

Since *Tarpon* has failed to meet its burden of proving that there are no less intrusive alternative sites, or of justifying the proposed massive height of its proposed tower, *Tarpon's* application for a Special Use Permit must be denied as a matter of law.

Point II

Tarpon's Application Should be Denied, Because its Proposed Installation Does Not Provide a Sufficient Fallzone or Safezone Around the Tower.

Consistent with local governments across the entire United States, The Town of Thompson has enacted a setback/fallzone requirement for cell towers for the purpose of protecting its citizenry, and the public at large, against the potential adverse impacts which irresponsibly placed towers present.

Specifically, Section §250-70 provides that "[a]ll proposed telecommunications towers and accessory structures shall be located on a single parcel and shall be set back from abutting parcels and street lines a distance sufficient to substantial contain on site all icefall or debris from tower failure..."

Additionally, Section §250-70(B) sets forth that if "the tower is not designed to fall within itself, the setback shall be the minimum required setback from the property line in the underlying zoning district plus the height of the tower."

There are three (3) physical dangers that have induced local governments, such as the Town of Thompson, to adopt specific setback requirements for cell towers, and which serve as the reason why the required setback distances for cell towers are invariably tied directly to the height of respective towers.

These dangers are ice fall, debris fall and structural failures.

Here, the proposed location by *Tarpon* places the base of the two hundred thirty-nine (239) foot tower only one hundred forty-seven (147) feet from the NYS Highway 17. Thus, placing the entire state highway well within the fall zone of the tower.

As detailed above the Zoning Code requires that the setback for a tower be the minimum

required setback from the property line in the underlying zoning district plus the height of the tower. Here the setback is not even the height of the tower. Thus, *Tarpon* is seeking to install its proposed tower in violation of the Town Zoning Code requirements regarding setbacks.

Since *Tarpon* is entirely without power to exclude persons from entering the highway area around its proposed tower, *Tarpon's* proposed location offers absolutely no protection to anyone who could be utilizing that section of the highway within the fallzone of the tower, or the ice fall or debris fall zones of the tower.

Ice Fall

A natural, but well-known danger associated with communications towers is "ice," and the very real risk that can come during the winter-early spring, when ice, which has formed upon an installation, begins to melt, comes loose, and hurdles to the ground. It would fall, in this case, from a height as high as two hundred thirty-nine (239) feet, and could reach speeds of 67-70 mph by the time it hit the ground.[6] (*See* Exhibit "G" annexed hereto)

As logic would dictate, if chunks of ice fell from a height of two hundred thirty-nine (1239) feet, they could seriously injure or kill anyone struck by them. Worst of all, chunks of ice falling from cell towers generate no noise, and as such, any person under it would receive no warning before being struck by same.

[6] To see dramatic video footage of chunks of ice falling from a communications tower causing severe damage to automobiles in a parking lot below, go to www.youtube.com/watch?v=pfBp2QYOIbc www.youtube.com/watch?v=YWqiSHRwmk8 or search on YouTube for "ice falls from tower". While such video depicts ice falling from a tower higher than that being proposed, experts have calculated that ice falling from a 150-foot tower would reach the speed of 67-70 mph by the time it hit the ground (*See e.g.* Exhibit "G" - a true copy of a physicist's report dated April 16, 2013 which calculates the speed of ice falling from a 150-foot cell tower).

Structural Failures

Equally well-documented are the multiple dangers of structural failures of all types of cell towers, from lattice structures to monopoles, wherein a component of an installation fails, causing an element or part of the structure to hurdle to the ground, or in some cases, the entire tower to collapse[7] or to burst into flames and fall over.[8] (*See* Exhibits "H" through "L" annexed hereto)

Some of the most common elements and areas of failure which result in the collapse of cell towers are baseplates,[9] flanges, joints, bolts and guy wires.[10]

Debris Fall

Finally, there is the danger of falling debris, and more specifically, items dropped or caused to fall during routine maintenance activities that must be performed upon such towers on a regular basis.[11]

To afford adequate protections against these very real dangers, local governments (including the Town of Thompson) have imposed setback requirements to afford

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[7] To see dramatic images of a 165-foot tower having collapsed at a firehouse, crushing the Fire Chief's vehicle, go to www.firehouse.com/news/10530195/oswego-new-york-cellular- tower-crushes-chiefs-vehicle, or go to Google and search for "Oswego cell tower collapse."

[8] To see videos of modern towers bursting into flames and/or burning to the ground, go to http://www.youtube.com/watch?v=0cT5cXuyiYY&NR=1 or http://www.youtube.com/watch?v=y NKVWrazg, or simply go to *Google*, and search for "cell tower burns."

[9] To see images of monopole baseplate failures, go to http://residentsact.blogspot.com/2007/11/just-how-safe-are-monopole-cell-towers.html

[10] To see multiple images of telecommunications towers which have collapsed, go to google, type in a search for "radio tower collapse", and then choose "images" from the search results.

[11] Annexed hereto as Exhibit "M" is a page from a study completed by a consultant hired by the City of Brookfield Wisconsin, - which depicts a lump hammer which had been dropped from a cell tower during routine maintenance, and crashed through the roof of a nearby structure.

sufficiently sized buffer/safety areas to ensure the safety of both their citizens and the public at large.

These buffer or safety zones consist of an area surrounding a tower which is restricted from public or personal access, and which is large enough to ensure that if a tower were to fail or collapse, or ice were to hurdle downward from the top of it, nobody would be close enough to be injured or killed by same.

As a rule of thumb, to ensure that a buffer/safety zone of sufficient size is maintained, knowledgeable local governments across the Country (such as the Town of Thompson) have enacted ordinances that generally require minimum setbacks ranging from 100% to 200% of the height of a respective communications tower.

Pursuant to the Zoning Code, because the two hundred thirty-nine (239) foot tower if it were to collapse would fall outside the leased parcel and because the tower is set back less than 100% of the height of the tower from all sides of the leased parcel, the Planning Board should determine that the required minimum setback in this case is not met by *Tarpon*. Since *Tarpon's* proposed tower does not meet such setback requirements, nor afford a sufficiently safe fallzone around its proposed tower to restrict access to the zones for structural failures, ice fall or debris fall, its application should be denied.

POINT III

Tarpon's Application Must be Denied, Because the Proposed Cell Tower Would Inflict The Adverse Impacts Which the Relevant Provisions of the Thompson Zoning Ordinance Were Specifically Enacted to Prevent

As the Zoning Code makes quite clear, the intent behind the provisions pertaining to Wireless Telecommunication Facilities (Chapter 250), and the reason why the Town implemented a Special Use Permit requirement for same, was to protect the Town, its communities and the residents and residential properties against the adverse impacts which irresponsibly placed wireless facilities would inflict upon the homes and communities within the Town.

That legislative intent is codified in Section §250-62 et seq, which is entitled "Purpose" and explicitly states that the intent of enacting Chapter 250 was, among other things, to "to promote the health, safety and general welfare of the residents of the Town," to "*minimize the total number of telecommunications towers in the community*" and "*to minimize adverse visual effects from telecommunications towers by requiring careful siting.*"

Consistent with such intent, Section §250-63 of the Code provides that wireless facilities, such as those which are currently the subject of *Tarpon's* application, cannot be built without the granting of a Special Use Permit (§250-63) and Site Plan Approval.

A site plan for a new Cell Tower cannot be approved unless the applicant can: (a) justify the height it proposes for the new tower §250-69(B), (b) establish that there are no less intrusive alternative sites available §250-69(B), (c) establish that the proposed siting will preserve the privacy of any adjoining properties §250-70, and (d) establish that the proposed siting will best preserve the aesthetic and natural character of the neighborhood §250-71(E).

These provisions, of course, are in addition to the codified legislative intent set forth within §250, which clearly states that the intent of the Zoning Code is to: (a) guide the orderly development of the Town §250-1(A), to prevent inappropriate uses of land §250-1(B), to prevent abuses that would offend the eye or cause unfavorable reaction §250-1(F), and to preserve the beauty of the community and economic value of land §250-1(I).

The irresponsible placement of the massive twenty-three (23) story Cell Tower at the location being proposed by *Tarpon* would not only cause it to "stick out like a sore thumb", it would inflict upon nearby residential properties and the surrounding community the precise types of adverse impacts which both the Zoning Code, and its provisions, were specifically enacted to prevent.

As such, *Tarpon's* application for a Special Use Permit and Site Plan Approval should be denied.

A. The Proposed Installations Will Inflict Dramatic and Wholly Unnecessary Adverse Impacts Upon the Aesthetics and Character of The Areas

Recognizing the likely adverse aesthetic impact which an irresponsibly placed wireless facility could inflict upon nearby homes and residential communities, the Town of Thompson enacted Chapter 250 to minimize adverse visual effects from telecommunications towers through "careful siting" *See* §250-62, consistent with the underlying regulatory intent set forth within 250-1 which is to "prevent abuses that would offend the eye." *See* §250-1(F).

The irresponsible placement of the massive twenty-three (23) story Cell Tower sought by *Tarpon*, if permitted to be constructed, would not only stand out like a sore thumb, it would dominate the skyline, destroy the otherwise pristine views enjoyed by dozens of nearby homeowners, and would inflict substantial adverse, and wholly unnecessary aesthetic impacts upon

those homes and the surrounding community.

(i) Evidence of the Actual Adverse Aesthetic Impacts Which the Proposed Installations Would Inflict Upon the Residential Homes

As logic would dictate, the persons who are best suited to accurately assess the nature and extent of the adverse aesthetic impacts which an irresponsibly placed Cell Tower would inflict upon homes in close proximity to the proposed installation, are the homeowners and their families.

Consistent with same, federal Courts have ruled that when a local government is entertaining a Cell Tower application, it should accept, as direct evidence of the adverse aesthetic impacts which a proposed Cell Tower would inflict upon nearby homes, statements and letters from the actual homeowners, because they are in the best position to know and understand the actual extent of the impact they stand to suffer *See e.g.* Omnipoint Communications Inc. v. The City of White Plains, 430 F2d 529 (2nd Cir. 2005). Moreover, Federal Courts have consistently held that adverse aesthetic impacts are a valid basis on which to deny applications for proposed wireless facilities. *See* Omnipoint Communications Inc. v. The City of White Plains, 430 F2d 529 (2nd Cir. 2005).

Annexed collectively hereto as Exhibit "E" are letters from homeowners whose homes are situated in close proximity to the site upon which *Tarpon* proposes to install its twenty-three (23) story Cell Tower.

Within each of those letters, the homeowners, and others who are intimately acquainted with their homes, personally detail the adverse aesthetic impacts that the proposed installations would inflict upon their respective homes. They have provided detailed and compelling explanations of the dramatic adverse impacts their properties would suffer if the proposed installation is permitted to proceed.

Detailed descriptions of the adverse aesthetic impacts which *Tarpon's* proposed twenty-three (23) story Cell Tower would inflict upon the nearby homes include letters from the following homeowners: Douglas Poetzsch, 14 Gold Point Road, Rock Hill, NY 12775, Catherine Poetzsch, 14 Gold Point Road, Rock Hill, NY 12775, Annie Rody-Wright, 113 South Lake Road, Rock Hill, NY 12775, Marlene and Philip Rhodes, 4 Little North Shore Road, Rock Hill, NY 12775, Leigh Poetzsch, 14 Gold Point Road, Rock Hill, NY 12775, David Wright, 113 South Lake Road, Rock Hill, NY 12775, , David Harris, 14 First Road, Rock Hill, NY 12775, Linda M. Cantwell, 102 North Shore Road, Rock Hill, NY 12775, Jim Harris, 14 First Road, Rock Hill, NY 12775, John Lynch, 102 North Shore Road, Rock Hill, NY 12775, Carolyn Coughlin, 14 First Road, Rock Hill, NY 12775, Dan Alexander, Concerned Resident, Mr. and Mrs. Robert Funck, 81 Wurtsboro Mountain Road, Rock Hill, NY 12775, David C. Ennis, Jr., 14 Little North Shore Road, Rock Hill, NY 12775, Donna Sweeney, Concerned Resident, James Schrade, Concerned Resident, Thomas H. Kozlark, 29 Sylvan Shore Road, Rock Hill, NY 12775, Christopher Wernau, 6 Gold Point Road, Rock Hill, NY 12775, Joyce Moshier, 91 South Lake Road, Rock Hill, NY 12775, Abigail Harris, 14 First Road, Rock Hill, NY 12775, Daria Rickett, 125 South Lake Road, Rock Hill, NY 12775, Laurie M. Supinski, 91 South Shore Road, Rock Hill, NY 12775, Sally Hallinan, 2 Elm Road, Rock Hill, NY 12775, Philip Rhodes, 4 Little North Shore Road, Rock Hill, NY 12775, Maura Sweeney, 179 South Lake Road, Rock Hill, NY 12775, Madelyn Wernau, 6 Gold Point Road, Rock Hill, NY 12775, Herb Wernau, 6 Gold Point Road, Rock Hill, NY 12775, Maureen McGavin Kozlark, 29 Sylvan Shore Road, Rock Hill, NY 12775, Sandra King, 73 Wurtsboro Mountain Road, Rock Hill, NY 12775, Robert and Daria Rickett, 125 South Lake Road, Rock Hill, NY 12775, Rebecca Harris, 14 First Road, Rock Hill, NY 12775, Phyllis Perry, 106 Middletown Point Road, Rock Hill, NY 12775, Jody Lounsbury, Concerned Resident, John Hallinan, 2 Elm Road, Rock Hill, NY 12775, Harold Stephan, 24 Sylvan Shore Road, Rock Hill, New York 12775, Ellen

Ladenheim, Concerned Resident, Mark DeMuro, 76 and 93 South Lake Road, Rock Hill, NY 12775, Chris Wallace, Concerned Resident, Amekua and Harold Wanaksink, Judy King, 121 South Lake Road, Rock Hill, NY 12775, Marlene Rhodes, 4 Little North Shore Road, Rock Hill, NY 12775, Joan Krieger, 108 Middletown Point Road, Rock Hill, NY 12775, Laura Scovazzo and Jo Beth Kemp, 16 Little North Shore Road, Rock Hill, NY 12775, Derek and Marcella Bloomfield, 88 North Shore Road, Rock Hill, NY 12775, and Michael T. Horan, 2 Fir Road, Rock Hill, NY 12775

Significantly, as is set forth hereinabove, all of the adverse aesthetic impacts which the proposed wireless facilities would inflict upon their respective homes are entirely unnecessary, because neither *Tarpon* nor *Verizon* needs the proposed twenty-three (23) story Cell Tower to provide wireless services within the Town.

As such *Tarpon*'s application for a Special Use Permit and Site Plan Approval to construct its massive Cell Tower should be denied.

B. The Proposed Installations Will Inflict Substantial and Wholly Unnecessary Losses in the Values of Adjacent and Nearby Residential Properties

In addition to the adverse impacts upon the aesthetics and residential character of the area at issue, the irresponsible placement of such a massive Cell Tower in such close proximity to nearby residential homes would contemporaneously inflict upon such homes a severe adverse impact upon the actual value of those residential properties.

Across the entire United States, both real estate appraisers[12] and real estate brokers have rendered professional opinions which simply support what common sense dictates.

When wireless facilities are installed unnecessarily close to residential homes, such homes suffer material losses in value which typically range anywhere from 10% to 20%.[13]

In the worst cases, Cell Towers built near existing homes have caused the homes to be rendered wholly unsaleable.[14]

As has been recognized by federal Courts, it is perfectly proper for a local zoning

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[12] *See e.g.* a February 22, 2012 article discussing a NJ appraiser's analysis wherein he concluded that the installation of a Cell Tower in close proximity to a home had reduced the value of the home by more than 10%, go to http://bridgewater.patch.com/articles/appraiser-t-mobile-cell-tower-will-affect-property-values

[13] In a series of three professional studies conducted between 1984 and 2004, one set of experts determined that the installation of a Cell Tower in close proximity to a residential home reduced the value of the home by anywhere from 1% to 20%. These studies were as follows:

The Bond and Hue - *Proximate Impact Study* - The Bond and Hue study conducted in 2004 involved the analysis of 9,514 residential home sales in 10 suburbs. The study reflected that close proximity to a Cell Tower reduced price by 15% on average.

The Bond and Wang - *Transaction Based Market Study*

The Bond and Wang study involved the analysis of 4,283 residential home sales in 4 suburbs between 1984 and 2002. The study reflected that close proximity to a Cell Tower reduced the price between 20.7% and 21%.

The Bond and Beamish - *Opinion Survey Study*

The Bond and Beamish study involved surveying whether people who lived within 100' of a Cell Tower would have to reduce the sales price of their home. 38% said they would reduce the price by more than 20%, 38% said they would reduce the price by only 1%-9%, and 24% said they would reduce their sale price by 10%-19%.

[14] Under FHA regulations, no FHA (federally guaranteed) loan can be approved for the purchase of any home which is situated within the fall zone of a Cell Tower. *See* HUD FHA HOC Reference Guide Chapter 1 - hazards and nuisances. As a result, there are cases across the country within which: (a) a homeowner purchased a home, (b) a Cell Tower was thereafter built in close proximity to it, and (c) as a result of same, the homeowners could not sell their home, because any buyer who sought to buy it could not obtain an FHA guaranteed loan. *See, e.g.* October 2, 2012 Article ". . .Cell Tower is Real Estate Roadblock" at http://www.wfaa.com/news/consumer/Ellis-County-Couple--Cell-tower-making-it-impossible-to-sell-ho me--172366931.html.

authority to consider, as direct evidence of the reduction of property values which an irresponsibly placed Cell Tower would inflict upon nearby homes, the professional opinions of licensed real estate brokers and/or appraisers, who could provide their professional opinions as to the adverse impact upon property values which would be caused by the installation of the proposed wireless facility *See* Omnipoint Communications Inc. v. The City of White Plains, 430 F2d 529 (2nd Cir. 2005), and this is especially true when they are possessed of years of real estate sales experience within the community and specific geographic area at issue.

As evidence of the adverse impact that the proposed wireless installations would have upon the property values of the homes which would be adjacent and/or in close proximity to the proposed Cell Tower described herein, annexed hereto collectively as Exhibit "F" is a professional joint appraisal of three homes situated in close proximity to the site of the proposed tower.

Given the drastic reductions in property values that the proposed installations would inflict upon the nearby homes, which would result in the loss of millions of dollars in losses to the owners of those homes, the granting of *Tarpon's* application would inflict upon the residential neighborhood the very type of injurious impacts which the Zoning Ordinance was specifically intended to prevent. Accordingly, *Tarpon's* application should be denied.

POINT IV

§ 6409(a) of the Middle-Class Tax Relief and Job Creation Act of 2012 Would Allow *Tarpon* to Increase the Height of the Proposed Facilities Without Further or Prior Zoning Approval

As substantial as the adverse impacts upon the nearby homes and communities will be if the proposed facilities were constructed at the heights currently proposed by *Tarpon*, *Tarpon's* submissions suggest that once these facilities are built, *Tarpon* might unilaterally choose to increase the height of the eight (8) poles owned by *Tarpon* by as much as an additional twenty-two (22) feet, and the Town would be legally prohibited from stopping *Tarpon* from doing so, due to the constraints of the Middle-Class Tax Relief and Job Creation Act of 2012.

§ 6409(a) of the Middle-Class Tax Relief and Job Creation Act of 2012 provides that notwithstanding section 704 of the Telecommunications Act of 1996 or any other provision of law, a State or local government may not deny, and shall approve, any eligible request for a modification of an existing wireless facility or base station that does not substantially change the physical dimensions of such facility or base station. *See* 47 U.S.C. § 1455(a).

Under the FCC's reading and interpretation of § 6409(a) of the Act, local governments are prohibited from denying modifications to wireless facilities unless the modifications will "substantially change" the physical dimensions of the facility, pole or tower.

The FCC defines "substantial change" to include any modification that would increase the height of the facility by more than ten (10%) percent or by more than "the height of one additional antenna with separation from the nearest existing antenna not to exceed 20 feet, whichever is greater."

Typical telecommunication antennas range from four (4) to eight (8) feet tall, so this provision would allow an increase in the proposed facility's height by as much as an additional thirty-six (36) feet, and this height increase could not be challenged or prevented by the Town.

Simply stated, under the FCC's regulation, if *Tarpon* were permitted to build its desired 184 foot tower, *Tarpon,* at any time thereafter, could unilaterally increase the height of its tower by as much as an additional thirty-six (36) feet, and there would be no way for the Town to prevent such an occurrence.

Considering the even more extreme adverse impacts which an increase in the height of the facilities would inflict upon the homes and communities nearby, *Tarpon's* application should be denied, especially since, as set forth above, *Tarpon* doesn't actually *need* the proposed Cell Tower in the first place.

POINT V

To Comply With the TCA, *Tarpon*'s Application Should Be Denied in a Written Decision Which Cites the Evidence Provided Herewith

The Telecommunications Act of 1996 requires that any decision denying an application to install a wireless facility: (a) be made in writing, and (b) be made based upon substantial evidence, which is discussed in the written decision. *See* 47 U.S.C.A. §332(c)(7)(B)(iii).

A. The Written Decision Requirement

To satisfy the requirement that the decision be in writing, a local government must issue a written denial which is separate from the written record of the proceeding, and the denial must contain a sufficient explanation of the reasons for the denial to allow a reviewing Court to evaluate the evidence in the record supporting those reasons. *See e.g.* MetroPCS v. City and County of San Francisco, 400 F.3d 715(2005).

B. The Substantial Evidence Requirement

To satisfy the requirement that the decision be based upon substantial evidence, the decision must be based upon such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. "Substantial evidence" means "less than a preponderance, but more than a scintilla." Review under this standard is essentially deferential, such that Courts may neither engage in their own fact-finding nor supplant a local zoning board's reasonable determinations. *See e.g.* American Towers, Inc. v. Wilson County, Slip Copy 59 Communications Reg. P & F 878 (U.S.D.C. M.D. Tennessee January 2, 2014)[3:10-CV-1196]

To ensure that the Board's decision cannot be challenged under the Telecommunications Act of 1996, it is respectfully requested that the Board deny *Tarpon's* application in a separate written decision, wherein the Board cites the evidence based upon which it made its determination.

Conclusion

In view of the foregoing, it is respectfully submitted that *Tarpon's* application for Special Use Permit and site plan approval should be denied in its entirety.

Respectfully Submitted,

Andrew J. Campanelli