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REPLY TO:

Tarrytown Office

October 16, 2025

Honorable Mayor Lance N. Millman and
Members of the Board of Trustees
Village of Montebello
One Montebello Road
Montebello, NY 10901

RE: Homeland Towers, LLC
350 Haverstraw Road, Village of Montebello, NY ("Property")

Dear Honorable Mayor Millman and Members of the Board of Trustees:

We are the attorneys for Homeland Towers, LLC ("Homeland Towers") in connection with its proposal to lease a portion of the above captioned Property from the Village for a proposed public utility wireless telecommunication facility ("Facility"), including a monopine tower and equipment compound designed for the collocation of Village emergency communications equipment and four wireless carriers. The plans and other materials enclosed herewith have been updated to show both a 100- and a 110-foot tower to be considered and decided on by the Board.

In furtherance of Homeland Towers' lease proposal and request for the Village Board to conduct a review and make a determination that the proposal is in the public interest by performing a Monroe Balancing Test, enclosed please find ten (10) sets of the following additional documents and information in response to comments made at the September 17, 2025 meeting:

1. Verizon Wireless Joinder Letter, dated September 26, 2025, confirming the need for the Facility to remedy a significant gap in service;

2. Revised Visual Resource Assessment ("Visual Resource Evaluation"), with the following updates:

    - Appendix A - Viewshed Maps are revised to include the locations of new photo points in Harriman State Park which demonstrate no visibility (see new Photos 23, 24 and 25).

- Appendix B - Photo Log is revised to include photographs from trail overlooks within Harriman State Park (see new photos 23, 24 and 25). Table 1 - Photo Locations is revised to include new photos 23, 24 and 25.
- The discussion of probability from Harriman State Park on page 4 is revised to address trail views and lack of visibility.
- Appendix C - Photo Simulations is revised to include photo simulations illustrating a brown painted monopole alternative (see photos 01, 02, and 14)

3. Alternative Site Analysis by Klaus Wimmer ("Alternative Site Analysis");
4. Species analysis letter from TriLeaf, dated September 19, 2025; and
5. Revised Site Plan. Please note that the Site Plan has been revised to further reduce the size of the equipment compound from 50" x 60' to 50' x 50'. This significant reduction allows for the preservation of three additional trees plus numerous saplings, and the planting of seven additional proposed trees for a total of 20 new plantings. As shown on the Site Plan, significant landscaping is proposed. Moreover, the Proposed Lease, Section 5(e) includes an additional $20,000.00 payment to the Village intended for tree planting.

The Monroe Balancing Test

It is well recognized under New York State Law that municipalities are accorded certain "immunity" from local zoning regulations. The leading New York Court of Appeals decision, Matter of County of Monroe v. City of Rochester, 72 N.Y.2d 338, 533 N.Y.S.2d 702 ("Monroe"), establishes the "balancing of the interests" ("Monroe Balancing Test") approach for determining whether a project should be accorded immunity from local zoning regulations.

In Bruenn v. Town Bd. of the Town of Kent (attached to this letter as Exhibit 1), the Supreme Court of the State of New York ruled that the Monroe Balancing Test is applicable to telecommunications facilities on the property of the municipality performing the Monroe Balancing Test, the same as in this case. See also, Carmelos v. Armenia, 152 A.D.2d 928, 543 N.Y.S.2d 832 (4th Dep't 1989) (Town of Grand Island immune under Monroe from its own zoning for installing floodlights at Town-owned tennis courts without challenge from second governmental entity); Corrini v. Village of Scarsdale, 1 Misc3d 907(A); 781 N.Y.S.2d 623, 2003 WL 23145905 (Westchester Sup. 2003) (Monroe balancing test exempts Village's construction of ambulance facility on Village-owned land from zoning without challenge from second governmental entity); Dunn v. Warwick, 146 A.D.2d 601, 537 N.Y.S.2d 174 (2d Dep't 1989) (Town effort to construct Town Hall on Town-owned property not subject to zoning and no challenge from second governmental entity); In the Matter of the Application of Richard Syms v. Town of Amenia, Supreme Court of Duchess County, Index No. 5002/2002 (Town Board appropriately applied the Monroe balancing test to exempt a wireless telecommunications tower from zoning on Town-owned property without challenge from second governmental entity).

Monroe permits the Village Board to determine whether or not it is in the public interest to subject a particular project to local zoning if it serves governmental interests. Monroe discusses the following nine (9) factors to consider when balancing the interests of the public and the governmental entity:

1. The nature and scope of the instrumentality seeking immunity;

2. The encroaching governmental entity's legislative grant of authority;

3. The kind of function or land use involved;

4. The effect local land use regulation would have upon the enterprise concerned;

5. Alterative locations for the facility in less restrictive zoning areas;

6. The impact upon legitimate local interests;

7. Alternative methods of providing the proposed improvement;

8. The extent of the public interest to be served by the improvements; and

9. The intergovernmental participation in the project development process and an opportunity to be heard.

The Village Board should analyze each of the foregoing considerations to determine whether the Facility should be exempt from the Village of Montebello zoning regulations.

FIRST: The Village is a municipal corporation of the State of New York and provides emergency and public safety protection to its residents. Therefore, the Village is purely public in nature and is a governmental entity that provides an essential public service.

SECOND: The Facility will be located within the municipal borders of the Village, and therefore there is no encroaching entity. The Village has authority to lease Village lands. NYS Village Law § 1-102(1) provides: A village "shall have power . . . to take, purchase, hold, lease, sell and convey such real and personal property as the purposes of the corporation may require." Here the land to be leased is vacant land and not devoted to public uses and is not necessary for the purposes of the Village. Moreover the lease is fair compensation for the vacant land.

THIRD: The function or land use contemplated by the Village under the Agreement is a public utility wireless communications facility. The Facility will consist of a 100- or 110-foot tower and compound to support the communication needs of various Village departments, and to provide for the collocation of antennas operated by wireless public utility telecommunications service providers, including Verizon Wireless. See Verizon Wireless Joinder Letter, submitted herewith. Verizon Wireless is a public utility in this context. In Cellular Telephone Company v. Rosenberg, the Court of Appeals unambiguously held that federally licensed wireless carriers provide an essential public service and are public utilities in the State of New York which should be accorded favored treatment. Cellular Telephone Company v. Rosenberg, 82 N.Y.2d 364, 604 N.Y.S.2d 895 (1993). Moreover, in Cellular Telephone Company v. Town of Oyster Bay, the Second Circuit Court of Appeals, citing Rosenberg, held that: "[i]n New York, cellular telephone

companies are afforded the status of public utilities." See Cellular Telephone Company v. Town of Oyster Bay, 166 F.3d 490, 494 (2d Cir. 1999) (internal citations omitted).

FOURTH: Imposing local land use regulations on the proposed Facility would have the effect of unreasonably delaying an essential public need for immediate and effective emergency response and reliable wireless communications. See Dunn v. Warwick, 146 A.D.2d 601, 604, 537 N.Y.S.2d 174, 176 (2d Dep't 1989) (When applying the balancing test, "no element should be 'thought of as ritualistically required or controlling'"); Town of Hempstead v. State of New York, 42 A.D.3d 527, 840 N.Y.S.2d 123 (2d Dep't 2007) ("[w]e note that even assuming that the Town is correctly contending that the subject tower is more visible from the surrounding residences than the negative declaration pursuant to SEQRA states, this factor does not outweigh **the public benefits which are gained from more widespread cellular coverage in the subject area**").

FIFTH: There are no alternative locations for the Facility in less restrictive zoning areas as such facilities are not expressly regulated. There are also no other alternative locations. See Alternative Site Analysis submitted herewith. Moreover, the proposed location for the Facility at the subject Property is ideal in order to minimize aesthetic impacts to the greatest extent feasible based on the large size of the property and distance from neighboring uses, as demonstrated by the Visual Resource Evaluation. The Property already supports municipal operations, and therefore the location of the Facility on the Property will not have a detriment on the community. By controlling the location of the Facility on municipal property, the Village can ensure that there is adequate infrastructure in place for the location of emergency communication antennas while controlling the proliferation of new towers.

SIXTH: The Facility will not have an adverse environmental or other impact on the public because the Facility will be sited on a large parcel distant from neighboring residential uses. See EAF. The Facility will benefit the public interest by providing essential services, by producing revenue for the Village, and by providing critical infrastructure for municipal emergency wireless communications and public utility commercial wireless services, and will be sited to minimize any potential adverse environmental impacts. The Facility will comply with all structural standards and will not adversely affect the public health, safety or general welfare. The Facility will not cause any harmful interference with the frequencies of any radio, television, telephone or other uses. The Facility will have no impact on pedestrian or vehicular traffic since the proposed use is unmanned, requiring infrequent maintenance visits of approximately once per month. The Facility will not produce any smoke, gas, odor, heat, dust, noise above ambient levels, fumes, vibrations or flashing lights; the Facility will not generate solid waste, wastewater or sewage, will not require water supply or waste disposal, and will not attract insects, vermin or other vectors.

Any human exposure to electromagnetic energy from the Facility, even under "worst case" conditions, will be several orders of magnitude below the exposure limits established by the FCC. See FCC Compliance Report. The Facility will not impact any wetlands and will not be located within any wetland buffers. See Site Plan.

SEVENTH: Due to the topography of the Village, the proposed height of the Facility is necessary to provide reliable wireless communications services in the local area and support collocation, thereby discouraging the proliferation of towers.

EIGHTH: The Facility will protect and promote the public interest, in that it will serve and benefit the entire community by providing the infrastructure necessary to offer the public wireless telecommunications services essential for protecting public health, safety, and welfare, including the provision of enhanced 911 services. See VComm RF Justification Report.

NINTH: The zoning exemption contemplated by this resolution shall apply and extend to the commercial public utility antennas and related equipment located on or associated with the Facility consistent with the decision of the New York State Court of Appeals in Crown v. Department of Transportation, 4 N.Y.3d 159, 791 N.Y.S.2d 494 (Court of Appeals 2005).

TENTH: The Agreement is for Village land that will not be required by the Village over the term of the Lease, and the compensation provided to the Village under the Agreement is for fair market value.

ELEVENTH: The Village Board of Trustees has reviewed the project, has conducted multiple open meetings and has a public hearing scheduled for October 22, 2025. Moreover, the application has been circulated to all Interested Agencies under SEQRA and provided all notices required under the New York State Village Law.

It is also important to note that the Monroe Balancing Test is applicable to the Facility, including Homeland Towers and Verizon Wireless because the Village is a governmental subdivision that is entitled to governmental immunity. In Crown v. Department of Transportation, the Second Department addressed a request for a declaration by the holder of a contract to build telecommunications towers on state lands that it and the commercial licensees of space on its towers were exempt from local zoning regulations. Crown v. Department of Transportation, 309 A.D.2d 863, 76 N.Y.S.2d 898 (2d Dep't 2003). The Second Department Crown Court expressly held that "[t]he Wireless Telephone Providers are not precluded from enjoying the State's immunity simply because they are private entities or because collocating on the DOT's towers will advance their financial interests." Crown v. Department of Transportation, 309 A.D.2d 863, 866, 76 N.Y.S.2d 898, 901 (2d Dep't 2003). The Second Department Crown Court further held that "it is not the private status of the Wireless Telephone Providers but, rather, the public nature of the activity sought to be regulated by the local zoning authority that is determinative in this case." Id.

The Court of Appeals went on to both uphold the Second Department Crown case and amplify the Second Department's conclusions set forth therein. As the Court of Appeals held, "[t]he fact that the wireless providers will also realize profit from their services does not undermine the public interests served by co-location." Crown v. Department of Transportation, 4 N.Y.3d 159, 791 N.Y.S.2d 494 (Court of Appeals 2005). See also Town of Hempstead v. State of New York, 42 A.D.3d 527, 840 N.Y.S.2d 123 (2d Dep't 2007) ("While County of Monroe involved two governmental agencies, the court has made it clear that a private entity may share in the immunity accorded to the State if the result of the balancing test is in the State's favor"); and In the Matter of the Application of Richard Syms v. Town of Amenia, Supreme Court of Duchess County, Index No. 5002/2002 (Town Board permitted to exempt a previously constructed wireless telecommunications tower from zoning on Town-owned property).

We look forward to discussing this matter at the October 22, 2025 Board of Trustees public hearing.

If you have any questions, please do not hesitate to contact me.

Respectfully submitted,
SNYDER & SNYDER, LLP

By:_____
Robert D. Gaudioso

Enclosures
RDG/cae
cc: Warren Berbit, Esq.
Homeland Towers

Exhibit 1

H:\Orange\Article 78\Bruenn v. Kent.wpd

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF PUTNAM

----------X

PETER BRUENN, CYNTHIA BRUENN, MARCUS LOVETT, CHRISTINE LOVETT, ALEXANDRA VAUGHN, JOHN DEARMAN, DANIELLE DEARMAN, DENNIS ROGERS, LONE BLECHER, GLEN DAVIDSON and LYNDA DAVIDSON,

Petitioners,

For an Order and Judgment Under Article 30 & 78 of the New York State Civil Practices Law and Rules, Municipal Law §51 and CPLR §3001,

THE TOWN BOARD OF THE TOWN OF KENT, KATHERINE DOHERTY, MICHAEL TIERNEY, PENNY ANN OSBORN, JOHN A. GREENE, LOUIS TARTARO, consisting the TOWN BOARD OF THE TOWN OF KENT, THE TOWN OF KENT and HOMELAND TOWERS LLC,

Respondents.

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DECISION & ORDER

Index No. 1023/13

Sequence No. 1
Motion Date: 1/27/14

LUBELL, J.

The following papers were considered in connection with this petition for an Order and Judgment under Article 30 and Article 78 *et seq* of the New York State Civil Practices Law and Rules:

PAPERS	**NUMBERED**
NOTICE OF PETITION/PETITION/EXHIBITS A-K	1
MEMORANDUM OF LAW IN SUPPORT OF PETITION	2
AFFIDAVIT IN OPPOSITION (DOHERTY)	3
AFFIDAVIT IN OPPOSITION (WILSON)/EXHIBIT A	4
VERIFIED ANSWER TO PETITION	5
AFFIRMATION IN OPPOSITION (GAUDIOSO)/EXHIBIT A	6
VERIFIED ANSWER	7
MEMORANDUM OF LAW IN OPPOSITION	8
REPLY AFFIRMATION IN FURTHER SUPPORT/EXHIBITS A-C	9
REPLY MEMORANDUM OF LAW IN SUPPORT	10

Plaintiffs-Petitioners are Town of Kent (the "Town") homeowners (the "Homeowners") situated within the immediate vicinity of the Town of Kent Highway Garage, a Town owned parcel located at 21 Smokey Hollow Court, Carmel, New York, (the "Site") upon which the Town Board of the Town of Kent (the "Town Board") authorized respondent Homeland Towers, LLC ("Homeland") to build and maintain a 150-foot monopole wireless telecommunications tower (the "Tower"). The Tower will not only be used for the enhancement of Town public safety services, it will also be leased for profit by Homeland to five federally licensed public utility wireless providers. In turn, the Town will benefit from its lease of a portion of the site to Homeland.

The Homeowners commenced this hybrid CPLR Article 78 proceeding/Declaratory Judgment action seeking to annul and vacate the two underlying April 16, 2013, resolutions authorizing same, and for a declaration adjudging and declaring that said resolutions, and any authority to use the Site or build the Tower are illegal and *void ab initio*.

The Homeowners argue that the Town Board resolutions are null and void *ab initio* to the extent that they (a) purport to authorize Homeland to build and maintain structures prohibited under the Zoning Law of the Town of Kent (the "Zoning Law"), (b) exempts Homeland from the requirements of obtaining use and area variances from the Kent Zoning Board of Appeals (the "ZBA"), and (c), thereby "grants Homeland *de facto* variances". In other words, the Homeowners argue that Homeland's application for the erection of the Tower should have been subjected to the review of the ZBA and that the Town lacked authority to perform the "immunity balancing test" established in the seminal case of Matter of County of Monroe (City of Rochester), 72 NY2d 338 (1988). The Homeowners also argue that the Town Board's determinations are arbitrary and capricious and not supported by substantial evidence.

The Court disagrees. The Town Board has the authority to perform the immunity balancing test and, upon doing so, properly conducted same. Its determinations are rational, supported by substantial evidence in the record and are neither arbitrary nor capricious. Finally, the Homeowners fail to state a claim for relief under section 51 of the General Municipal Law, or any other section of law or theory of recovery advanced.

The immunity balancing test is applicable to the proposed project. Even though the erection of the Tower will advance the private entity interests of its owner, Homeland, and that of the

five federally licensed public utility wireless providers who will be able to use the Tower in furtherance of their commercial enterprises, such "does not undermine the public purposes" for which the Tower will be erected and maintained" (Crown Communication New York, Inc. v Dept. of Transp. of State of New York, 309 AD2d 863, 866 [2d Dept 2003] affd sub nom. Crown Communication New York, Inc. v Dept. of Transp. of State, 4 NY3d 159, 824 NE2d 934 [2005]). The public benefits of having the Tower erected include the enhancement of services of Town public safety entities to the community, the ability to allow five federally licensed public utility wireless providers to co-locate on the Tower which helps minimize the number of towers needed to effectuate widespread reliable cell service, and the ability to remedy a significant gap in service. It is "the public nature of the activity sought to be regulated by the local zoning authority that is determinative . . . " (Crown Communication New York, Inc. v Dept. of Transp. of State of New York, 309 AD2d 863, 866 [2d Dept 2003] affd sub nom. Crown Communication New York, Inc. v Dept. of Transp. of State, 4 NY3d 159, 824 NE2d 934 [2005]).

The applicability of the Monroe immunity balancing test is not limited to situations where there exists a conflict between competing government entities or subdivisions with differing interests. Although the immunity balancing test arose out of such circumstances (see Matter of County of Monroe, supra, [county vs city]), its application has evolved and is not so circumscribed (see e.g., Armenia v Luther, 152 AD2d 928 [4th Dept 1989][town immune from its own zoning regulations upon installation of floodlights at tennis courts and softball diamond situated in a town park]; Dunn v Town of Warwick, 146 AD2d 601, 604 [2d Dept 1989][town not obligated to obtain planning board approval for the construction of proposed town hall on town property]).

The Homeowner's position with respect to the powers of zoning boards of appeal, generally, and the ZBA specifically, are accurately stated in its memoranda of law (see Matter of Real Holding Corp. Lehigh, 2 NY3d 297 [2004][zoning boards of appeals are vested with the exclusive power to grant or deny, in the first instance, a variance from zoning ordinances]; see also Carbone v Town of Bedford, 144 AD2d 420 [2d Dept 1988]; Town Law §267-b(3); §267(1), §267-b; Matter of Comco Inc. v. Stanley P. Amelkin et al., 62 NY2d 260 [1964][exclusive authority of a zoning board of appeals cannot be circumvented by a town board]; see also Article XVI of the Town of Kent's Zoning Laws]). Nonetheless, such does not vitiate the power of the Town Board to employ the "immunity balancing test" of Matter of Monroe, supra, to determine whether, in the first instance, an entity should be granted immunity from local zoning requirements. Application of the immunity balancing

test is not within the exclusive jurisdiction of a zoning board of appeals (see e.g., Matter of Monroe, supra, [no zoning board involvement in balancing test]; Town of Hempstead v State, 42 AD3d 527, 529 [2d Dept 2007][Supreme Court properly employed "balancing of public interests" test and correctly determined telecommunications tower was immune from local zoning laws]; King v County of Saratoga Indus. Dev. Agency, 208 AD2d 194, 199-200 [3d Dept 1995][Supreme Court correctly determined that challenged decision of Saratoga Industrial Development Agency was in keeping with *Matter of County of Monroe, supra*, and it "properly concluded that the benefits inherent in the development of a project necessary to the economic well-being of an area . . . outweigh the interest of the Town in the banning of such projects from its precincts"; Nanuet Fire Engine Co. No. 1, Inc. v Amster, 177 Misc 2d 296, 297 [Sup Ct 1998][matter remitted to Town of Clarkstown, in the first instance, to apply the balancing of interest test, there having been no public hearing with respect to the proposed project and the record before the court failing contain sufficient information to enable court to determine whether petitioner is subject to local zoning]; Town of Riverhead v County of Suffolk, 39 AD3d 537, 539 [2d Dept 2007][due to conflicting evidence in the record, court could not determine under the "balancing of public interests test" whether county was entitled to construct and utilize a new fueling facility]; Town of Fenton v Town of Chenango, 91 AD3d 1246, 1251 [3d Dept 2012] lv to appeal dismissed in part, denied in part, 19 NY3d 898 [2012][Supreme Court's analysis and conclusion, upon application of the factors articulated in County of Monroe, upheld as sound]). As such, contrary to the Homeowners' assertion, the Town Board has not and is not about to act in excess of its jurisdiction or powers (see CPLR §7803[2], CPLR §3001).[1]

Upon review of the challenged determinations, the Court finds that they are neither illegal, arbitrary, or capricious nor do they constitute an abuse of discretion (Baker v. Brownlie, 248 A.D.2d 527, 528[2d Dept 1998); Matter of Tarantino Zoning Board of Appeals of Town of Brookhaven, 228 A.D.2d 511, 512 [2d Dept 1996]). The determinations are also supported by substantial evidence in the record (Retail Property Trust v. Town of Hempstead, 98 N.Y.2d 190, 196 [2002] citing Matter of Toys "R" Us v. Silva, 89 N.Y.2d 411, 423 [1996]). The record clearly reflects an exhaustive six-year Town Board process involving seven public hearings addressing the Monroe balancing test alone.

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[1] Application of the immunity balancing test must be distinguished from the balancing test employed by a zoning board when, for example, considering area variance applications pursuant to Town Law §267-b(3).

Contrary to the Homeowners' assertion, the Town Board properly and adequately considered multiple alternative locations, including the "superior" alternative location advanced by the Homeowners. A Generic Environmental Impact Statement was prepared and the Town Board adopted a Town-wide Wireless Infrastructure Plan before even embarking upon the specific Town-owned Highway Garage location upon which the Tower was approved.[2] Not only was the Site reviewed, but, as well, there was an Alternative Site Analysis and a Supplemental Alternative Site Analysis wherein the following is found:

> The fifth site was Identified as Route 301 (owned by CMF Property LLC) . . . This property is currently undeveloped. This site was rejected due to the difficult topography of the lot. Such topography would result in potential environmental impacts during construction, including tree clearing and grading associated with lengthy access road and the facility compound. Moreover there are no existing utilities on site. It also appears that the NYC DEP owns the land between Route 301 and this lot. This would mean that access to the site at this location would require an access road of up to a half a mile through very difficult terrain resulting in potential environmental impacts. Accordingly, this site is not a feasible alternative site.

In any event, the availability of the site is speculative and far from certain (see T-Mobile v. City of Anacortes, 572 F.3d 987, 998 [9th Cir. 2009][speculative alternative location does not constitute viable alternative]) and is hardly developed from a technical, engineering, and environmental feasibility viewpoint.

The Court also uphold's the Town Board's determination regarding the risk of ice fall as rational, supported by substantial evidence in the record and neither arbitrary or capricious.

Whether or not this is a proper Monroe issue, and it appears not to be, the Town Board draws the Court's attention to the Engineering Certification letter from Kavish Zawar, a New York State Licensed Professional Engineer from Tectonic, dated March 15,

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[2] The Homeowners do not challenge the Town Board's Negative Declaration under the State Environmental Quality Review Act (N.Y. Envtl. Conserv. Law, Art 8).

2013. This letter was submitted in response to the Homeowners' concerns about the danger of ice falling from the Tower. Therein, Engineer Zawar concludes:

> [B]ased on the design of the facility as a monopole, its location within a secured fenced compound at the Town-owned Highway Garage, and the minimal possibility of ice accumulation and fall, we believe there is not a significant risk to persons or property from ice fall in this situation.

The concerns raised by physicist Dennis L. Rogers on the subject of ice fall were presented to the Town Board at its March 19 and April 2 and 16, 2013, public hearings. They were not ignored. In response, Engineer Zawar submitted a Supplemental Engineering Letter dated April 8, 2013, addressing asserted inadequacies of Mr. Rogers' calculations due to incorrect assumptions and design criteria. The issue was further addressed at the April 16th Town Board public hearing at which time there was discussion about the weather conditions one might expect in the Town of Kent and how that would not pose an icing problem.

The Town's determination that there is a need for the Tower at the proposed location will also not be disturbed.

Again, whether or not a proper consideration under the Monroe balancing test, the Court concludes that the Town Board's determination that there is such a need is rational, supported by substantial evidence in the Record and is neither arbitrary nor capricious.

This determination derives from the Town's six-year review of this project, including its adoption of a Generic Environmental Impact Statement and a Wireless Infrastructure Plan (the "WIF"). The WIF demonstrates through actual drive test data and signal propagation maps that a significant gap in reliable wireless services exists in the vicinity of the Highway Garage. There is other support in the record as well. (See Supplemental Alternative Site Analysis of Vincent Xavier -Verizon Wireless propagation maps). In addition, the Town of Kent Police Department had the following to say in a submission of February 26, 2013:

> I am writing this letter in support of the proposed installation of a cell tower off of Smokey Hollow Ct. Currently our cell phones and mobile computers use Verizon Wireless for cellular service. Often in the western part of

> the Town of Kent the cellular signal strength is weak which limits cell phone service and causes officers to lose connection on their mobile computers. Loss of connection does not allow officers to access DMV [Department of Motor Vehicle] or communicate with the front desk via the computer. The possibility of Verizon accessing this tower would improve cellular signal strength therefore increase public and officer safety. This tower may also be used for any future enhancements to our radio system.

There is other support as well, including: letters from federally licensed wireless telecommunications carriers Verizon Wireless and AT&T, confirming their intent to co-locate on the Tower to remedy a gap in service in the Town of Kent; a letter from NYCOMCO, the professional communications provider for the Town of Kent Police Department, Highway Department and Fire Department, dated March 7, 2013, which states that the Tower at the Highway Garage "will improve public safety wireless communications and help secure the health, safety and welfare of the community."

There is also substantial evidence in the record that the Town conducted a thorough analysis of the impact of the proposal on property values, including the Lane Appraisal Report which concludes that "the installation, presence, and/or operation of the proposed Facility will not result in the diminution of property values or reduce the marketability of properties in the immediate area." There is also a supplemental Lane Appraisal Report (see T-Mobile v. Town of Ramapo, 701 F. Supp. 2d 446 [S.D.N.Y. 2009]). The Town Board's acceptance of same will not be disturbed by the Court (Retail Property Trust v. Town of Hempstead, 98 N.Y.2d 190,196 [2002] citing Matter of Toys "R" Us v. Silva, 89 N.Y.2d 41 1, 423 [1996]). This determination is neither illegal, arbitrary, or an abuse of discretion (see e.g. Baker v. Brownlie, 248 A.D.2d 527, 528 [2d Dept 1998]); Matter of Tarantino v. Zoning Board of Appeals of Town of Brookhaven, 228 A.D.2d 511, 512 [2d Dept 1996]).

Notwithstanding the Homeowners' allegations, the Court finds that the record, as a whole, adequately supports the Town's position that the public in general and the Homeowners specifically were accorded an adequate opportunity to have any relevant and material concerns raised and addressed over the six-year review process, which included seven duly noticed public hearings held on November 27, 2012, December 18, 2012, January 29, 2013, February 26, 2013, March 19, 2013, April 2, 2013 and April 16, 2013. There were also numerous additional duly noticed public hearings and workshop meetings associated with the Generic Environmental Impact

Statement, the Town Wireless Infrastructure Plan, the lease agreement between Homeland and the Town, and the amendment to said lease. (See New York SMSA Limited Partnership v. Village of Floral Park Board of Trustees, 812 F.Supp.2d 143 [E.D.N.Y. 2011]; Cellular Telephone Company v. Town of Oyster Bay, 166 F.3d 490, 494-495 (2d Cir. 1999) ("generalized health concerns of citizens are insufficient to rise to the level of substantial evidence").

Finally in this regard, the Court does not find that the Town Board abused its discretion or otherwise acted arbitrarily, capriciously or contrary to law when it limited residents' final statements to three minutes during its seventh and final public hearing on the matter, April 16, 2013. In addition, their unfounded fears about radio frequency emissions were properly addressed.

The Court further finds that, within the confines of this CPLR Article 78 proceeding/Declaratory Judgment action, the Homeowners have failed to state a cause of action under section 51 of the General Municipal Law and 42 U.S.C. 1983. An action under GML §51 cannot be sustained in the absence of a showing of fraud, collusion, bad faith or public mischief (Bernstein v. Feiner, 13 A.D.3d 519, 521 [2d Dept 2004]).

The 1983 action must fail as well. "The essential elements of the cause of action are conduct committed by a person acting under color of State law, which deprived the Plaintiff of 'rights, privileges, or immunities secured . . . by the Constitution or laws of the United States" (Bower Associates v. Town of Pleasantville, 304 A.D.2d 259, 262 [2d Dept 2003]). In any event, it is not properly rased in the context and nature of proceedings currently before the Court (id. at 263).

Based upon the foregoing, it is hereby

ORDERED, ADJUDGED and DECLARED, that the challenged Town Board resolutions are *not* void ab initio, are valid and of full legal effect, are not affected by errors of law, are neither arbitrary, capricious, nor contrary to law, are supported by substantial evidence in the record and are not otherwise actionable as illegal acts under General Municipal Law §51 or as otherwise herein advanced by Homeowners; and, it is further

ORDERED, that, Homeowners application for injunctive relief be and is hereby denied; and, it is further

ORDERED, that, the action be and is hereby dismissed in all respects.

The foregoing constitutes the Opinion, Decision, Order and Judgment of the Court.

Dated: Carmel, New York
June 13 , 2013

HON. LEWIS J. LUBELL, J.S.C.

Campanelli & Associates, PC
By: Andrew J. Campanelli, Esq.
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