

**REGULAR MEETING  
ZONING BOARD OF APPEALS**

Nyack Village Hall  
Nyack, New York

October 25, 2010

Present: Catherine Friesen, Chair  
Mary Ann Armano  
John Dunnigan  
Robert Knoebel, Sr.  
Ellyse Berg

**In Memoriam:**  
Raymond O’Connell

The following resolution was offered by Member Armano, seconded by Member Knoebel, and carried based upon a review of the evidence presented at the public hearing held on September 27 and October 25, 2010.

**BOARD OF APPEALS  
VILLAGE OF NYACK, COUNTY OF ROCKLAND**  
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In the Matter of the Application of MetroPCS, New York  
(at Nyack Hospital) to Permit Telecommunications  
Antennas and Equipment at 160 North Midland Avenue  
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The applicant comes before this Board seeking:

1. A Special Permit pursuant to VON Code 59-3.2D(1)(b)(i) *et. seq.* to permit the installation of a wireless communication facility; and
2. A use variance from VON Code 59-3.1 (Table of Permitted Uses) to permit construction of a wireless communication facility in a district where not permitted.

The Zoning Board of Appeals held a public meeting on September 27, 2010 and October 25, 2010, and due deliberations having been made on October 25, 2010;

Now, upon said hearing and upon the evidence adduced thereat, it is hereby found and determined that:

**PROCEDURAL HISTORY**

On June 30, 2010, the Applicant submitted an application to co-locate a wireless telecommunications facility on the existing building known as Nyack Hospital, located at 160

North Midland Avenue, Nyack, New York. The original application contained a Building Department application for site plan review, and also requested a use variance. At the Building Department's request, the Applicant also submitted a formal application for a Special Permit (dated August 17, 2010) and for an area variance (dated August 17, 2010), which, together with the original application materials, were received and placed on the ZBA docket for public hearing in September. The Building Department later determined that the application for an area variance was unnecessary. The Applicant has now also filed, at the request of the Building Department, a formal application for a use variance dated October 15, 2010.

A full public hearing was held on September 27, 2010. At the public hearing the applicant made a full factual presentation and answered questions from the ZBA and the public. As is the policy of this Board, the application was held open pending the submission to and determination by the ZBA's retained telecommunications expert, Michael Musso, P.E. of Henningson, Durham & Richardson, Architecture & Engineering. Following a review of the application materials, Mr. Musso rendered a report dated October 22, 2010. In addition, the application was held open pending receipt of the recommendation of the Planning Board with respect to the requested variances.

The procedural history was passed 5-0.

### **FINDINGS OF FACT & CONCLUSIONS OF LAW**

**FIRST:** That the applicant has appeared before the Zoning Board of Appeals seeking a Special Permit and the Variance described above.

**SECOND:** The Board, in reaching its decision, has taken the following factual testimony and evidence under consideration:

- A. The presentation, complete application materials submitted by the applicant and all subsequent amendments thereto;
- B. The correspondence and report of Michael Musso, P.E., consultant to the Zoning Board of Appeals;
- C. County of Rockland Department of Planning letter dated September 10, 2010;
- D. Town of Clarkstown Department of Planning letter dated August 26, 2010;
- E. Oral testimony of the public:
  - a. Cristina Plais
  - b. Mary Malone
  - c. Mark Pricksi
  - d. Lawrence Freres;
  - e. David Newman;
  - f. Tom Weiss;
  - g. Bessie Bedoll;
  - h. Holley Corey.
- F. ZBA members knowledge of the site.

**THIRD:** That based on the analysis performed by the Zoning Board's consultant, each of the factual assertions made by the applicant in relation to site selection, system need, system operation, system function and safety have been proven, and the application comports with the Village's Telecommunications Law (Section 59-3.2(D)(1)).

**FOURTH:** The Village of Nyack's Planning and Architectural Review Boards have rendered positive recommendations to this Board in relation to the grant of the Special Permit and the Variance. In approving the applicant's site plan, the Planning Board determined that there were no environmental consequences resulting from the application, and issued a negative declaration under SEQRA. The Planning Board imposed no conditions on its site plan approval; the ARB found that the proposed antenna and equipment had minimal visual impact and voted to approve the application as presented, without conditions.

**FIFTH:** The Town of Clarkstown has indicated by letter that there are no planning issues impacting that town, and a letter from the Rockland County Planning Board referencing the State Department of Transportation has also been received.

**SIXTH:** The Zoning Board has considered the environmental consequences of the application based on the consultant's review, the Planning Board's SEQRA determination, and the EAF in the file, and has determined that the proposed installation will have no environmental impact.

#### STANDARD OF REVIEW

With respect to applications by public utilities, the New York State Court of Appeals has determined that a more lenient standard governs review of applications for both use variances and area variances. See Cellular Telephone Co. v. Rosenberg, 82 NY2d 364 (1993); Consolidated Edison Co. of NY v. Hoffman, 43 NY2d 598 (1978). A wireless company may obtain a use variance to site a cellular telecommunications facility in a zone in which it is not a permitted use and/or an area variance by demonstrating that its new construction is a public necessity required to render safe and adequate service, and that there are compelling reasons, economic or otherwise, explaining why the proposed request is more feasible than alternative options. Id. Where the intrusion or burden on the community is minimal, the required showing by the utility is correspondingly reduced. Id.; see also Nextel Partners Inc., v. Town of Saint Ann, 1AD3d 89 (3<sup>rd</sup> Dept. 2003).

Having evaluated these factors in light of the evidence submitted by the Applicant and the conclusions of the Board's expert, the Board finds:

**First:** that the Applicant has established the intrusion on the neighborhood is negligible and the burden on the community is minimal, in that proposed Facility will be co-located on the rooftop of the existing Hospital building and the proposed Facility is consistent in design with the

existing T-Mobile and AT&T facilities, and thus that the required showing by the public utility is reduced, (5-0) and

**Second:** That the Applicant has established that the installation of the facility is a public necessity, required for it to render safe and adequate service to its customers in the area. (5-0).

With respect to the application for a Special Permit, the Zoning Board of Appeals considered the factors set forth in the Code of the Village of Nyack Section 59-6.9(c) *et. seq.* and reaches the following conclusions of law:

**FIRST:** That taking into consideration the public health, safety and welfare, all proposed structures, equipment and material shall be readily accessible for fire and police protection.

**SECOND:** That the proposed use is of such location, size and character that, in general, it will not be detrimental to the orderly development of adjacent properties in accordance with the zoning classification of such properties.

**THIRD:** That as this installation is located in a residential district:

A. The location and size of such use, the nature and intensity of operations will not be hazardous or inconvenient to or incongruous with the district or conflict with the normal traffic of the neighborhood, and

B. The location and height of the proposed is such that the use will not hinder or discourage the appropriate development and use of adjacent land and buildings or impair the value thereof.

**FOURTH:** That pursuant to the SEQRA, a review of all the evidence and the “hard look” examination of the application submitted by the applicant and reviewed by the Zoning Board’s consultant, this Board gives a “negative declaration” to this application as submitted.

**THEREFORE**, the Zoning Board of Appeals having taken testimony and evidence at public hearings held on September 27, 2010 and October 25, 2010 and has weighed the factors governing variance applications by telecommunications providers as set forth above and the factors contained in the Code of the Village of Nyack Section 59-6.9(c) *et. seq.* and found that, on balance the interests of justice would be promoted by GRANTING the variance and Special Permit as applied for, with the following conditions:

1. That the recommendations of the Zoning Board’s consultant be followed, as agreed to by the applicant, specifically that:
  - a. A protocol should be developed between MetroPCS and Nyack Hospital that approximately coordinates construction activities, routine and emergency service visits by MetroPCS personnel and maintenance of the visual aspects of the equipment;
  - b. Any planned roof top maintenance activities by persons not trained in FR exposure should be coordinated by Nyack Hospital and MetroPCS to eliminate the

potential for RF exposures at levels above the general public MPE. FCC signage shall be maintained at all points of rooftop access, and in proximity to the wireless carrier equipment (e.g. at antenna arrays and/or equipment cabinets);

- c. Exterior portions of coaxial cables, antennas, antenna pipe mount attachments, bolts, and the GPS antennas should be painted to be consistent in color with the existing building façade and the existing panel antennas.
  - d. Any proposed modifications to the MetroPCS facility will require the appropriate notification, consent and approvals of the Village of Nyack prior to implementation. It is recommended that RF calculations be revised and reviewed for any future proposal to alter the MetroPCS antenna configuration at the site;
  - e. The special use permit includes the following appropriate provisions for maintaining facility compliance with all applicable codes: upkeep of the equipment (including all visible components of the facility, antenna and antenna mounts) and abandoning/decommissioning of unused equipment if necessary in the future.
2. That the antennae be painted in such a manner as to best blend in with the sky to minimize any visual impact.
  3. That the applicant participate in a site management agreement to coordinate and exchange R-F technical information as well as delineate responsibilities related to any joint responsibility for the site. This agreement shall be provided to the building department within 30 days of this decision. Amendments to this agreement shall be promptly forwarded to the building department.
  4. That the applicant shall submit to the Building Inspector a certification related to compliance with Federal RF emission standards based on actual emission testing. This certification shall be submitted once yearly, and is due on the anniversary date of the Special Permit.
  5. Renewal of the Special Permit every 2 years shall be required.

On roll call, the vote was as follows:

Ayes: 5

Nays: 0

Abstain: 0

*/s Catherine H. Friesen*

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CATHERINE H. FRIESEN, Chair  
Zoning Board of Appeals, Nyack.