



December 3, 2020

MEMORANDUM TO: Vernon Township Land Use Board

FROM: Jessica C. Caldwell, P.P., A.I.C.P., Land Use Board Planner

SUBJECT: Diamond Communications, LLC & T-Mobile Northeast, LLC
Preliminary & Final Major Site Plan
Block 378, Lot 17 (Formally Known as Block 141, Lot 12.02)
13 Vanderhoof Court
Township of Vernon, Sussex County

Dear Board Members:

The Applicants, Diamond Communications, LLC and T-Mobile Northeast LLC., is seeking preliminary and final major site plan approval to construct a 167-foot telecommunications lattice tower (to top of proposed lightning rod) within a fenced compound on the above-mentioned property. T-Mobile proposes to place twelve (12) telecommunications antennas at the top of the tower and related equipment at the base of the tower inside the fenced compound. The property has an existing JCP&L power substation building and several power lines. The site in question is located along Vanderhoof Court south of NJSH Route 94 in the C-3 Office-Professional Zone. In addition, the subject property is located within the Highlands Planning Area. The Application requires a use, conditional use variance, a height variance as well bulk variances.

1. **Items Submitted:** The Applicant has submitted the following:

- i. Fourteen (14) sheets of plans entitled, "Proposed Wireless Communication Facility "Vernon Substation" 13 Vanderhoof Court, Vernon, New Jersey 07462 Block: 378 Lot: 17 F.K.A. Block: 141 Lot: 12.02 Sussex County," prepared by Frank Colasurdo Architects, Inc., dated September 26, 2018, last revised October 26, 2020.
- ii. Environmental Impact Statement, prepared by Diamond Communications, LLC., dated October 2020.
- iii. Independent Radio Frequency Report Regarding a proposed Wireless Communications Facility for T-Mobile, Site ID: NJ07320 13 Vanderhoof Court Vernon Township, New Jersey Sussex County, prepared by Pier Con Solutions, LLC, dated June 13, 2019.
- iv. Evaluation of the Radiofrequency Environment in the Vicinity of the Proposed NJ07320C Wireless Facility, 13 Vanderhoof Court, Vernon, NJ 07462, Located in the County of Sussex, prepared by PierCon Solutions, LLC, dated May 20, 2019.

- v. Photographic Simulations entitled, "Proposed 160-Foot-Tall T-Mobile Wireless Telecommunications Facility, Site ID #NJ07320, 13 Vanderhoof Court, Vernon, New Jersey," prepared by Ricci Planning, dated December 19, 2019.
 - vi. One (1) sheet of a Boundary Survey entitled, "NJ208 Vernon Sub RFQ, Township of Vernon, Sussex County, New Jersey," prepared by James S. Murphy PLS, dated September 25, 2018.
 - vii. Photographic Simulations entitled, "Proposed T-Mobile Wireless Telecommunications Facility, Site ID #NJ07320, 13 Vanderhoof Court, Vernon, New Jersey," prepared by Ricci Planning, dated September 27, 2018.
 - viii. Copy of application and additional supporting documents.
2. **Existing Development:** Block 378, Lot 17 is 5.52 acres and is developed with an existing JCP&L power substation building surrounded by fencing and several power lines. The subject site is located in the C-3 Office-Professional Zone.
 3. **Proposed Development:** The Applicant is proposing to construct a 167-foot telecommunications lattice tower (to top of proposed lightning rod) as well as twelve (12) telecommunications antennas at the top of the tower and related equipment at the base of the tower inside a fenced compound.
 4. **Area & Bulk Requirements:** The subject site is located in the C-3 Office-Professional Zone. As per Section 330-187D, personal wireless telecommunications towers, equipment and facilities are a permitted conditional use, and the specific bulk standards are set within the Section. The proposed tower does not affect the conformity of the existing setbacks in the C-3 Zone. The following tables reviews existing and proposed requirements:

C-3 Office Professional Zone

Bulk Regulations	Required	Existing	Proposed
Min. Lot Area	5 Acres (217,800 SF)	5.52 Acres (240,809 SF)	NC
Wireless Telecommunications Facility Within All Residential Zones	Prohibited	Existing Property in C-3 Zone	NC
Residential Set Back from Property Line	300 Ft or 300% of the Tower's Height = 600 Ft	None Existing	70 Ft 1 In to Residential Property Line (V)
Non-Residential Set back from Property Line	120% of the Tower's Height = 240 Ft	None Existing	70 Ft 1 In

Bulk Regulations	Required	Existing	Proposed
			to Non-Residential Property Line (V)
Max. Fence Height	6 Ft	7 Ft High with 1 Ft Barbed Wire Existing Fence (E)	6 Ft Fence
Max. Height for Accessory Building	15 Ft	None Existing	No Building Proposed 5 Ft 11 In to Top of Proposed Equipment 8 Ft 7 In to Top of Proposed Generator
Max. Area of the Wireless Telecommunications Facility	1,500 SF	None Existing	1,500 SF Fence Facility
Stealth Technology	Required to Make Tower Appear to be a Tree of a Native Species	None Existing	Lattice Tower (Testify)
Max Tower Height	80 Ft	None Existing	167 Ft AGL to Top of Lightning Rod (V)
			160 Ft AGL to Top of Tower (V)
			160 Ft AGL to Top of Antennas (V)
C-3 Office Professional Zone			
Min. Lot Area	40,000 SF	240,809 SF	NC
Min. Lot Width	150 Ft	1023 Ft 2 In	NC
Min. Front Yard	75 Ft	No Existing	63 Ft 5 In to Proposed Compound (V)
			75 Ft

Bulk Regulations	Required	Existing	Proposed
			to Proposed Tower
			100 Ft 11 In to Proposed Equipment
			106 Ft 8 In to Proposed Generator
Min. Side Yard	20 Ft	No Existing	54 Ft 11 In to Proposed Compound
Min. Side Yard	20 Ft	No Existing	70 Ft 1 In to Proposed Tower
			72 Ft 4 In to Proposed Equipment
			70 Ft to Proposed Generator
Min. Rear Yard	50 Ft	No Existing	410 Ft 6 In to Proposed Compound
			427 Ft 4 In to Proposed Tower
			421 Ft 10 In to Proposed Equipment
			416 Ft 8 In to Proposed Generator
Max. Building Height	3 Stories 35 Ft	15 Ft to Top of Existing Substation Building	No Building Proposed
			5 Ft 9 In to Top of Proposed Equipment
			8 Ft 7 In to Top of Proposed Generator
Max. Building Coverage	25%	No Existing	NC

Bulk Regulations	Required	Existing	Proposed
Max. Lot Coverage	50%	21.8%	23.2%

(E) = Existing Non-Conforming

(V) = Variance Required

NC = No Change

6. Review:

A. **Principal Use:** According to Section 330-170, only one principal structure may be erected on a lot except for related structures forming one principal use in the same ownership. There is currently an existing JCP&L power substation surrounded by fencing and several power lines on the subject property. The Applicants are proposing a telecommunications lattice tower, twelve (12) antennas, a generator and associated equipment at the base of the tower within a fenced compound. The existing power substation building, and the proposed lattice tower are considered principal uses owned by two different entities. **A d(1) use variance is required.**

B. **Conditional Use:** According to Section 330-187(D)(1)(c), as a last location priority, a provider may apply for approval to construct a new telecommunications tower. No new tower shall be permitted unless the applicant demonstrates to the reasonable satisfaction of the approving authority that no existing tower structure or alternative technology that does not require the use of towers can accommodate the applicant's proposed antenna. The applicant shall submit information requested by the approving authority related to the availability of suitable existing towers, other structures or alternative technology. Evidence submitted to demonstrate that no existing tower, structure or alternative technology can accommodate the applicant's proposed antenna must consist of evidence showing that a significant gap in the availability of wireless service will exist if a new tower is not located within the geographic area. Upon establishing a significant gap in service, the provider must demonstrate to the reasonable satisfaction of the approving authority of the proposed tower is the least intrusive means of filling that gap with a reasonable level of service. To do so, the provider must show that a good faith effort has been made to identify and evaluate less intrusive alternatives.

[1] Construction requirements: The following are the construction requirements for all new tower applications:

[a] Area and setback requirements.

[1] Minimum lot area: five acres. The existing parcel is 5.52 acres. No changes are proposed. This complies.

[2] Residential setback from property lines: 300 feet or 300% of the tower's height (600 feet), whichever is greater. The Applicants are proposing a setback of 70 feet and 1 inch, which does not comply with the ordinance. **A variance pursuant to N.J.S.A. 40:55D-70(d)(3) is required for failing to meet the conditional use standard of the ordinance.**

[3] Non-residential setback from property lines: 120% of the height of the tower from any adjoining lot line, non-appurtenant building or structure or street right-of-way. Applicants are proposing a setback of 70 feet and 1 inch, which does not comply with the ordinance. **A variance pursuant to N.J.S.A. 40:55D-70(d)(3) is required for failing to meet the conditional use standard of the ordinance.**

[c] Maximum tower height.

[1] Eighty feet. This shall be measured as the overall height, including antennas. The Applicants are proposing a tower height of 167 feet. **A height variance pursuant to N.J.S.A. 40:55D-70(d)(6) is required for failing to meet the conditional use standard of the ordinance.**

According to Section 330-187(D)(3)(a), applicants are required to use the latest stealth or camouflaging technology to either make a tower appear to be a tree of native species to blend in with the surrounding trees, other types of stealth structures or to be completely concealed by placement within an existing structure. The Applicants have not proposed any stealth or camouflaging techniques for the proposed telecommunications tower and antennas. The Applicants should provide testimony on this otherwise, **a variance is required.**

Lighting: According to Section 330-80(C)(3), illumination shall be designed to minimize undesirable off-site effects. Lighting shall be designed to respect and protect the use and enjoyment of neighboring properties and in such a manner as to avoid distraction of motorists. The intensity of all light sources proposed in connection with the development, together with all proposed light shielding and similar features, shall be subject to Planning Board approval. The Applicants are proposing one (1) downward facing floodlight. This complies.

According to Section 330-80(C)(4), lighting intensity shall not exceed 0.3 footcandle along any property line and shall be arranged and shielded to reflect the light away from adjoining streets or properties. This regulation shall not apply to lights that are used solely for the illumination of entrances or exits or driveways leading to a parking lot. The Applicants are proposing a range of 5 footcandles from the light source to 0.5 footcandle along the southerly portion of the proposed fence. This complies with the ordinance.

According to Section 330-80(C)(5), lighting shall be provided by fixtures with a mounting height not more than 25 feet or the height of a building, whichever is less, unless said standard is located within 250 feet of a residential zone, in which case the mounting height shall not exceed 15 feet. Mounting height shall be measured from the ground level to the center line of the light source. Light source other than pedestrian walkway lighting shall be spaced at a distance not to exceed five (5) times the mounting height. The Applicants are proposing a floodlight that would be mounted eight (8) feet high. The light would be mounted to a pole attached to an equipment box. This complies.

According to Section 330-80(C)(9), no outdoor floodlight or spotlight and no light beam or emission from any light, whether indoors or outdoors, shall be directed toward any point of the premises. The Applicants are proposing a downward facing floodlight on the premises. This complies.

According to Section 330-187(D)(3)(g), site lighting shall be oriented inward towards the site to avoid off-site impact. No tower lighting, except regulatory lights required by federal laws, shall be permitted. The Applicants are proposing one (1) pole mounted downward facing floodlight for security and safety purposes within the compound. This complies.

- C. **Fences:** According to Section 330-178(C)(5), no fence anywhere in a front yard including a fence running along or approximately parallel to a side lot line within a front yard, shall be more than four (4) feet high nor shall it be less than 50% open. On a through lot, this subsection shall apply to all yard which abut a street. The Applicants are proposing a six (6) feet high fence in the front yard, which does not comply with the ordinance. **A variance is required.**

According to Section 330-178(C)(6), no fence, running substantially along a rear lot, or approximately parallel thereto, or otherwise in a rear yard, shall exceed six feet in height measured from average grade corresponding to each eight-foot section of fencing. If such fence has decorative scalloped panels or pickets

along its upper edge, height may be measured to the lowest point of such edge, thus allowing posts and corresponding elements to exceed the height limitation of this subsection, but in no event by more than one foot. Where a rear yard or side yard of a corner lot abuts a side lot line and front yard of an adjacent lot, then in no event shall a fence in such rear or side yard on the corner lot exceed four feet in height or be less than 50% open for such portion thereof which lies parallel to or otherwise substantially alongside the front yard of the adjacent lot. The Applicants are proposing a six (6) feet high brown vinyl coated chain link fence with a twelve (12) feet wide gate, which complies.

- D. **Parking:** According to Section 330-187(D)(3)(o), one (1) off-street parking stall shall be required. The Applicants are proposing to construct a twelve (12) feet wide access gravel access drive. There appears to be one (1) off-street parking stall along the north-easterly portion of the proposed compound. The Applicants should provide testimony on this.

- E. **Noise:** According to Section 330-187(D)(3)(c), noise levels at any property line shall not be more than 50 decibels. Elements of the proposed project that generate any measurable noise include the AC units built into the proposed equipment shelter and the proposed emergency generator. Noise associated with the AC units is similar to that generated by exterior residential AC units. The generator would only be used approximately once a month for short periods of time and during power outages. The project is in compliance with the limits of the State and Local noise regulations. Additional documentation regarding noise will be provided by the Applicant at the public hearing(s) as required. This complies.

- F. **Outdoor Storage:** According to Section 330-192, in non-residential districts, no article, object or material shall be kept, stored or displayed outside of the confines of a building unless the same is screened by special planting or fencing and is otherwise approved pursuant to an approval by the Planning Board. The Applicants are proposing a six (6) feet high fence around the tower and related equipment at the base of the tower inside a compound. This complies with the ordinance.

- G. **Tree Removal:** According to Section 330-246(A), trees shall be permitted to be removed as necessary to permit the construction of buildings, structures, decks, pools, driveways, septic field, lawn area for recreational use for the residents of the dwelling and any other authorized improvements. Existing vegetation shall be preserved to the greatest extent feasible. The Applicants are proposing to remove 13 deciduous trees and two (2) evergreen trees. This complies.

7. **Criteria for Granting “C” Variances:** The Applicants are seeking bulk variances for tower and antenna setbacks from residential and non-residential property lines as well as the front yard setback for the C-3 Office-Professional Zone. Variances can be granted by the Board, pursuant to N.J.S.A. 40:55D-70c where two provisions exist:
- a. The first provision for granting a “c” variance is under N.J.S.A. 40:55D-70(c)(1) where the Board must find whether there has been a showing of peculiar exceptional practical difficulties or exceptional undue hardship arising out of the exceptional narrowness, shallowness, or shape of a piece of property, or by reason of an extraordinary and exceptional situation uniquely affecting this specific piece of property or the structures lawfully existing thereon.
 - b. The second provision for granting a “c” variance is under N.J.S.A. 40:55D-70(c)(2) where the Board must find that the application relates to a unique situation on a specific piece of property, that the purposes of the MLUL would be advanced by the requested deviation, that the variance can be granted without substantial detriment to the public good, the benefits of granting the variance outweigh any detriments and that the variance will not substantially impair the zone plan or ordinance. Under (c)(2), the Applicant should show that the proposal is a better zoning alternative to that which is permitted by the ordinance and provides benefits to the community as a whole, not just the applicant.
 - c. The negative criteria a two-part proof: (1) that the proposed variance can be granted without any substantial detriment to the public good and (2) the proposed variance will not substantially impair the intent and the purpose of the zone plan and zoning ordinance.
8. **Granting “D(1)” Use and “D(6) Height Variances:** The application requires a “d(1)” variance for two principal uses and a “d(6)” variance for height because the proposed tower height is greater than 10 feet or 10 percent of that permitted by the Zone. The maximum communication tower height permitted is 80 feet. The Applicants seek to add antennae to the tower that will result in a height of 167 feet, which is in excess of 10 feet and 10% of what is permitted.

The Board has the power to grant “d” variances “in particular cases and for special reasons.” This is the so-called positive criteria of the “d” variance. In *Smart SMR v. Fair Lawn Board of Adjustment*, 152 N.J. 309, 329-331 (1998), the NJ Supreme Court stopped short of deeming wireless telecommunication facilities as “inherently beneficial” uses. The court found that some sites are better suited than others for these uses. Smart did determine that an FCC license meets the general welfare requirement of the positive criteria, the applicant must also show that the proposed site is particularly suitable for the proposed wireless communication facility by showing there is a gap in coverage or service in the area where the facility is proposed and that the siting of the facility in that location will result in substantially better coverage and service.

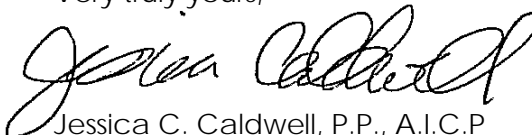
If those two noted aspects of the positive criteria are answered, then negative criteria can be satisfied via the Sica balancing test established in *Sica v. Wall Township Board of Adjustment*, 127 N.J. 152 (1992). There is no “enhanced quality of proof” requirement. Instead, the Board must balance the positive and negative criteria and determine whether, on balance, the requested “d” variances can be granted without causing substantial detriment to the public good and substantial impairment of the intent and purpose of the zone plan and zoning ordinance. The Sica balancing test includes the following four (4) steps:

- a. **First Step:** Identify the public interest at stake, understanding that some proposals are more compelling to the public interest than others.
 - b. **Second Step:** Identify any detrimental effects that could be caused by the granting of the variances including primarily, substantial detriment to the public good (surrounding area) and substantial impairment to the zone plan or zoning ordinance.
 - c. **Third Step:** Determine whether the imposition of reasonable conditions can mitigate the negative impacts identified.
 - d. **Fourth Step:** Lastly, the Board must balance the positive and negative criteria and determine whether, on balance, the “d” variance can be granted without causing substantial detriment to the public good and substantial impairment of the intent and purpose of the zone plan and zoning ordinance.
9. **Conditional Use Variance Pursuant to N.J.S.A. 40:55D-70(d)(3):** The ordinance permits new tower construction as a conditional use as noted. The application does not meet all of the conditional use criteria necessitating a conditional use variance. Criteria for granting a conditional use variance were established by *Coventry Square v. Westwood Zoning Board of Adjustment*, 138 N.J. 285, 293-294 (1994). The Coventry standards are in part similar to the flexible ‘c’ variance criteria.
- a. In Coventry, the court states that a conditional use application’s inability to meet all conditions does not necessarily negate the appropriateness of the

site for the use. Coventry found that conditional uses are presumed by the zoning ordinance to be suitable for the site given certain conditions. Thus, the applicant must show the site remains suitable despite the fact that all conditions of the use are not met. This is similar to the positive criteria of a "c" variance and not the enhanced burden of proof required by the Medici case law.

- b. The negative criteria are also somewhat varied from the Medici case law under Coventry; the Applicants need to address the impacts associated with the conditions that cannot be met, not the entire proposal. In this case, negative impacts associated with the increase in height of the proposed antennae need to be addressed. These aspects of the application are required to meet the enhanced burden for the negative criteria.

Very truly yours,



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cc: Via Email Only

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