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## Chapter 150. Zoning

### Part 2. Regulatory Provisions

#### Article XII. Individual Standards and Requirements for Particular Special Permit Uses

This Section §150-126 is intended to repeal and replace all previous versions of, and amendments to, Section §150-126 of Article XII of Chapter 150 of the Code, all of which are hereby repealed and replaced in their entirety by this Section 150-126 et. seq., as of the effective date hereof.

#### §150-126 Telecommunications Towers and Personal Wireless Service Facility Requirements

No telecommunications Tower or other Personal Wireless Service facility shall be sited, constructed, reconstructed, installed, materially changed or altered, expanded, or used unless in conformity with this section.

The installation, construction, erection, relocation, substantial expansion, or material alteration of any Personal Wireless Service facility (PWSF) within the Town shall require a special use permit pursuant to the provisions of this section unless otherwise provided herein below.

The performance of maintenance, routine maintenance, in-kind replacement of components, and/or repairs (as defined herein) to an existing Personal Wireless Service facility and/or existing Personal Wireless Service equipment shall not require a special use permit.

Each Application for a Special Use Permit under this chapter and each individual Personal Wireless Service facility for which an Application for a Special Use Permit is submitted shall be considered based upon the individual characteristics of each respective installation at each proposed location as an individual case. In other words, each installation, at each proposed location, shall be reviewed and considered independently for its own characteristics and potential impacts, irrespective of whether the proposed facility is designed and intended to operate independently or whether the installation is designed and/or intended to operate jointly as part of a Distributed Antenna System.

#### §150-126(A) Purpose and Legislative Intent

The purpose of this section is to promote the health, safety, and general welfare of the residents of the Town of Fishkill and to preserve the scenic, historical, natural, and man-made character and appearance of the Town while simultaneously providing standards for the safe provision, monitoring, and removal of cell Towers and other Personal Wireless Service facilities consistent with applicable federal, state and local laws and regulations.

Consistent with the balancing of interests which the United States Congress intended to embed with the federal Telecommunications Act of 1996 (hereinafter "the TCA"), Section §150-126 is intended to serve as a *Smart Planning Provision*, designed to achieve the four (4) simultaneous objectives of: (a) enabling Personal Wireless Service providers to provide adequate Personal

Wireless Services throughout the Town so that Town residents can enjoy the benefits of same, from any FCC-licensed Wireless Carrier from which they choose to obtain such services, while (b) minimizing the number of cell Towers and/or other Personal Wireless Service facilities needed to provide such coverage, (c) preventing, to the greatest extent reasonably practical, any unnecessary adverse impacts upon the Town's communities, residential areas, and individual homes, and (d) complying with all of the legal requirements which the TCA imposes upon the Town, when the Town receives, processes and determines Applications seeking approvals for the siting, construction and operation of cell Towers and/or other Personal Wireless Service facilities.

The Town seeks to minimize, to the greatest extent possible, any unnecessary adverse impacts caused by the siting, placement, physical size, and/or unnecessary proliferation of, Personal Wireless Service facilities, including, but not limited to, adverse aesthetic impacts, adverse impacts upon property values, adverse impacts upon the character of any surrounding properties and communities, adverse impacts upon historical and/or scenic properties and districts, and the exposure of persons and property to potential dangers such as structural failures, icefall, debris fall, and fire.

The Town also seeks to ensure that, in applying this section, the Planning Board is vested with sufficient authority to require Applicants to provide sufficient, accurate, and truthful Probative Evidence, to enable the Board to render factual determinations consistent with both the provisions set forth herein below and the requirements of the TCA when rendering decisions upon such Applications.

To achieve the objectives stated herein, the Town seeks to employ the "General Authority" preserved to it under Section 47 U.S.C.A. §332(c)(7)(A) of the TCA to the greatest extent which the United States Congress intended to preserve those powers to the Town, while simultaneously complying with each of the substantive and procedural requirements set forth within the subsection 47 U.S.C.A. §332(c)(7)(B) of the TCA.

#### §150-126(B) Definitions; Word Usage

For purposes of this article, and where not inconsistent with the context of a particular section, the defined terms, phrases, words, abbreviations, and their derivations, shall have the meaning given in this section. When not inconsistent with the context, words in the present tense include the future tense, words used in the plural number include words in the singular number, and words in the singular number include the plural number. The word "shall" is always mandatory and not merely directory. The definitions set forth herein shall supersede any definitions set forth within Section §150-6, and the definitions set forth herein below shall control and apply to §150-126 and all subparagraphs herein.

#### **ACCESSORY FACILITY OR ACCESSORY STRUCTURE**

A facility or structure serving or being used in conjunction with a Personal Wireless Services facility or complex and located on the same property or lot as the Personal Wireless Services facility or complex, or an immediately adjacent lot including, but not limited to, utility or transmission equipment storage sheds or cabinets.

**ACHP**

The federal Advisory Council on Historic Preservation.

**ADEQUATE COVERAGE**

As determined by the Planning Board, Adequate Coverage means that a specific Wireless Carrier's Personal Wireless Service coverage is such that the vast majority of its customers can successfully use the carrier's Personal Wireless Service the vast majority of the time, in the vast majority of the geographic locations within the Town, that the success rate of using their devices exceeds 97%, and that any geographic gaps in a carrier's gaps in Personal Wireless Services are not significant gaps, based upon such factors including, but not limited to, lack of significant physical size of the gap, whether the gap is located upon a lightly traveled or lightly occupied area, whether only a small number of customers are affected by the gap, and/or whether or not the carrier's customers are affected for only limited periods of time. A Wireless Carrier's coverage shall not be deemed inadequate simply because the frequency or frequencies at which its customers are using its services are not the most preferred frequency of the Wireless Carrier.

**ANTENNA**

An apparatus designed for the purpose of emitting radiofrequency (RF) radiation, to be operated or operating from a fixed location, for the provision of Personal Wireless Service.

**APPLICANT**

Any individual, corporation, limited liability company, general partnership, limited partnership, estate, trust, joint-stock company, association of two or more persons having a joint common interest, or any other entity submitting an Application for a Special Use Permit, site plan approval, variance, building permit, and/or any other related approval, for the installation, operation and/or maintaining of one or more Personal Wireless Service facilities.

**APPLICATION**

Refers to all necessary and required documentation and evidence that an Applicant must submit to receive a Special Use Permit, building permit, or other approval for Personal Wireless Service facilities from the Town.

**BOARD**

The Planning Board of the Town of Fishkill.

**CELL TOWER**

A free-standing, guy-wired, or otherwise supported pole, Tower, or other structure designed to support or employed to support, equipment and/or antennas used to provide Personal Wireless Services, including, but not limited to, a pole, monopole, monopine, slim stick, lattice Tower or other types of standing structures.

**CEQ**

The Council on Environmental Quality was established under NEPA.

**CODE and/or the CODE**

The Code of the Town of Fishkill.

**COLOCATION and/or CO-LOCATE**

To install, mount or add new or additional equipment to be used for the provision of Personal Wireless Services to a pre-existing structure, facility, or complex which is already built and is currently being used to provide Personal Wireless Services, by a different provider of such services, Wireless Carrier or Site Developer.

**COMPLETE APPLICATION, COMPLETED APPLICATION**

An Application that contains all the necessary and required information, records, evidence, reports, and/or data necessary to enable an informed decision to be made with respect to an Application. Where any information is provided pursuant to the terms of this Article and the Zoning Administrator or the Town's expert or consultant or the Board determines, based upon information provided, that any additional, further or clarifying information is needed as to one or more aspects, then the Application will be deemed incomplete until that further or clarifying information is provided to the satisfaction of the Zoning Administrator, Planning Board or the Town's expert or consultant or the Board.

**COMPLEX**

The entire site or facility, including all structures and equipment, located at the site.

**DEPLOYMENT**

The placement, construction, or substantial modification of a Personal Wireless Service facility.

**DISTRIBUTED ANTENNA SYSTEM, DAS**

A network of spatially separated antenna nodes connected to a common source via a transport medium that provides Personal Wireless Services within a geographic area.

**EFFECTIVE PROHIBITION**

A finding by the Planning Board that, based upon an Applicant's submission of sufficient probative, relevant, and sufficiently reliable evidence, and the appropriate weight which the Board deems appropriate to afford same, an Applicant has established that an identified Wireless Carrier does not have Adequate Coverage as defined hereinabove, but suffers from a significant gap in its Personal Wireless Services within the Town and that a proposed installation by that Applicant would be the least intrusive means of remedying that gap, such that a denial of the Application to install such installation would effectively prohibit the carrier from providing Personal Wireless Services within the Town. Any determination of whether an Applicant has established, or failed to establish, both the existence of a significant gap and whether its proposed installation is the least intrusive means of remedying such gap, shall be based upon Substantial Evidence, as is hereinafter defined.

**ELEVENTH HOUR SUBMISSIONS**

An Applicant's submission of new and/or additional materials in support of an Application within 48 hours of the expiration of an applicable Shot Clock, or at an otherwise unreasonably short period of time before the expiration of the Shot Clock, making it impracticable for the

Planning Board to adequately review and consider such submissions due to their complexity, volume, or other factors, before the expiration of the Shot Clock.

**ENURE**

To operate or take effect. To serve to the use, benefit, or advantage of a person or party.

**EPA**

The United States Environmental Protection Agency.

**FAA**

The Federal Aviation Administration, or its duly designated and authorized successor agency.

**FACILITY**

A set of wireless transmitting and/or receiving equipment, including any associated electronics and electronics shelter or cabinet and generator.

**FCC**

The Federal Communications Commission.

**GENERAL POPULATION/UNCONTROLLED EXPOSURE LIMITS**

The applicable radiofrequency radiation exposure limits set forth within 47 CFR §1.1310(e)(1), Table 1 Section (ii), made applicable pursuant to 47 CFR §1.1310(e)(3).

**HEIGHT**

When referring to a Tower, Personal Wireless Service Facility, or Personal Wireless Service Facility structure, the Height shall mean the distance measured from the pre-existing grade level to the highest point on the Tower, Facility, or structure, including, but not limited to, any accessory, fitting, fitment, extension, addition, add-on, antenna, whip antenna, lightning rod or other types of lightning-protection devices attached to the top of the structure.

**HISTORIC STRUCTURE**

Any structure that would meet the definition of a regulated structure as defined in this Chapter.

**ILLEGALLY EXCESSIVE RF RADIATION or ILLEGALLY EXCESSIVE RADIATION**

RF radiation emissions at levels that exceed the legally permissible limits set forth within 47 CFR §1.1310(e)(1), Table 1 Sections (i) and (ii), as made applicable pursuant to 47 CFR §1.1310(e)(3).

**IN-KIND REPLACEMENT**

The replacement of a malfunctioning component(s) with a properly functioning component of substantially the same weight, dimensions, and outward appearance.

**MACROCELL**

A cellular base station that typically sends and receives radio signals from large Towers and antennas. These include traditionally recognized Cell Towers, which typically range from 50 to 199 feet in Height.

**MAINTENANCE or ROUTINE MAINTENANCE**

Plumbing, electrical or mechanical work that may require a building permit but that does not constitute a modification to the Personal Wireless Service Facility. It is work necessary to assure that a wireless Facility and/or telecommunications structure exists and operates: reliably and in a safe manner, presents no threat to persons or property, and remains compliant with the provisions of this chapter and FCC requirements.

**NECESSARY or NECESSITY or NEED**

What is technologically required for the equipment to function as designed by the manufacturer, and that anything less will result in prohibiting the provision of service as intended and described in the narrative of the Application. "Necessary" or "need" does not mean what may be desired, preferred, or the most cost-efficient approach and is not related to an Applicant's specific chosen design standards. Any situation involving a choice between or among alternatives or options is not a need or a necessity.

**NEPA**

The National Environmental Policy Act, 42 U.S.C. §4321 et seq.

**NHPA**

The National Historic Preservation Act, 54 U.S.C. 300101 et seq, and 36 CFR Part 800 et seq.

**NODE, DAS NODE**

A fixed antenna and related equipment installation that operates as part of a system of spatially separated antennas, all of which are connected through a medium through which they work collectively to provide Personal Wireless Services, as opposed to other types of personal wireless facilities, such as Macrocells, which operate independently.

**NOTICE ADDRESS**

An address, which is required to be provided by an Applicant at the time it submits an Application for a Special Permit, at which the Town, Planning Board and/or Zoning Administrator can mail notice, and the mailing of any notice to such address by first-class mail shall constitute sufficient notice to any and all Applicants, co-Applicants, and/or their attorneys, to satisfy any notice requirements under this Chapter, as well as any notice requirements of any other local, state and/or federal law.

**OCCUPATIONAL/CONTROLLED EXPOSURE LIMITS**

The applicable radiofrequency radiation exposure limits set forth within 47 CFR §1.1310(e)(1), Table 1 Section (i), made applicable pursuant to 47 CFR §1.1310(e)(2).

**PERSONAL WIRELESS SERVICE, PERSONAL WIRELESS SERVICES**

Commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services, within the meaning of 47 U.S.C. §332(c)(7)(c)(i), and as defined therein.

## **PERSONAL WIRELESS SERVICE FACILITY, PERSONAL WIRELESS SERVICES FACILITY or PWSF**

A Facility or facilities used for the provision of Personal Wireless Services, within the meaning of 47 U.S.C. §332(c)(7)(c)(ii). It means a specific location at which a structure that is designed or intended to be used to house or accommodate antennas or other transmitting or receiving equipment is located. This includes, without limitation, Towers of all types and all kinds of support structures, including but not limited to buildings, church steeples, silos, water Towers, signs, utility poles, or any other structure that is used or is proposed to be used as a telecommunications structure for the placement, installation and/or attachment of antennas or the functional equivalent of such. It expressly includes all related facilities and equipment such as cabling, radios and other electronic equipment, equipment shelters and enclosures, cabinets, and other structures enabling the Complex to provide Personal Wireless Services.

## **PROBATIVE EVIDENCE**

Evidence which tends to prove facts, and the more a piece of evidence or testimony proves a fact, the greater its probative value, as shall be determined by the Planning Board, as the finder-of-fact in determining whether to grant or deny Applications for Special Use Permits under Article XII of the Town Code.

## **REPAIRS**

The replacement or repair of any components of a wireless Facility or Complex where the replacement is substantially identical to the component or components being replaced, or for any matters that involve the normal repair and Maintenance of a wireless Facility or Complex without the addition, removal, or change of any of the physical or visually discernible components or aspects of a wireless Facility or Complex that will impose new visible intrusions of the Facility or Complex as originally permitted.

## **RF**

Radiofrequency.

## **RF RADIATION**

Radiofrequency radiation, that being electromagnetic radiation which is a combination of electric and magnetic fields that move through space as waves, and which can include both Non-Ionizing radiation and Ionizing radiation.

## **SECTION 106 REVIEW**

A review under Section 106 of the National Historic Preservation Act.

## **SETBACK**

For purposes of special use permit Applications, a Setback shall mean the distance between (a) any portion of a personal wireless Facility and/or Complex, including but not limited to any and all accessory facilities and/or structures, and (b) the exterior line of any parcel of real property or part thereof which is owned by, or leased by, an Applicant seeking a special use permit to construct or install a personal wireless Facility upon such real property or portion thereof. In the event that an Applicant leases only a portion of real property owned by a landlord, the Setback shall be measured from the Facility to the line of that portion of the real property which is



actually leased by the Applicant, as opposed to the exterior lot line of the non-leased portion of the property owned by the landlord.

### **SEQRA**

The New York State Environmental Quality Review Act, 6 NYCRR Part 617 et seq.

### **SHOT CLOCK**

The applicable period which is presumed to be a reasonable period within which the Town is generally required to issue a final decision upon an Application seeking special use permit approval for the installation or substantial modification of a Personal Wireless Services Facility or structure, to comply with Section 47 U.S.C. §332(c)(7)(B)(ii) of the TCA.

### **SHPO**

The New York State Historic Preservation Office

### **SITE DEVELOPER or SITE DEVELOPERS**

Individuals and/or entities engaged in the business of constructing wireless facilities and wireless Facility infrastructure and leasing space and/or capacity upon, or use of, their facilities and/or infrastructure to *Wireless Carriers*. Unlike *Wireless Carriers*, Site Developers generally do not provide Personal Wireless Services to end-use consumers.

### **SMALL CELL**

A fixed cellular base station that typically sends and receives radio signals and which are mounted upon poles or support structures at substantially lower elevations than Macrocell facilities.

### **SMALL WIRELESS FACILITY**

A Personal Wireless Service Facility that meets all of the following criteria

- (a) The Facility does not extend the Height of an existing structure to a total cumulative Height of more than fifty (50) feet, from ground level to the top of the structure and any equipment affixed thereto;
- (b) Each antenna associated with the Deployment is no more than three (3) cubic feet in volume;
- (c) All wireless equipment associated with the Facility, including any pre-existing equipment and any proposed new equipment, cumulatively total no more than twenty-eight (28) cubic feet in volume;
- (d) The Facility is not located on tribal land; and
- (e) The Facility will not result in human exposure to radiofrequency radiation in excess of the applicable FCC safety standards set forth within Table 1 of 47 CFR §1.1310(E)(1).

### **SPECIAL USE PERMIT**

The official document or permit granted by the Planning Board pursuant to which an Applicant is allowed to file for and obtain a building permit to construct and use a Personal Wireless Services Facility, Personal Wireless Service equipment, and/or any associated structures and/or

equipment which are used to house, or be a part of, any such Facility or Complex, or to be used to provide Personal Wireless Services.

**STATE**

The State of New York.

**STEALTH or STEALTH TECHNOLOGY**

A design or treatment that minimizes adverse aesthetic and visual impacts on the land, property, buildings, and other facilities adjacent to, surrounding, and generally in the same area as the requested location of such Personal Wireless Service Facilities. This shall mean building the least visually and physically intrusive Facility and Complex under the facts and circumstances.

**STRUCTURE**

A pole, Tower, base station, or other building, physical support of any form used for, or to be used for, the provision of Personal Wireless Service.

**SUBSTANTIAL EVIDENCE**

Substantial Evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It means less than a preponderance but more than a scintilla of evidence.

**TCA**

The Telecommunications Act of 1996, 47 U.S.C. §332(c)

**TOLLING or TOLLED**

The pausing of the running of the time period permitted under the applicable Shot Clock for the respective Type of Application for a Personal Wireless Services Facility. Where a Shot Clock is tolled because an Application has been deemed incomplete and timely notice of incompleteness was mailed to the Applicant, the submission of additional materials by the Applicant to complete the Application will end the tolling, thus causing the Shot Clock period to *resume* running, as opposed to causing the Shot Clock to begin running *anew*.

**TOWER, TELECOMMUNICATIONS TOWER**

Any Structure designed primarily to support one or more antennas and/or equipment used or designed for receiving and/or transmitting a wireless signal.

**TOWN**

The Incorporated Town of Fishkill.

**UNDERTAKING**

Any Application for a special use permit seeking Board approval for the installation of a Personal Wireless Services Facility licensed under the authority of the FCC shall constitute an

undertaking within the meaning of NEPA, in accord with 42 CFR §137.289 and 36 CFR §800.16.

### **WIRELESS CARRIERS or CARRIER**

Companies that provide Personal Wireless Services to end-use consumers.

### **ZONING BOARD OF APPEALS**

The Zoning Board of Appeals of the Town of Fishkill, established pursuant to Article XX §150-178.

#### §150-126(C) Application Types

There shall be four (4) specific types of Applications for special use permits under this section, which

shall include Type I, Type II, Type III, and Type IV Applications. It shall be the obligation of any Applicant to explicitly and correctly identify which type of Application they are filing.

#### 1. Type I Applications Colocations of Small Wireless Facilities

Type I Applications shall be limited to Applications wherein an Applicant seeks to Co-Locate a new Small Wireless Facility, as defined in this chapter, by installing new Personal Wireless Service equipment upon an already existing small Personal Wireless Services Facility Structure.

If the completed Facility would still meet the physical limits and requirements to meet the definition of a Small Wireless Facility after the installation of the new equipment, then the Application to install such new equipment is a Type I Application.

Type I Applications for co-location of a Small Wireless Facility in Planned Industry (PI), General Business (GB), Planned Shopping Center (PSC), Planned Business (PB), and Restricted Business (RB) Districts shall be a permitted use with a building permit.

Type I Applications for co-location of a Small Wireless Facility in any residentially-zoned district shall require an Applicant to obtain a Special Use Permit from the Planning Board.

#### 2. Type II Applications Co-locations which do not meet the definition of a Small Wireless Facility.

Type II Applications shall be limited to Applications wherein an Applicant is seeking to Co-Locate new Personal Wireless Service equipment by installing such new wireless equipment upon an already existing Personal Wireless Services Facility Structure, Tower, or Complex, which does not meet the definition of a Small Wireless Facility or which will not meet the definition of a Small Wireless Facility if and when the proposed new Personal Wireless Service equipment is installed upon the existing Facility and/or Structure. Type II Applications for co-location of Personal Wireless Service Facility equipment in Planned Industry (PI), General

Business (GB), Planned Shopping Center (PSC), Planned Business (PB), and Restricted Business (RB) Districts shall either be a permitted use with a building permit, or a Special Use Permit use, as set forth below.

The co-location of Personal Wireless Service Facility equipment on an approved PWSF Tower or PWSF Structure on property within PI, GB, PSC, PB, and RB Districts is a permitted use subject to the issuance of a building permit, provided that the Zoning Administrator determines that the proposed co-location will not:

- (a) Increase the approved Height of the supporting Structure by more than 15%;
- (b) Cause the original approved number of antennas to be exceeded by more than 50%;
- (c) Increase the original approved square footage of accessory buildings by more than 200 square feet;
- (d) Add new or additional microwave antenna dishes;
- (e) expand the footprint of said support Structure; or
- (f) cause adverse impacts on the existing support Structure or the surrounding area.

If the Zoning Administrator cannot make the findings above, Special Use Permit and site plan approvals will be required in accord with Articles X and XI of this chapter, and the Building Inspector shall refer the Application to the Planning Board, where it will be subject to the terms and conditions specified in the requirements and standards in this section as part of the special use permit and site plan review process.

### 3. Type III Applications          New Small Wireless Facilities

Type III Applications shall be limited to Applications seeking to install and/or construct a new Small Wireless Facility as defined in Section §150-126(B) hereinabove.

Type III Applications shall require Applicants to obtain a special use permit from the Planning Board.

### 4. Type IV Applications          New Towers and All Other Wireless Facilities

Type IV Applications shall include Applications for the installation of a new Telecommunications Tower, Personal Wireless Service Facility, Complex, Structure, or equipment, which does not meet the criteria for Type I, Type II, or Type III Applications.

Type IV Applications shall require Applicants to obtain a special use permit and site plan Approvals from the Planning Board.

### §150-126(D) Shot Clock Periods

To comply with the requirements of Section 47 U.S.C. 332(c)(7)(B)(ii) of the TCA, the







tenders an additional submission to the Zoning Administrator to remedy the issues the Zoning Administrator identified in the Notice of Incomplete Application, which he had mailed to the Applicant.

The submission of any responsive materials by the Applicant shall automatically cause the shot clock period to resume running.

If upon receipt of any additional materials from the Applicant, the Zoning Administrator determines that the Application is still incomplete and/or defective, then the Zoning Administrator shall, once again, mail a Notice of Incompleteness within **ten (10) days** of the Applicant having filed its supplemental or corrected materials to the Town and the Shot Clock shall once again be Tolloed, and the same procedure provided for hereinabove shall be repeated.

#### §150-126(E) Shot Clock Tolls, Extensions & Reasonable Delay Periods

Consistent with the letter and intent of Section 47 U.S.C. §332(c)(7)(B)(ii) of the TCA, each of the Shot Clock periods set forth within Section §150-126.4 hereinabove shall generally be presumed to be sufficient periods within which the Planning Board shall render decisions upon special use permit Applications.

Notwithstanding same, the applicable Shot Clock periods may be Tolloed, extended by mutual agreement between any Applicant and/or its representative and the Planning Board, and the Planning Board shall not be required to render its determination within the Shot Clock period presumed to be reasonable for each type of Application, where the processing of such Application is reasonably delayed, as described hereinbelow.

#### 1. Tolling of the Applicable Shot Clock Due to Incompleteness and/or Applicant Error

As provided for within Section §150-126(D) hereinabove, in the event that the Zoning Administrator deems an Application incomplete, the Zoning Administrator shall send a Notice of Incompleteness to the Applicant to notify the Applicant that its Application is incomplete and/or contains material errors, and shall reasonably identify the missing information and/or documents and/or the error(s) in the Application.

If the Zoning Administrator mails a Notice of Incompleteness as described hereinabove, the applicable Shot Clock shall automatically be Tolloed, meaning that the applicable Shot Clock period within which the Planning Board is required to render a final decision upon the Application shall immediately cease running, and shall not resume running, unless and until the Town receives a responsive submission from the Applicant.

If and when the Applicant thereafter submits additional information in an effort to complete its Application, or cure any identified defect(s), then the Shot Clock shall automatically *resume* running, but shall not be deemed to start running *anew*.



The applicable Shot Clock period shall, once again, be Tolloed if the Zoning Administrator thereafter provides a second notice that the Application is still incomplete or defective, despite any additional submissions which have been received by the Town, from the Applicant, up to that point.

2. Shot Clock Extension by Mutual Agreement

The Planning Board, in its sole discretion, shall be free to extend any applicable Shot Clock period by mutual agreement with any respective Applicant. This discretion on the part of the Board shall include the Board's authority to request, at any time, and for any period of time the Planning Board may deem reasonable or appropriate under the circumstances, consent from a respective Applicant, to extend the applicable Shot Clock period, to enable the Board, the Applicant, or any relevant third party, to complete any type of Undertaking or task related to the review, analysis, processing, and determination of the particular Application, which is then pending before the Board, to the extent that any such Undertaking, task, or review is consistent with, or reasonably related to, compliance with any federal, state, or local law, and/or the requirements of any provision of the Town Code, including but not limited to this Article.

In response to any request by the Board, the Applicant, by its principal, agent, attorney, site acquisition agent, or other authorized representative can consent to any extension of any applicable Shot Clock, by affirmatively indicating its consent either in writing or by affirmatively indicating its consent on the record at any public hearing or public meeting. The Planning Board shall be permitted to reasonably rely upon a representative of the Applicant indicating that they are authorized to grant such consent on behalf of the respective Applicant, on whose behalf they have been addressing the Board within the hearing process.

3. Reasonable Delay Extensions of Shot Clock Periods

The Town recognizes that there may be situations wherein, due to circumstances beyond the control of the Town and/or the Planning Board, the review and issuance of a final decision upon a special use permit Application for a personal wireless Facility cannot reasonably be completed within the Application Shot Clock periods delineated within Section §150-126(D) hereinabove.

If, despite the exercise of due diligence by the Town and the Planning Board, the determination regarding a specific Application cannot reasonably be completed within the applicable Shot Clock period, the Board shall be permitted to continue and complete its review, and issue its determination at a date beyond the expiration of the applicable period, if the delay of such final decision is due to circumstances including, but not limited to, those enumerated hereinbelow, each of which shall serve as a reasonable basis for a reasonable delay of the applicable Shot Clock period.

Reasonable delays which may constitute proper grounds for extending the presumed sufficient

periods for rendering determinations under the applicable Shot Clock periods may include, but are not necessarily limited to, those set forth within Sections §150(O), (P), (Q), and (R) herein below.

#### §150-126(F) Application Requirements

Applications for special use permits under this section shall be made to the Zoning Administrator, in accordance with Article XI of this Chapter who shall initially determine whether or not the Application is complete and/or free of defects upon receipt of the same.

If the Zoning Administrator determines that the Application is defective or incomplete, they shall promptly mail a **Notice of Incompleteness** to the Applicant, in accord with §150-126(D) to Toll the applicable Shot Clock, to ensure that the Town and the Planning Board are afforded sufficient time to review and determine each respective Application.

Each Application shall include the following materials, the absence of any one of which listed hereinbelow, shall render the respective Application incomplete:

1. Special Use Permit and Site Development Plan Applications

Completed Applications for a Special Use Permit and site development plan that shall identify all Applicants, co-Applicants, Site Developer(s), and Wireless Carrier(s) on whose behalf the Application is being submitted, as well as the property owner of the proposed site.

2. Filing Fees

The appropriate filing fees then being charged by the Town for Applications for special use permit Applications and other related Applications.

3. A "Notice Address"

A "Notice Address," that being a specific address to which the Town, Planning Board, and/or Zoning Administrator may mail any type of notice, and that the mailing of same to such address shall constitute sufficient notice to any Applicant, co-Applicant, and/or their attorney, to comply with any requirement under this section as well as any local, state and/or federal law

4. Proof of Authorization for Site Occupancy

Where an Applicant is not the owner of the real property upon which it seeks to install its equipment or Facility, they shall submit proof of authorization to occupy the site at issue. If the Applicant is leasing all or a portion of real property upon which it intends to install its new Facility or equipment, then the Applicant shall provide a written copy of its lease

with the owner of such property. The Applicant may redact any financial terms contained within the lease, but it shall not redact any portion of the lease which details the amount of area leased nor the specific portion of the real property to which the Applicant has obtained the right to occupy, access, or preclude others from entering.

Where an Applicant is seeking to Co-Locate new equipment into an existing Facility, it shall provide a copy of its written co-location agreement with the owner of such pre-existing Facility, from which it may redact any financial terms.

5. A Drawn-To-Scale Depiction

The Applicant shall submit drawn-to-scale depictions of its proposed wireless support Structure and all associated equipment to be mounted thereon, or to be installed as part of such Facility, which shall clearly and concisely depict all equipment and the measurements of same, to enable the Zoning Administrator to ascertain whether the proposed Facility would qualify as a Small Wireless Facility as defined under this Article.

If the Applicant claims that its proposed installation qualifies as a Small Wireless Facility within this Article, the drawn-to-scale depiction shall include complete calculations for all of the antennas and equipment of which the Facility will be comprised, depicting that, when completed, the installation and equipment will meet the physical size limitations which enable the Facility to qualify as a Small Wireless Facility.

6. Site Development Plan

The Applicant shall submit a site development plan in accordance with Article X of this Chapter. The site development plan shall also show all existing and proposed Structures and improvements, including antennas, roads, buildings, guy wires and anchors, parking, and landscaping, and shall include grading plans for new Facilities and roads. Any methods used to conceal the modification of the existing Facility shall be indicated on the site plan.

7. Engineer's Report

To the extent that an Application proposes the co-location of new equipment onto an existing Tower or Facility, the Applicant shall provide an engineer's report certifying that the proposed shared use will not diminish the structural integrity and safety of the existing Structure and explaining what modifications, if any, will be required in order to certify to the above.

8. Environmental Assessment Form

A completed environmental assessment form (EAF) and a completed visual EAF addendum.

9. Visual Impact Analysis

A completed visual impact analysis, which, at a minimum, shall include the following:

(a) Small Wireless Facilities

For Applications seeking approval for the installation of a Small Wireless Facility, the Applicant shall provide a visual impact analysis which shall include photographic images taken from the perspectives of the properties situated in closest proximity to the location being proposed for the siting of the Facility, as well as those properties which would reasonably be expected to sustain the most significant adverse aesthetic impacts due to such factors as their close proximity to the site, their elevation relative to the site, the existence or absence of a "clear line of sight" between the Tower location and their location.

(b) Telecommunications Towers and Personal Wireless Service Facilities which do not meet the definition of a Small Wireless Facility

For Applications seeking approval for the installation of a Telecommunications Tower or a Personal Wireless Service Facility that does not meet the definition of a Small Wireless Facility, the Applicant shall provide:

- (i) A "Zone of Visibility Map" to determine locations from where the new Facility will be seen.
- (ii) A visual impact analysis which shall include photographic images taken from the perspectives of the properties situated in closest proximity to the location being proposed for the siting of the Facility, as well as those properties which would reasonably be expected to sustain the most significant adverse aesthetic impacts due to such factors as their close proximity to the site, their elevation relative to the site, the existence or absence of a "clear line of sight" between the Tower location and their location.

The photographic images shall depict the Height at which the proposed Facility shall stand when completed, including all portions and proposed attachments to the Facility, including, but not limited to, the main support Structure, all antennas, transmitters, whip antennas, lightning rods, t-bars, crossbars, and cantilever attachments which shall, in whole or in part, be affixed to it, any and all surrounding equipment compound(s), fencing, cellular equipment cabinets, transformers, transformer vaults and/or cabinets, sector distribution boxes, ice bridges, backup generators, including but not limited to equipment boxes, switch boxes, backup generators, ice bridges, etc., to the extent that any of such compound

and/or equipment will be visible from properties other than the property upon which the proposed Tower and compound are to be installed.

The visual impact analysis shall include an assessment of alternative designs and color schemes, as well as an assessment of the visual impact of the proposed Facility, taking into consideration any supporting Structure which is to be constructed, as well as its base, guy wires, accessory Structures, buildings, and overhead utility lines from abutting properties and streets.

10. Alternative Site Analysis

A completed alternative site analysis of all potential less intrusive alternative sites which the Applicant has considered, setting forth their respective locations, elevations, and suitability or unsuitability for remedying whatever specific wireless coverage needs the respective Applicant or a specific Wireless Carrier is seeking to remedy by the installation of the new Facility which is the subject of the respective Application for a special use permit.

If, and to the extent that an Applicant claims that a particular alternative site is unavailable, in that the owner of an alternative site is unwilling or unable to accommodate a wireless Facility upon such potential alternative site, the Applicant shall provide Probative Evidence of such unavailability, whether in the form of communications or such other form of evidence that reasonably establishes same.

The alternative site analysis shall contain:

- (a) an inventory of all existing tall Structures and existing or approved communications Towers within a two-mile radius of the proposed site.
- (b) a map showing the exact location of each site inventoried, including latitude and longitude (degrees, minutes, seconds), ground elevation above sea level, the Height of the Structure and/or Tower, and accessory buildings on the site of the inventoried location.
- (c) an outline of opportunities for shared use of an existing wireless Facility as opposed to the installation of an entirely new Facility.
- (d) a demonstration of good-faith efforts to secure shared use from the owner of each potential existing tall Structure and existing or approved communications Tower, as well as documentation of the physical, technical, and/or financial reasons why shared usage is not practical in each case.

11. FCC Compliance Report

An FCC Compliance Report, prepared by a licensed engineer, and certified under penalties of perjury, that the content thereof is true and accurate, wherein the licensed engineer shall certify that the proposed Facility will be FCC compliant as of the time of its installation, meaning that the Facility will not expose members of the general public to radiation levels that exceed the permissible radiation limits which the FCC has set.

If it is anticipated that more than one carrier and/or user is to install transmitters into the Facility that the FCC Compliance Report shall take into account anticipated exposure from all users on the Facility and shall indicate whether or not the combined exposure levels will, or will not exceed the permissible General Population Exposure Limits, or alternatively, the occupational Exposure Limits, where applicable. Such FCC Compliance Report shall provide the calculation or calculations with which the engineer determined the levels of RF radiation and/or emissions to which the Facility will expose members of the general public.

On the cover page of the report, the report shall explicitly specify: (a) Whether the Applicant and their engineer are claiming that the applicable FCC limits based upon which they are claiming FCC compliance are the *General Population Exposure Limits* or the *Occupational Exposure Limits*. If the Applicant and/or their engineer are asserting that the Occupational Exposure Limits apply to the proposed installation, they shall detail a factual basis as to why they claim that the higher set of limits is applicable, (b) The exact minimum distance factor, measured in feet, which the Applicant's engineer used to calculate the level of radiation emissions to which the proposed Facility will expose members of the general public. The minimum distance factor is the closest distance (i.e., the minimum distance) to which a member of the general public shall be able to gain access to the transmitting antennas mounted upon, or which shall be a part of, the proposed Facility.

12. FCC License

A copy of any applicable Federal Communications Commission license possessed by any carrier named as an Applicant, co-Applicant, or whose equipment is proposed for installation as of the time the Application is being filed with the Town.

13. Effective Prohibition Claims

The Town is aware that Applicants seeking approvals for the installation of new wireless Facilities often assert that federal law, and more specifically the TCA, prohibits the local government from denying their respective Applications.

In doing so, they assert that their desired Facility is "Necessary" to remedy one or more significant gaps in a carrier's Personal Wireless Service, and they proffer computer-generated propagation maps to establish the existence of such purported gaps.

The Town is additionally aware that, in August 2020, driven by a concern that propagation maps created and submitted to the FCC by Wireless Carriers were inaccurate, the FCC caused its staff to perform actual drive tests, wherein the FCC staff performed 24,649 tests, driving nearly ten thousand (10,000) miles through nine (9) states, with an additional 5,916 stationary tests conducted at 42 locations situated in nine (9) states.

At the conclusion of such testing, the FCC Staff determined that the accuracy of the propagation maps submitted to the FCC by the Wireless Carriers had ranged from as little as 16.2% accuracy to a maximum of 64.3% accuracy.

As a result, the FCC Staff recommended that the FCC no longer accept propagation maps from Wireless Carriers without supporting drive test data to establish their accuracy. A copy of the FCC Staff's 66-page report is made a part of this Chapter as Appendix 1. The Town considers it of critical import that Applicants provide truthful, accurate, complete, and sufficiently reliable data to enable the Planning Board to render determinations upon Applications for new wireless Facilities consistent with both the requirements of this Article and the statutory requirements of the TCA.

Consistent with same, if, at the time of filing an Application under this Article, an Applicant intends to assert before the Planning Board or the Town that: (a) an identified Wireless Carrier suffers from a significant gap in its Personal Wireless Services within the Town, (b) that the Applicant's proposed installation is the least intrusive means of remedying such gap in services, and/or (c) that under the circumstances pertaining to the Application, a denial of the Application by the Planning Board would constitute an "Effective Prohibition" under Section 47 U.S.C. §332 the TCA, then, at the time of filing such Application, the Applicant shall be required to file a written statement which shall be entitled:

**"Notice of Effective Prohibition Conditions"**

If an Applicant files a Notice of Effective Prohibition Conditions, then the Applicant shall be required to submit Probative Evidence to enable the Planning Board to reasonably determine: (a) whether or not the conditions alleged by the respective Applicant exist, (b) whether there exists a significant gap or gaps in an identified Wireless Carrier's Personal Wireless Services within the Town, (c) the geographic locations of any such gaps, and (d) the geographic boundaries of such gaps, to enable the Planning Board to determine whether granting the respective Application would be consistent with the requirements of this Article and the legislative intent behind same, and whether or not federal law would require the Planning Board to grant the respective Application, even if it would otherwise violate the Town's zoning Code, including, but not limited to, this Article.

The additional materials which the Applicant shall then be required to provide shall include the following:

(a) Drive Test Data and Maps

If, and to the extent that an Applicant claims that a specific Wireless Carrier suffers from a significant gap in its Personal Wireless Services within the Town, the Applicant shall conduct or cause to be conducted a Drive Test within the specific geographic areas within which the Applicant is claiming such gap or gaps exist, for each frequency at which the carrier provides Personal Wireless Services. The Applicant shall provide the Town and

the Planning Board with the actual drive test data recorded during such drive test, in a simple format which shall include, in table format:

- (i) the date and time for the test or test,
- (ii) the location, in longitude and latitude of each point at which signal strength was recorded and
- (iii) each signal strength recorded, measured in DBM, for each frequency.

Such data is to be provided in a separate table for each frequency at which the respective carrier provides Personal Wireless Services to any of its end-use customers.

- (iv) the Applicant shall also submit Drive Test Maps, depicting the actual signal strengths recorded during the actual drive test, for each frequency at which the carrier provides Personal Wireless Services to its end-use customers.

If an Applicant claims that it needs a “minimum” signal strength (measured in DBM) to remedy its gap or gaps in service, then for each frequency, the Applicant shall provide three (3) signal strength coverage maps reflecting actual signal strengths in three (3) DBM bins, the first being at the alleged minimum signal strength, and two (2) additional three (3) DBM bin maps depicting signal strengths immediately below the alleged minimum signal strength claimed to be required.

By way of example, if the Applicant claims that it needs a minimum signal strength of – 95 DBM to remedy its alleged gap in service, then the Applicant shall provide maps depicting the geographic area where the gap is alleged to exist, showing the carrier’s coverage at – 95 to -98 DBM, -99 to -101 DBM and -102 to -104 DBM, for each frequency at which the carrier provides Personal Wireless Services to its end-use customers.

(b) Denial of Service and/or Dropped Call Records

If and to the extent that an Applicant claims that a specific Wireless Carrier suffers from a capacity deficiency, or a gap in service that renders the carrier incapable of providing Adequate Coverage of its Personal Wireless Services within the Town, then the Applicant shall provide dropped call records and denial of service records evidencing the number and percentage of calls within which the carrier’s customers were unable to initiate, maintain and conclude the use of the carrier’s Personal Wireless Services without actual loss of service, or interruption of service.

14. Estimate for Cost of Removal of Facility



A written estimate for the cost of the decommissioning, removal of the Facility, including all equipment that comprises any portion or part of the Facility, compound, and/or Complex, as well as any Accessory Facility or Structure, including the cost of the full restoration and reclamation of the site, to the extent practicable, to its condition before development in accord with the decommissioning and reclamation plan required herein

15. Property Owner Consent & Liability Acknowledgement

A signed written consent from each owner of the subject real property upon which the respective Applicant is seeking installation of its proposed Personal Wireless Service Facility, wherein the owner or owners, both authorize the Applicant to file and pursue its special use permit Application and acknowledge the potential landowner's responsibility, under section §150-126(K) for engineering, legal and other consulting fees incurred by the Town.

§150-126(G) Design Standards

The following design standards shall apply to all Applications for the siting, construction, Maintenance, use, erection, movement, reconstruction, expansion, material change, or structural alteration of a Personal Wireless Service Facility.

1. Small Wireless Facilities

Small Wireless Facilities (SWF) shall be sited to inflict the minimum adverse impacts upon individual residential properties, and specifically, to minimize, to the greatest extent reasonably feasible, adverse aesthetic impacts upon residential homes or reductions in the property values of same.

SWFs attached to pre-existing wooden and non-wooden poles shall conform to the following criteria:

- (a) Proposed antenna and related equipment shall meet:
  - (i) design standards which the Town may maintain and update as needed, provided that the Town makes its designed standards publicly available for review by any potential Application seeking approval for the installation of an SWF within the Town, and
  - (ii) National Electric Safety Code (NESC) standards; and
  - (iii) National Electrical Code (NEC) standards.
- (b) Antennas and antenna equipment, including but not limited to radios, cables, associated shrouding, disconnect boxes, meters, microwaves, and conduit, which are mounted on poles, shall be mounted as close to the pole as technically feasible. They shall not be illuminated except as required by municipal, federal, or state authority, provided this shall not preclude Deployment on a new or replacement street light.

- (c) Antennas and associated equipment enclosures must be camouflaged to appear as an integral part of the pole or be mounted as close to the pole as feasible. Conduits and cabinets shall cover all cables and wiring to the extent that it is technically feasible if allowed by the pole owner. The number of conduits shall be minimized to the extent technically feasible. To the extent technically feasible, antennas, equipment enclosures, and all ancillary equipment, boxes, and conduits shall match the approximate material and design of the surface of the pole or existing equipment on which they are attached.

SWFs attached to Replacement Poles and New Poles shall conform to the criteria set forth herein above for SWF's attached to pre-existing wooden and non-wooden poles, but shall additionally conform to the following criteria:

- (a) The Town prefers that wireless providers and Site Developers install SWF's on existing or replacement poles instead of installing new poles, and accordingly, to obtain approval for the installation of a new pole, the provider shall be required to document that installation on an existing or replacement pole is not technically feasible.
- (b) To the extent technically feasible, all replacement poles and new poles and pole-mounted antennas and equipment shall substantially conform to the material and design of the pole being replaced, or in the case of a new pole, it shall conform to the nearest adjacent pole or poles.
- (c) The Height of Replacement Poles and New Poles shall conform with the Height limitations applicable to the district within which the Applicant seeks to install their proposed SWF unless the Applicant obtains a variance to obtain relief from any such limitation(s).

2. Telecommunications Towers and Personal Wireless Service Facilities which do not meet the definition of a Small Wireless Facility

The design of a proposed new Telecommunications Tower or Personal Wireless Service Facility shall comply with the following:

- (a) The choice of design for installing a new Personal Wireless Service Facility or the substantial modification of an existing Personal Wireless Service Facility shall be chosen to minimize the potential adverse impacts that the new or expanded Facility may, or is likely to, inflict upon nearby properties.
- (b) Any new Telecommunications Tower shall be designed to accommodate future shared use by other communications providers.
- (c) Unless specifically required by other regulations, a Telecommunications Tower shall have a finish (either painted or unpainted) that minimizes its degree of visual impact.

- (d) Notwithstanding the Height restrictions listed elsewhere in this chapter, the maximum Height of any new Telecommunications Tower shall not exceed that which shall permit operation without artificial lighting of any kind or nature, in accordance with municipal, state, and/or federal law and/or regulation.
- (e) Accessory Structures
  - (i) Accessory Structures shall maximize the use of building materials, colors, and textures designed to blend with the natural surroundings. The use of camouflage communications Towers may be required by the Planning Board to blend the communications Tower and/or its Accessory Structures further into the natural surroundings. "Camouflage" is defined as the use of materials incorporated into the communications Tower design that give communications Towers the appearance of tree branches and bark coatings, church steeples and crosses, sign Structures, lighting Structures, or other similar Structures.
  - (ii) Accessory Structures shall be designed to be architecturally similar and compatible with each other and shall be no more than 12 feet high. The buildings shall be used only for housing equipment related to the particular site. Whenever possible, the buildings shall be joined or clustered so as to appear as one building.
  - (iii) No portion of any Telecommunications Tower or Accessory Structure shall be used for a sign or other advertising purpose, including but not limited to the company name, phone numbers, banners, and streamers, except the following. A sign of no greater than two square feet indicating the name of the Facility owner(s) and a twenty-four-hour emergency telephone shall be posted adjacent to any entry gate. In addition, "no trespassing" or other warning signs may be posted on the fence. All signs shall conform to the sign requirements of the Town.
- (f) Towers must be placed to minimize visual impacts. Applicants shall place Towers on the side slope of the terrain so that, as much as possible, the top of the Tower does not protrude over the ridgeline, as seen from public ways.
- (g) Existing vegetation. Existing on-site vegetation shall be preserved to the maximum extent possible. No cutting of trees shall take place on a site connected with an Application made under this article prior to the approval of the special use permit use.

- (h) Screening.
  - (i) Deciduous or evergreen tree plantings may be required to screen portions of the Telecommunications Tower and Accessory Structures from nearby residential property as well as from public sites known to include important views or vistas.
  - (ii) Where a site adjoins a residential property or public property, including streets, screening suitable in type, size and quantity shall be required by the Planning Board.
  - (iii) The Applicant shall demonstrate to the approving board that adequate measures have been taken to screen and abate site noises such as heating and ventilating units, air conditioners, and emergency power generators. Telecommunications Towers shall comply with all applicable sections of this chapter as it pertains to noise control and abatement.
- (i) Lighting. Telecommunications Towers shall not be lighted except where FAA/FCC required lighting of the Telecommunications Towers necessary. No exterior lighting shall spill from the site in an unnecessary manner.
- (j) Access.
  - (a) Adequate emergency and service access shall be provided and maintained. Maximum use of existing roads, public or private, shall be made. Road construction shall, at all times, minimize ground disturbance and vegetation cutting to the top of fill, the top of cuts, or no more than 10 feet beyond the edge of any pavement. Road grades shall closely follow natural contours to assure minimal visual disturbance and reduce soil erosion potential.
  - (b) To the extent feasible, all network interconnections to and from the Telecommunications site and all power to the site shall be installed underground. At the initial construction of the access road to the site, sufficient conduit shall be laid to accommodate the maximum possible number of Telecommunications providers that might use the Facility.
- (k) Parking. Parking shall be provided to assure adequate emergency and service access. The Planning Board shall determine the number of required spaces, but in no case shall the number of parking spaces be less than two spaces.
- (l) Fencing. The Telecommunications Tower and any Accessory Structures shall be adequately enclosed by a fence, the design of which shall be approved by the

Planning Board. The Planning Board may waive this requirement if the Applicant demonstrates that such measures are unnecessary to ensure the security of the Facility.

§150-126(H) Planning Board Initial Review

1. Initial Review

Upon their acceptance of an Application that appears to be complete, the Building Inspector shall transmit the Application to the Planning Board for initial review.

The Planning Board shall then conduct an initial review to consider whether or not to establish itself as Lead Agency pursuant to SEQRA and/or NEPA and whether or not a use or area variance is required for the proposed Application such that a referral for an Application to the ZBA will be required to be made after the Planning Board has declared itself to serve as Lead Agency and during the process of the Planning Board considering a SEQRA determination of environmental significance. That consideration of granting any required variances by the ZBA is done concurrently with the Planning Board's review and consideration of Special Use Permit and site plan approval.

The Planning Board shall then conduct a public hearing upon each Application, and render its determinations in accord with Sections §150-126(I) and §150-126(J) herein below, and shall ultimately determine whether or not to grant each Applicant a Special Use Permit and/or site plan approval.

2. Intermunicipal Notification for New Towers.

To keep neighboring municipalities informed, and to facilitate consideration of an existing tall Structure or existing Telecommunications Towers in a neighboring municipality for shared use, and to assist in the continued development of the county's emergency service communications system, the Planning Board shall require that an Applicant who proposes a new Telecommunications Tower shall notify, in writing, the legislative body of each municipality that borders the Town of Fishkill and the Director of the Office of Emergency Management of Dutchess County. 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 capacity for future use.

§150-126(I) Hearings and Public Notice

1. Public Hearings

The Planning Board shall conduct a public hearing upon each Special Use Permit Application, consistent with the procedures in Code chapter 114, except the Planning Board shall have authority to schedule such additional or more frequent public hearings as may be necessary to comply with the applicable Shot Clocks imposed upon the Town and the Planning Board under the requirements of the TCA.

2. Required Public Notices

The Planning Board shall ensure that both the public and property owners whose properties might be adversely impacted by the installation of a wireless Facility receive Notice of any public hearing pertaining to same and shall ensure that they are afforded an opportunity to be heard concerning same.

Before the date scheduled for the public hearing, the Planning Board shall cause to be published in the official newspaper, a Notice of Public Hearing for New Wireless Facility, at least once per week, for at least two successive weeks, a reasonable description of the Application, and the date, time and place for the public hearing, in accordance with Code chapter 114.

The reasonable cost of publishing such Notice shall be incorporated into the Application fee for a Special Use Permit under this section and collected by the Town at the time an Application for a Special Use Permit is filed. If, for whatever reason, the Notice does not get published and the Town does not ultimately incur the expense of same, that portion of the Application fee shall be refunded to the Applicant upon the Applicant's request for same.

In accordance with Code chapter 114, the Planning Board shall mail a written Notice of Public Hearing to property owners, which shall provide the Applicant's name, a brief description of the personal wireless Facility for which the Applicant seeks a Special Use Permit, and the date, time, and location of the hearing.

The face of each envelope containing the notices of the public hearing shall state, in all bold typeface, in all capital letters, in a font size no smaller than 12 point, the words:

**“NOTICE OF PUBLIC HEARING FOR NEW WIRELESS FACILITY”**

An Affidavit shall be prepared by an employee or officer of the Town, in accordance with code chapter 114, which shall include an actual copy of the Notice which was mailed.

For Type I and Type III Applications, notices of public hearing shall be mailed to all property owners whose real properties are situated within 300 feet of any property line of the real property upon which the Applicant seeks to install its new wireless Facility. If the site for the proposed Facility is situated on, or adjacent to, a residential street containing twelve (12) houses or less, the Planning Board shall additionally mail a copy of such

notices to all homeowners on that street, even if their home is situated more than 300 feet from any property line of the property upon which the Applicant proposes to install its Facility.

For Type II and Type IV Applications, the Applicant shall mail such notices of public hearing to all property owners whose real properties are situated within 1,500 feet of any property line of the real property upon which the Applicant seeks to install its new wireless Facility.

The Applicant shall additionally post a notice upon the proposed site advising the public of the public hearing, in accord with Section §114-2(C) of the Code.

§150-126(J) Factual Determinations to be Rendered by the Planning Board

1. Evidentiary Standards

In determining Special Use Permit Applications for Personal Wireless Service Facilities, the Planning Board shall have sole discretion to determine what Probative Evidence it shall require each Applicant to produce in support of its Application to enable the Board to make each of the factual determinations enumerated below.

By way of common examples of the types of evidence which the Board may require an Applicant to produce, are the following:

- (a) where an Applicant is not the owner of the real property upon which it proposes to install a new wireless Facility, the Board can require the Applicant to provide a copy of the Applicant's lease with the property owner (including any schedules, property descriptions, Appendices or other attachments), from which the Applicant may censor or delete any financial terms which would be irrelevant to the factual issues which the Board is required to determine;
- (b) where the Board deems it appropriate, the Board can require the Applicant to perform what is commonly known as a "balloon test" and to require the Applicant to publish reasonably sufficient advance public notice of same, to enable the Board, property owners, and the community, an opportunity to assess the actual adverse aesthetic impact which the proposed Facility is likely to inflict upon the nearby properties and surrounding community;
- (c) where the Applicant asserts a claim that a proposed Facility is necessary to remedy one or more existing significant gaps in an identified Wireless Carrier's Personal Wireless Services, the Board may require the Applicant to provide Drive-Test generated coverage maps, as opposed to computer-generated coverage maps, for each frequency at which the carrier provides Personal Wireless Services, to show signal strengths in bins of three (3) DBM each, to enable the Board to assess the existence of such significant gaps accurately, and/or whether the carrier possesses Adequate Coverage within the geographic area which is the subject of the respective Application.

- (d) where the Applicant asserts that a potential less intrusive alternative location for a proposed Facility is unavailable because the owner of the potential alternative site is incapable or unwilling to lease space upon such site to the Applicant, the Board may require the Applicant to provide proof of such unwillingness in the form of communications to and from such property owner, and/or a sworn affidavit wherein a representative of the Applicant affirms, under penalty of perjury, that they attempted to negotiate a lease with the property owner, what the material terms of any such offer to the property owner were, when the offer was tendered, and how, if at all, the property owner responded to such offer.

The Board shall have sole discretion to determine, among other things, the relevance of any evidence presented, the probative value of any evidence presented, the credibility of any testimony provided, whether expert or otherwise, and the adequacy of any evidence presented.

The Board shall not be required to accept, at face value, any unsupported factual claims asserted by an Applicant but may require the production of evidence reasonably necessary to enable the Board to determine the accuracy of any factual allegations asserted by each respective Applicant.

Conclusory factual assertions by an Applicant shall not be accepted as evidence by the Board.

## 2. Factual Determinations

To decide Applications for special use permits under this section, the Planning Board shall render factual determinations, which shall include two (2) specific types of factual determinations, as applicable.

First, the Board shall render local zoning determinations according to Section (a) hereinbelow.

Then, if, and only if, an Applicant asserts claims that: (a) its proposed wireless Facility or installation *is necessary to remedy a significant gap in Personal Wireless Services for an explicitly identified Wireless Carrier*, and (b) that its proposed installation *is the least intrusive means of remedying a specifically identified significant gap or gaps*, the Board shall *additionally* render TCA determinations, in accord with Section (b) hereinbelow.

The Board shall separately record each factual determination it makes in a written decision and shall reference, or make note of, the evidence based upon which it rendered each of its factual determinations.

Each factual determination made by the Board shall be based upon Substantial Evidence.



For purposes of this provision, "Substantial Evidence" shall mean such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It means less than a preponderance but more than a scintilla of evidence.

Evidence which the Board may consider shall include any evidence submitted in support of an Application, and any evidence submitted by anyone opposing a respective Application, whether such evidence is in written or photographic form, or whether it is in the form of testimony by any expert, or any person who has personal knowledge of the subject of their testimony. The Board may, of course, additionally consider as evidence any information or knowledge which they, themselves, personally possess, and any documents, records or other evidence which is a matter of public record, irrespective of whether such public record is a record of the Town, or is a record of or is maintained by, another federal, state and/or other governmental entity and/or agency which maintains records which are available for, or subject to, public review.

The requirements for specific factual determinations set forth below are intended to enure to the benefit of the Town, its residents, and property owners, and not Applicants.

If, and to the extent that the Planning Board fails to render one or more of such determinations, that omission shall not constitute grounds upon which the respective Applicant can seek to annul, reverse or modify any decision of the Planning Board.

(a) Local Zoning Determinations

The Board shall make the following factual determinations as to whether the Application meets the requirements for granting a special use permit under this Article.

(i) Compliance with Section §150-106

Whether the proposed installation will meet each of the conditions and standards set forth within Section §150-106 in the absence of which the Planning Board is not authorized to grant a special use permit under Section §150-106 or §150-126.

(ii) Potential Adverse Aesthetic Impacts

Whether the proposed installation will inflict a significant adverse aesthetic impact upon properties that are located adjacent to, or in close proximity to, the proposed site, or any other properties situated in a manner that would sustain significant adverse aesthetic impacts by the installation of the proposed Facility.

(iii) Potential Adverse Impacts Upon Real Estate Values

Whether the proposed installation will inflict a significant adverse impact upon the property values of properties that are located adjacent to, or in close proximity to the proposed site, or properties that are otherwise situated in a manner that

would cause the proposed installation to inflict a significant adverse impact upon their value.

(iv) Potential Adverse Impact Upon the Character of the Surrounding Community

Whether the proposed installation will be incompatible with the use and/or character of properties located adjacent to or in close proximity to the proposed site or other properties situated in a manner that would cause the proposed installation to be incompatible with their respective use.

(v) Potential Adverse Impacts Upon Historic Properties or Historic Districts

Whether the proposed installation will be incompatible with and/or would have an adverse impact upon, or detract from the use and enjoyment of, and/or character of a historic property, historic site, and/or historic district, including but not limited to Historic Structures, properties and/or districts which are listed on, or are eligible for listing on, the National Register of Historic Places.

(vi) Potential Adverse Impacts Upon Ridgelines or Other Aesthetic Resources of The Town

Whether the proposed installation will be incompatible with and/or would have an adverse aesthetic impact upon or detract from the use and enjoyment of, and/or character of, recognized aesthetic assets of the Town including, but not limited to, scenic areas and/or scenic ridgelines, scenic areas, public parks, and/or any other traditionally or historically recognized valuable scenic assets of the Town.

(vii) Sufficient Fall Zones

Whether the proposed installation shall have a sufficient fall zone and/or safe zone around the Facility to afford the general public safety against the potential dangers of structural failure, icefall, debris fall, and fire.

(viii) Mitigation

Whether the Applicant has mitigated the potential adverse impacts of the proposed Facility to the greatest extent reasonably feasible. To determine mitigation efforts on the part of the Applicant, the mere fact that a less intrusive site, location, or design would cause an Applicant to incur additional expense is not a reasonable justification for an Application to have failed to propose reasonable mitigation measures.

If when applying the evidentiary standards set forth in subparagraph (a) hereinabove, the Planning Board determines that the proposed Facility shall inflict one or more of the adverse impacts described hereinabove to such a substantial extent that granting the respective Application would inflict upon the Town and/or its citizens and/or property

owners the types of adverse impacts which this provision was enacted to prevent, the Planning Board shall deny the respective Application for a special use permit unless the Board additionally finds that a denial of the Application would constitute an Effective Prohibition, as provided for in Sections (b) and (c) immediately hereinbelow.

(b) TCA Determinations

In cases within which an Applicant has filed a "Notice of Effective Prohibition Conditions," the Planning Board shall make three (3) additional factual determinations, as listed herein below:

(i) Adequate Personal Wireless Services Coverage

Whether the specific Wireless Carrier has adequate Personal Wireless Services coverage within the geographic areas for which the Applicant claims a significant gap exists in such coverage.

(ii) Significant Gap in Personal Wireless Services of an Identified Carrier

Whether the Applicant has established, based upon Probative Evidence provided by the Applicant and/or its representative, that a specific Wireless Carrier suffers from a significant gap in its Personal Wireless Services within the Town.

In rendering such determination, the Board shall consider factors including, but not necessarily limited to (a) whether the identified Wireless Carrier which is alleged to suffer from any significant gap in their Personal Wireless Services has adequate service in its Personal Wireless Services at any frequency being used by the carrier to provide Personal Wireless Services to its end-use customers, (b) whether any such alleged gap is relatively large or small in geographic size, (c) whether the number of the carrier's customers affected by the gap is relatively small or large, (d) whether or not the location of the gap is situated on a lightly traveled road, or sparsely or densely occupied area, and/or (d) overall, whether the gap is relatively insignificant or otherwise relatively *de minimis*.

A Significant Gap cannot be established simply because the carrier's customers are currently using the carrier's Personal Wireless Services, but the frequency at which the customers are using such services is not the frequency most desired by the carrier.

(iii) Least Intrusive Means of Remedying Gap(s) in Service

Whether the Applicant has established based upon Probative Evidence provided by the Applicant and/or its representative, that the installation of the proposed Facility, at the specific site proposed by the Applicant, and the specific portion of the site proposed by the Applicant, and at the specific Height proposed by the Applicant is the least intrusive means of remedying whatever significant gap or gaps which the Applicant has contemporaneously proved to exist as determined

by the Planning Board based upon any evidence in support of, and/or in opposition to, the subject Application.

In rendering such determination, the Board shall consider factors including, but not necessarily limited to: (a) whether the proposed site is the least intrusive location at which a Facility to remedy an identified significant gap may be located, and the Applicant has reasonably established a lack of potential alternative less intrusive sites and lack of sites available for co-location, (b) whether the specific location on the proposed portion of the selected site is the least intrusive portion of the site for the proposed installation (c) whether the Height proposed for the Facility is the minimum Height actually necessary to remedy an established significant gap in service, (d) whether or not a pre-existing Structure can be used to camouflage the Facility and/or its antennas, (e) whether or not, as proposed, the installation mitigates adverse impacts to the greatest extent reasonably feasible, through the employ of Stealth design, screening, use of color, noise mitigation measures, etc., and/or (f) overall whether or not there is a feasible alternative to remedy the gap through alternative, less intrusive substitute installations, such as the installation of multiple shorter installation, instead of a single microcell Facility.

(c) Finding of Effective Prohibition or Lack of Effective Prohibition

If when applying the evidentiary standards set forth in subparagraph (a) hereinabove, the Planning Board affirmatively determines that the Applicant has failed to establish either: (i) that an identified Wireless Carrier suffers from a significant gap(s) in its Personal Wireless Services within the Town, and/or (ii) that the Applicant has failed to establish that the proposed installation is the least intrusive means of remedying any such gap or gaps, then the Planning Board may deny the Application pursuant to Section (b) hereinabove, and such denial shall not constitute an “Effective Prohibition.”

If when applying the evidentiary standards set forth in subparagraph (a) hereinabove, the Planning Board affirmatively determines that the Applicant has established both: (i) that an identified Wireless Carrier suffers from a significant gap in Personal Wireless Services within the Town, and (ii) that the proposed installation is the least intrusive means of remedying such significant gap or gaps, then the Planning Board shall grant the Application, irrespective of any determinations the Board may make pursuant to Section (b) hereinabove, because any such denial would constitute an “Effective Prohibition.”

§150-126(K) Retention of Consultants

1. Use of Consultants

Where deemed reasonably necessary by the Planning Board and/or the Town, the Planning Board and/or the Town may retain the services of professional consultants to assist the Planning Board in carrying out its duties in deciding special use permit Applications for Personal Wireless Service Facilities. Where the Planning Board uses the

services of private engineers, attorneys, or other consultants for purposes of engineering, scientific, land use planning, environmental, legal, or similar professional reviews of the adequacy or substantive aspects of Applications, or of issues raised during the course of review of Applications for special use permit approvals of Personal Wireless Service Facilities, the Applicant and landowner, if different, shall be jointly and severally responsible for payment of all the reasonable and necessary costs incurred by the Town for such services. In no event shall that responsibility be greater than the actual cost to the Town of such engineering, legal, or other consulting services.

2. Advance Deposits for Consultant Costs

The Town and/or Planning Board may require advance periodic monetary deposits held by the Town on account of the Applicant or landowner to secure the reimbursement of the Town's consultant expenses. The Town Board shall establish policies and procedures for the fixing of escrow deposits and the management of payment from them. After audit and approval of itemized vouchers by the Town Comptroller as to reasonableness and necessity of the consultant charges, the Town may make payments from the deposited funds for engineering, legal or consultant services. Upon receiving a request by the Applicant or landowner, the Town shall supply copies of such vouchers to the Applicant and/or landowner reasonably in advance of audit and approval, appropriately redacted where necessary to shield legally privileged communications between Town officers or employees and the Town's consultant. When it appears that there may be insufficient funds in the account established for the Applicant or landowner by the Town to pay current or anticipated vouchers, the Town shall cause the Applicant or landowner to deposit additional sums to meet such expenses or anticipated expenses in accordance with policies and procedures established by the Town Board. Consultants shall undertake no review on any matter scheduled before the Planning Board until the initial escrow deposit has been made or requested replenishment of the escrow deposit has been made. No reviewing agency shall be obligated to proceed unless the Applicant complies with escrow deposit requirements.

3. Reasonable Limit Upon Consultant Expenses

A consultant expense or part thereof is reasonable in amount if it bears a reasonable relationship to the customary fee charged by engineers, attorneys, or planners within the region for services performed on behalf of Applicants or reviewing boards in connection with comparable Applications for land use or development.

The Town may also take into account any special conditions for considerations as it may deem relevant, including but not limited to the quality and timeliness of submissions on behalf of the Applicant and the cooperation of the Applicant and agents during the review process.

A consultant expense or part thereof is necessarily incurred if it was charged by the engineer, attorney or planner, or other consultants, for a service which was rendered to assist the Planning Board in: (a) making factual determinations consistent with the goals of protecting or promoting of the health, safety or welfare of the Town or its residents;

(b) assessing potential adverse environmental impacts such as those identified within a SEQRA process; (c) accessing potential adverse impacts to historic properties, Structures and/or districts, and/or (d) assessing and determining factual issues relevant to Effective Prohibition claims, as addressed herein, to enable the Board to best comply with the letter and intent of the provision of the TCA which is relevant thereto.

4. Audits Upon the Request of an Applicant

Upon request of the Applicant or landowner, the Town Board shall review and audit all vouchers and determine whether such engineering, legal and consulting expenses are reasonable in amount and necessarily incurred by the Town in connection with the review and consideration of a special use permit Application for Personal Wireless Service Facility. In the event of such a request, the Applicant or landowner shall be entitled to be heard by the Town Board on reasonable advance notice.

5. Liability for Consultant Expenses

For a land-use Application to be complete, the Applicant shall provide the written consent of all owners of the subject real property, both authorizing the Applicant to file and pursue land development proposals and acknowledging potential landowner responsibility, under this section, for engineering, legal, and other consulting fees incurred by the Town. If different from the Applicant, the owner(s) of the subject real property shall be jointly and severally responsible for reimbursing the Town for funds expended to compensate services rendered to the Town under this section by private engineers, attorneys, or other consultants. The Applicant and the owner shall remain responsible for reimbursing the Town for its consulting expenses, notwithstanding that the escrow account may be insufficient to cover such expenses. No building permit or other permit shall be issued until reimbursement of costs and expenses determined by the Town to be due. In the event of failure to reimburse the Town for such fees, the following shall apply:

The Town may seek recovery of unreimbursed engineering, legal, and consulting fees by court action in an appropriate jurisdiction, and the defendant(s) shall be responsible for the reasonable and necessary attorney's fees expended by the Town in prosecuting such action.

Alternatively, and at the sole discretion of the Town, a default in reimbursement of such engineering, legal and consulting fees expended by the Town shall be remedied by charging such sums against the real property that is the subject of the special use permit Application, by adding that charge to and making it a part of the next annual real property tax assessment roll of the Town. Such charges shall be levied and collected simultaneously and in the same manner as Town-assessed taxes and applied in reimbursing the fund from which the costs were defrayed for the engineering, legal and consulting fees. Prior to charging such assessments, the owners of the real property shall be provided written notice to their last known address of record, by certified mail, return receipt requested, of an opportunity to be heard and object before the Town Board to the

proposed real property assessment, at a date to be designated in the notice, which shall be no less than 30 days after its mailing.

§150-126(L) Setback Requirements

1. Small Wireless Facilities

- (a) Within Industrial, General Business, Planned Shopping, Planned Business, and Restricted Business Zoning Districts, the minimum Setback shall be fifty (50) feet, unless the Facility is being installed upon a pre-existing utility pole or other utility Structure.
- (b) Within all residentially-zoned districts, all Small Wireless Facilities shall be set back a minimum of 300 feet from any residential dwelling or Structure, unless the Facility is being installed upon a pre-existing utility pole or is being co-located upon a pre-existing personal wireless service facility.

2. Cell Towers and all Personal Wireless Service Facilities that do not meet the definition of a Small Wireless Facility

- (a) Each proposed wireless personal service Facility and Personal Wireless Service Facility Structure, compound, and Complex shall be located on a single lot and comply with applicable Setback requirements. Adequate measures shall be taken to contain on-site all icefall or debris from Tower failure and preserve the privacy of any adjoining residential properties.
- (b) Each lot containing a wireless personal service Facility and Personal Wireless Service Facility Structure, compound, and Complex shall have the minimum area, shape, and frontage requirements generally prevailing for the zoning district where located, in the Schedules of Regulations for Nonresidential and Residential Districts of this chapter, and such additional land if necessary to meet the Setback requirements of this section.
- (c) Telecommunications Towers shall comply with the following special minimum Setback requirements within Industrial, General Business, Planned Shopping, Planned Business, and Restricted Business Zoning Districts:
  - (i) Street line: Height of the tallest Tower or self-standing or guy-wired wireless support Structure plus 50 feet.
  - (ii) Side and rear lines: half the Height of the tallest Tower or self-standing or guy-wired wireless support Structure.
  - (iii) Setback from adjoining residential zoning district: Height of the tallest Tower or self-standing or guy-wired wireless support Structure plus 50 feet.

- (d) The Setback requirements for Telecommunications Towers located within R-4A, R-2A, R-MF-3, and R-MF-5 Zoning Districts shall be:
  - (i) From side and rear lot lines: 150 feet or half the Height of the tallest Tower or self-standing or guy-wired wireless support Structure, whichever is greater.
  - (ii) Distance from the street line: 150 feet.

§150-126(M) Height Restrictions

1. Small Wireless Facilities

Personal Wireless Service Facilities which meet the definition of a Small Wireless Facility shall not exceed a maximum height of 60 feet above ground elevation in Industrial, General Business, Planned Shopping, Planned Business, and Restricted Business Zoning Districts, and shall not exceed a maximum height of 45 feet within R-4A, R-2A, R-MF-3, R-MF-5 Zoning Districts.

2. Non-Small Wireless Facilities

Personal Wireless Service Facilities which do not meet the definition of a Small Wireless Facility shall not exceed a maximum Height of 185 feet above ground elevation in Industrial, General Business, Planned Shopping, Planned Business, and Restricted Business Zoning Districts, and shall not exceed a maximum Height of 110 feet within R-4A, R-2A, R-MF-3, R-MF-5 Zoning Districts.

§150-126(N) Use Restrictions and Variances

1. Use Restrictions by Application Type and Zoning District

Type I Applications No Use Variance Required

Type I Applications for co-location of a Small Wireless Facility in Planned Industry (PI), General Business (GB), Planned Shopping Center (PSC), Planned Business (PB), and Restricted Business (RB) Districts shall be a permitted use with a building permit.

Type I Applications for co-location of a Small Wireless Facility in any residentially-zoned district shall be a Special Use Permit use, requiring an Applicant to obtain a Special Use Permit from the Planning Board.

Type II Applications No Use Variance Required Unless Determined Otherwise

Applications for Colocations of a wireless personal services Facility, which do not meet the definition of a Small Wireless Facility, shall be considered a special use permit in all Districts and shall require a special use permit and a building permit, but shall not require a use variance, unless the Planning Board, in its sole discretion, determines that the



proposed Colocation will increase the overall intrusiveness of the site to a sufficient extent that its presence would no longer be compatible with the surrounding properties and/or surrounding community, in which case the Planning Board shall issue a decision determining that the Applicant shall be required to obtain a variance from the Zoning Board of Appeals in accord with Article XX of the Zoning Code.

In rendering a determination of whether or not a variance shall be required, the Planning Board shall consider, among other things: (a) the physical size, number, and potential intrusiveness of each new item of equipment to be installed as part of the proposed Colocation, (b) the extent to which the installation of such equipment is to require or effectuate a significant physical expansion of the size or area of the Facility or Complex, (c) the extent to which the addition of such additional equipment will likely increase the adverse aesthetic impact of the Facility, and/or any other potentially significant adverse impacts which are likely to cause a significant increase in the overall intrusiveness of the wireless Facility, and/or its compound or Complex, such that it will no longer be reasonably compatible with the use of nearby or surrounding properties and/or that its presence would be incompatible with the character and use of the nearby properties and/or surrounding community.

If the Planning Board determines that a variance is required for a specific proposed Facility, then the Applicant shall be required to file an Application for a variance to the Zoning Board of Appeals. The ZBA shall thereafter have the authority to (a) determine that no variance is necessary, (b) grant the Application for a variance, or (c) deny the Application for a variance.

#### Type III Applications No Use Variance Required

Applications for installing new Small Wireless Facilities that meet the criteria for Type III Applications shall be considered a special use permit use in all Districts. They shall require a special use permit and building permit but shall not require a variance.

#### Type IV Applications Variance Requirements

The installation of a new Cell Tower and/or all other wireless Facilities that are not a Small Wireless Facility shall be a prohibited use in all residentially-zoned districts and shall require a use variance, special use permit, site plan approval, and building permit.

#### §150-126(O) Environmental Impacts

If, and to the extent that, the Planning Board determines a proposed installation bears the potential for a significant adverse impact upon the environment within the meaning of SEQRA and/or the NEPA, then the Board shall be expected to comply with the requirements of SEQRA in determining both (a) the extent of adverse impacts upon the environment and/or historic properties and (b) what mitigation measures the Applicant should be required to undertake to minimize the adverse environmental impacts and/or adverse impacts upon historic sites, Structures and/or districts.

If a respective Applicant fails to obtain a review from the NYSDEC and/or NEPA and opinion letters from the NYSDEC and the FCC pertaining to its proposed installation prior to a first public hearing before the Planning Board for the respective Application, then the Planning Board may make direct requests to the NYSDEC and the FCC for their review of the Application. The Planning Board may request SHPO and the FCC's review and input in completing the statutorily-required environmental impact analysis pursuant to SEQRA and NEPA.

In addition, the Planning Board shall comply with the statutory requirements of SEQRA to complete a SEQRA review, make determinations of significance, and where appropriate, require the Applicant to complete a draft environmental impact statement, and if additionally appropriate, to thereafter complete a final environmental impact statement and analysis.

So long as the Planning Board acts with reasonable diligence in completing its SEQRA and NEPA review, if compliance with the statutory requirements for environmental review requires a period of effort that extends beyond the expiration of the applicable Shot Clock period, the delays beyond such period shall be deemed reasonable.

#### §150-126(P) Historic Site Impacts

The Planning Board shall consider the potential adverse impacts of any proposed Facility upon any historic site, district, or Structure consistent with the requirements of the Town's historic preservation law and comprehensive plan and SEQRA.

If, and to the extent that, the Planning Board determines that a proposed installation bears the potential for a significant adverse impact upon a historic site or a historic district within the meaning of SEQRA and/or the NHPA (especially if the historic site at issue is listed upon the national register of historic places), then the Board shall comply with the requirements of both SEQRA and Town law in determining both: (a) the extent of adverse impacts upon the historic properties, and (b) what mitigation measure might the Applicant be required to undertake to minimize the adverse environmental impacts and/or adverse impacts upon historic sites, Structures and/or district.

Should a respective Applicant fail to obtain a SHPO and/or a Section 106 review under NHPA, and opinion letters from SHPO and the FCC pertaining to its proposed installation prior to a first public hearing before the Planning Board for the respective Application, then the Planning Board shall make direct requests to SHPO and the FCC for their review of the Application. They shall request SHPO and the FCC's review and input in completing the statutorily-required environmental/historic impact analysis pursuant to SEQRA and NHPA.

This request shall include, but not be limited to, a request to the FCC for a Section 106 review, as defined in this Article, as the Town recognizes each Application for a special use permit for the installation of a Personal Wireless Services Facility shall constitute an Undertaking for purposes of compliance with the National Historic Preservation Act.

In addition, the Planning Board shall comply with the statutory requirements of SEQRA to complete a SEQRA review, make determinations of significance, and where appropriate, require the Applicant to complete a draft environmental impact statement, and if additionally appropriate, to thereafter complete a final environmental impact statement and analysis.

So long as the Planning Board acts with reasonable diligence in completing its SEQRA and NHPA review, if compliance with the statutory requirements for historic preservation review requires a period of effort that extends beyond the expiration of the applicable Shot Clock period, the delays beyond such period shall be deemed reasonable.

§150-126(Q) Force Majeure

In the event that the rendering of a final decision upon a special use permit Application under this Article is delayed due to natural and/or unnatural events and/or forces which are not within the control of the Town or the Planning Board, such as the unavoidable delays experienced in government processes due to the COVID 19 pandemic, and/or mandatory compliance with any related federal or state government orders issued in relation thereto, such delays shall constitute reasonable delays which shall be recognized as acceptable grounds for extending the period for review and the rendering of final determinations beyond the period allotted under the applicable Shot Clock.

§150-126(R) Eleventh Hour Submissions

In the event that an Applicant tenders eleventh-hour submissions to the Town and/or the Planning Board in the form of (a) expert reports, (b) expert materials, and/or (c) materials which require a significant period for review due either to their complexity or the sheer volume of materials which an Applicant has chosen to provide to the Board at such late point in the proceedings, the Planning Board shall be afforded a reasonable time to review such late-submitted materials.

If reasonably necessary, the Planning Board shall be permitted to retain the services of an expert consultant to review any late-submitted expert reports which were provided to the Board, even if such review or services extend beyond the applicable Shot Clock period, so long as the Board completes such review and retains and secures such expert services within a reasonable period of time thereafter, and otherwise acts with reasonable diligence in completing its review and rendering its final decision.

§150-126(S) Prohibition Against Illegally Excessive Emissions and RF Radiation Testing

As disclosed upon the FCC's public internet website, Personal Wireless Services Facilities erected at any Height under 200 feet are not required to be registered with the FCC.

Of even greater potential concern to the Town is the fact that the FCC does not enforce the RF radiation limits codified within the CFR by either: (a) testing the actual radiation emissions of wireless Facilities either at the time of their installation or at any time thereafter, or (b) requiring

their owners to test them. *See* relevant excerpts from the FCC's public internet website annexed as Appendix 2.

This means that when wireless Facilities are constructed and operated within the Town, the FCC will have no idea where they are located and no means of determining, much less ensuring, that they are not exposing residents within the Town and/or the general public to Illegally Excessive levels of RF Radiation.

The Town deems it to be of critical importance to the health, safety, and welfare of the Town, its residents, and the public at large that Personal Wireless Service Facilities do not expose members of the general public to levels of RF radiation that exceed the limits which have been deemed safe by the FCC, and/or are imposed under CFR.

In accord with the same, the Town enacts the following RF Radiation testing requirements and provisions set forth herein below.

No wireless Telecommunications Facility or combination of Facilities shall at any time be permitted to emit Illegally Excessive RF Radiation as defined in §150-126.2, or to produce power densities that exceed the legally permissible limits for electric and magnetic field strength and power density for transmitters, as codified within 47 CFR §1.1310(e)(1), Table 1 Sections (i) and (ii), as made applicable pursuant to 47 CFR §1.1310(e)(3).

To ensure continuing compliance with such limits by all owners and/or operators of Personal Wireless Services Facilities within the Town, all owners, and operators of Personal Wireless Service Facilities shall submit reports as required by this section.

As set forth hereinbelow, the Town may additionally require, at the owner and/or operator's expense, independent verification of the results of any analysis set forth within any reports submitted to the Town by an owner and/or operator.

If an operator of a Personal Wireless Service Facility fails to supply the required reports or fails to correct a violation of the legally permissible limits described hereinabove, following notification that their respective Facility is believed to be exceeding such limits, any special use permit or other zoning approval granted by the Planning Board or any other Board or representative of the Town is subject to modification or revocation by the Planning Board following a public hearing.

#### 1. Initial Certification of Compliance with Applicable RF Radiation Limits

Within forty-five (45) days of initial operation or a substantial modification of a Personal Wireless Service Facility, the owner and/or operator of each Telecommunications antenna shall submit to the Zoning Administrator a written certification by a licensed professional engineer, sworn to under penalties of perjury, that the Facility's radio frequency emissions comply with the limits codified within 47 CFR §1.1310(e)(1), Table 1 Sections (i) and (ii), as made applicable pursuant to 47 CFR §1.1310(e)(3).

The engineer shall measure the emissions of the approved Facility, including the cumulative impact from other nearby Facilities, and determine if such emissions are within the limits described hereinabove.

A report of these measurements and the engineer's findings with respect to compliance with the FCC's Maximum Permissible Exposure (MPE) limits shall be submitted to the Zoning Administrator.

If the report shows that the Facility does not comply with applicable limits, then the owner and/or operator shall cease operation of the Facility until the Facility is brought into compliance with such limits. Proof of compliance shall be a certification provided by the engineer who prepared the original report. The Town may require, at the Applicant's expense, independent verification of the results of the analysis.

## 2. Random RF Radiofrequency Testing

At the operator's expense, the Town may retain an engineer to conduct random unannounced RF Radiation testing of such Facilities to ensure the Facility's compliance with the limits codified within 47 CFR §1.1310(e)(1) et seq.

The Town may cause such random testing to be conducted as often as the Town may deem appropriate. However, the Town may not require the owner and/or operator to pay for more than one test per Facility per calendar year unless such testing reveals that one or more of the owner and/or operator's Facilities are exceeding the limits codified within 47 CFR §1.1310(e)(1) et seq., in which case the Town shall be permitted to demand that the Facility be brought into compliance with such limits, and to conduct additional tests to determine if, and when, the owner and/or operator thereafter brings the respective Facility and/or Facilities into compliance.

If the Town at any time finds that there is good cause to believe that a Personal Wireless Service Facility and/or one or more of its antennas are emitting RF radiation at levels in excess of the legal limits permitted under 47 CFR §1.1310(e)(1) et seq., then a hearing shall be scheduled before the Planning Board at which the owner and/or operator of such Facility shall be required to show cause why any and all permits and/or approvals issued by the Town for such Facility and/or Facilities should not be revoked, and a fine should not be assessed against such owner and/or operator.

Such hearing shall be duly noticed to both the public and the owner and/or operator of the respective Facility or Facilities at issue. The owner and/or operator shall be afforded not less than two (2) weeks written notice by first-class mail to its Notice Address.

At such hearing, the burden shall be on the Town to show that, by a preponderance of the evidence, the Facilities emissions exceeded the permissible limits under 47 CFR §1.1310(e)(1) et seq.

In the event that the Town establishes same, the owner and/or operator shall then be required to establish, by clear and convincing evidence, that a malfunction of equipment caused their failure to comply with the applicable limits through no fault on the part of the owner/operator.

If the owner and/or operator fails to establish same, the Planning Board shall have the power to, and shall revoke any special use permit, variance, building permit, and/or any other form of zoning-related approval(s) which the Planning Board, Zoning Board of Appeals, Zoning Administrator and/or any other representative of the Town may have then issued to the owner and/or operator, for the respective Facility.

In addition, the Planning Board shall impose a fine of not less than \$1,000, nor more than \$5,000 for such violation of subparagraph 1. hereinabove, or, in the case of a second offense within less than five (5) years, a minimum fine of \$5,000, nor more than \$25,000.

In the event that an owner or operator of one or more personal wireless Facilities is found to violate subparagraph 1. hereinabove, three or more times within any five (5) year period, then in addition to revoking any zoning approvals for the Facilities which were violating the limits codified in 47 CFR §1.1310(e)(1) et seq., the Planning Board shall render a determination within which it shall deem the owner/operator prohibited from filing any Applications for any new wireless personal services Facilities within the Town for a period of five (5) years.

#### §150-126(T) Bond Requirements, Removal of Abandoned Facilities and Reclamation

##### 1. Bond Requirement

At, or prior to the filing of an Application for a Special Use Permit for the installation of a new Personal Wireless Service Facility, each respective Applicant shall provide a written estimate for the cost of the decommissioning and removal of the Facility, including all equipment that comprises any portion or part of the Facility, compound and/or Complex, as well as any Accessory Facility or Structure, including the cost of the full restoration and reclamation of the site, to the extent practicable, to its condition before development in accord with the decommissioning and reclamation plan required herein. The Planning Board's engineer shall review this estimate.

Upon receiving a special use permit approval from the Planning Board, and a building permit, prior to the commencement of installation and/or construction of such Facility or any part thereof, the Applicant shall file with the Town a bond for a length of no less than three years in an amount equal to or exceeding the estimate of the cost of removal of the Facility and all associated Structures, fencing, power supply, and other appurtenances connected with the Facility. The bond must be provided within thirty (30) days of the approval date and before any installation or construction begins.

Replacement bonds must be provided ninety (90) days prior to the expiration of any previous bond.

At any time the Town has good cause to question the sufficiency of the bond at the end of any three-year period, the owner and/or operator of the Facility, upon request by the Town, shall provide an updated estimate and bond in the appropriate amount.

Failure to keep the bonds in effect is cause for removal of the Facility at the owner's expense. A separate bond will be required for each Facility, regardless of the number of owners or the location.

2. Removal of Abandoned Facilities

Any Personal Wireless Service Facility that is not operated or used for a continuous period of twelve (12) consecutive months shall be considered abandoned. At the owner's expense, the owner of said Facility shall be required to remove the Facility and all associated equipment buildings, power supply, fence, and other items associated with such Facility, compound and/or Complex, and permitted with, the Facility.

If the Facility is not removed within ninety (90) days, the bond secured by the Tower owner shall be used to remove the Facility and any Accessory Equipment and Structures.

§150-126(U) ADA Accommodations

[Reserved]

§150-126(V) General Provisions

1. Balancing of Interests

The Town formally recognizes that, as has been interpreted by federal courts within the Second Circuit, when it enacted the TCA, Congress chose to preserve local zoning authority over decisions regarding the placement, construction, and modification of Personal Wireless Facilities (47 U.S.C. §332(c)(7)(A)) subject only to the limitations set forth in subsection §332(c)(7)(b), consistent with the holding of the United States Court of Appeals in Sprint Spectrum L.P. v. Willoth, 176 F3d 630 (2<sup>nd</sup> Cir.1999) and its progeny, and the Town has relied upon such federal courts' interpretations of the TCA in enacting Chapter §150-126 et seq.

The Town similarly embraces the federal courts' determinations that the TCA was created to effectuate a balancing between the interests of facilitating the growth of wireless telephone service nationally and maintaining local control over the siting of wireless personal services facilities, as the Court additionally articulated in Omnipoint Communications Inc. v. The City of White Plains, 430 F3d. 529 (2<sup>nd</sup> Cir. 2005). This includes preserving to local governments, including the Town of Fishkill, the power to deny Applications for the installation of wireless personal services facilities, based upon traditional grounds of zoning denials, including, but not limited to, the potential adverse aesthetic impacts or a reduction in property values which the construction of any proposed Structure may inflict upon nearby properties or the surrounding community.

This additionally includes the recognition that, under this balancing of interest test, "once an area is sufficiently serviced by a wireless service provider, the right to deny Applications (for new wireless facilities) becomes broader" Crown Castle NG East LLC v. The Town of Hempstead, 2018 WL 6605857.

It is the intent of the Town that Article XII of the Town's Zoning Code be applied in a manner consistent with the balancing of interests codified within the TCA.

Consistent with same, the Town rejects and shall reject any current and/or future FCC interpretations of any provision of the TCA which are clearly inconsistent with, and/or are clearly contrary to, both the language of the TCA and binding decisions of the United States Court of Appeals for the Second Circuit and United States District Courts within the Second Circuit.

This includes a rejection of any FCC interpretations inconsistent with Willloth and any claims that the FCA legally prohibits the Planning Board from denying a special use permit Application, based solely upon a claim that an Applicant desires the installation of its new Facility for "densification" of its existing Personal Wireless Services, or to offer a new service, irrespective of whether or not the carrier already possesses Adequate Coverage within the Town, and irrespective of the potential adverse impact which the installation of such new Facility or facilities would inflict upon the Town, its property owners, citizens and/or communities.

2. Conflict With Federal or State Laws

To the extent that any provision of this Article is found to conflict with any applicable federal or State law, it is the intent of the Town that the remaining portion of this Article which has not been found to conflict with such law be deemed to remain valid and in full force and effect.