Statement in Opposition to Application by Bell Atlantic Mobile of Massachusetts Corporation Ltd. d/b/a Verizon Wireless

For a

Development of Regional Impact at 21 New Lane, West Tisbury, MA
Assessor's Map 31, Lot 48

Submitted to the
Martha's Vineyard Commission

January 24, 2013

Statement in Opposition ("Opposition") to Application
For a
Development of Regional Impact ("DRI")
Submitted to the
Martha's Vineyard Commission ("Commission")

Opponents:	James L. Cooper, Jr.; Dina ElBoghdady; Alan K. Temple; Margaret S. Temple; Ian M. Temple; Polly L. Peterson; Peter N. Temple; Polly L. Temple; Patrick J. Temple; Elizabeth E. Temple; Christopher C. McIsaac; Ian S. McIsaac; Betsy C. McIsaac; Tracey E. Braun; Suzanne E. Durrell; Kirk M. Reische; Eric Reische; Richard Reische; Diana Reische; Stephen Cohn; Margaret R. Weiss; Frederick L. Weiss; Susan B. Whiting; Phillips Harrington; and others who may express opposition (collectively, "Opponents")
Applicant:	Bell Atlantic Mobile of Massachusetts Corporation Ltd. d/b/a Verizon Wireless ("Verizon Wireless", "Verizon" or "Applicant")
Subject Parcel:	21 New Lane, West Tisbury, Mass., Assessor's Map 31, Lot 48 ("Subject Property")
Land Use Districts:	Coastal Overlay and RU Zoning Districts (Town of West Tisbury); Coastal DCPC
Proposal:	To install a new Personal Wireless Service Facility ("PWSF"), with associated ground equipment, on a leasehold portion of the Subject Property (the "Proposal")
Requested:	Disapproval of DRI Application pursuant to the Martha's Vineyard Commission Act ("Chapter 831"); Specification of Conditions for Resubmission
Date:	January 24, 2013

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I. Introduction

Verizon Wireless is proposing to build a visually intrusive, 80' high utility tower on the Subject Property in West Tisbury that would stand within the Coastal District of Critical Planning Concern ("Coastal DCPC") and loom as much as 45 feet above the surrounding tree canopy. Contrary to the shared policy purposes of the Massachusetts Constitution, Chapter 831, the Coastal DCPC, and the Island Plan, it would dramatically impair the natural scenic integrity of a sensitive, legally protected area, as well as the views and values of surrounding private properties within the Coastal DCPC.

If built as proposed, the tower would be a significant and detrimental Development of Regional Impact ("DRI") that would violate the DRI review standards of Sections 14 and 15 of Chapter 831, the Commission's goals and guidelines for the Coastal DCPC, and the applicable requirements of sections 6.1 and 8.8 of the West Tisbury Zoning Bylaw ("Bylaw"). It appears that the Applicant has deliberately misstated, and the ZBA has overlooked, the actual requirements of both the Coastal DCPC and Section 6.1 of the Bylaw in their deliberations to date. Where these requirements have been overlooked, the Commission should step in to enforce them in order to protect the integrity of its Coastal DCPC.

Moreover, approval of the proposal by the Commission would also set a precedent vesting rival wireless companies with the future right to degrade other sensitive scenic areas throughout the Coastal DCPC with similar visual pollution, and would effectively strip the Commission and town agencies of the power to regulate such adverse impacts.

Much of the justification and support for the proposed tower appears to revolve around the desire for improved cell phone reception in the immediate area, and improved cell phone reception is indeed a worthy and desirable goal. However, Verizon has not demonstrated that the proposed structure is *necessary* to its ability to provide wireless services, and that no feasible alternatives are possible. Instead, Verizon in effect has only argued that the proposal is a *convenient* means (for itself) of providing improved service. Previously, however, Verizon has demonstrated by its own past actions that such alternatives are in fact available. For example, on several recent occasions when the President of the United States was vacationing in the same neighborhood as the proposed tower, Verizon has actually provided improved cell phone service by other means without impairing the scenic qualities of the Coastal DCPC.[1]

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[1] Verizon has submitted arguments to the effect that local or regional land use regulatory denial of the proposed tower would violate the Federal Telecommunications Act of 1996. As will be discussed, these arguments are misleading and appear intended to intimidate the Commission and ZBA from exercising their proper statutory authority and obligations, and the public from expressing effective opposition. In fact, court decisions expressly affirm the broad powers of local and regional land use agencies, and impose a high burden on the applicant to prove that

The Opponents submitting this Opposition are neighboring property owners and their family members on or near the western shore of Tisbury Great Pond in West Tisbury and Chilmark, who share a common concern for preserving the scenic integrity of the Pond as a public resource.[2] We urge the Commission in the strongest possible terms to disapprove the Application as submitted. In anticipation that a revised application may be submitted, we also urge that any revised application be required to satisfy expressly enumerated conditions designed to protect the scenic integrity of the Coastal DCPC and the Island, and to ensure that no more visually intrusive facility is approved than is actually necessary. We also urge the Commission to determine whether the Application is so misleading as to warrant denial with prejudice under subsection 8.8-10. E. 1. of the Bylaw. Finally, if the Commission decides to allow Verizon to supplement or amend the Application, we request that the hearing be continued and the hearing record be held open for a sufficient time after Verizon submits any supplementary information to allow the public to respond.

II. The Application is Properly Before the Commission for Review as a DRI

A. The Proposal would have a permanent, strongly detrimental, regional impact.

The Application has been properly referred to the Commission as a DRI under Section 8 (Communications Facilities and Towers) of the Commission's DRI Checklist. The numerous suggestions in the Applicant's statement of support to the effect that the application has only *de minimis* regional impact are untrue and appear to be intentionally misleading. Contrary to Verizon's claims, the proposed tower has regional significance (1) as an element of the ongoing development of the Island's regional wireless communications network, (2) in its own right as a stand-alone facility affecting more than one of the Island's towns, and (3) as an otherwise prohibited development within the Coastal DCPC. The proposed cellular tower on the Subject Property is a significant, adverse DRI worthy of especially close scrutiny by the Commission. If the tower were to be approved as proposed, not only would an ugly and incompatible use be introduced to a sensitive coastal region, but also the precedent of the approval would severely erode the future authority of the Commission and the West Tisbury Zoning Board of Appeals ("ZBA") to enforce Coastal DCPC standards elsewhere.

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abuse of those powers effectively prohibited wireless service – a standard of proof that Verizon has not attempted to offer and cannot meet.

[2] The named Opponents are more particularly identified in Appendix A.

B. Wireless service expansion is properly within the regulatory purview of the Commission as a DRI.

In a confusing and self-contradictory fashion, Verizon's statement simultaneously attempts both to deny the regional significance of the proposed tower, and to justify the proposed tower by its contribution to the regional economy. In fact the proposal is an integral component of a regional phenomenon that is transforming Island life, namely, the construction of a robust wireless communications network. This phenomenon is a welcome addition to the regional economy and quality of life, and pressures for its more complete and effective realization are understandably strong.

However, Chapter 831 established the Commission precisely to balance otherwise uncontrolled economic development pressures of this sort against the need, as expressly described in Section 1, for effective regulation to "preserv[e] and conserv[e] for the enjoyment of present and future generations the unique natural, historical, ecological, scientific, and cultural values of Martha's Vineyard which contribute to public enjoyment, inspiration and scientific study, by protecting these values from development and uses which would impair them." Especially in light of the requirements of the Federal Telecommunications Act of 1996, 42 U.S.C. sections 332, *et seq*. ("TCA"), forbidding arbitrary local rulings that have the effect of either preventing wireless services or discriminating among competing providers of such services, regional oversight by the Commission is appropriate to ensure that the ongoing development of the regional network proceeds in a rational, fair, deliberate, and benign manner. It is presumably for this reason that all new wireless towers are required, under Section 8 of the Commission's DRI Checklist, to be submitted to the Commission for DRI review.

C. Verizon misrepresents the proposed impact as minimal and "local", not "regional", under Chapter 831, Section 12.

Verizon's November 20 Statement in Support of Application for a Development of Regional Impact ("November 20 statement") cites the factors listed at Section 12 of Chapter 831, which the Commission is required to consider, to argue that the proposal is more "local" rather than ''regional", and that it complies with DRI guidelines with minimal regional impact. Verizon's discussion in essence treats the proposal in isolation as a stand-alone project rather than a component element of a larger regional development. However, even from this narrower perspective, Verizon's discussion of these considerations contains several misstatements that, when corrected, refute Verizon's position that the proposal has little regional impact. These include:

(a) *the extent to which a type of development would create or alleviate environmental problems, including, but not limited to, air, water and noise pollution.* Verizon states that this consideration is "not applicable", but the Supreme Judicial

Court has held that visual pollution is a form of pollution that may be legitimately regulated. *John Donnelly & Sons, Inc., v. The Outdoor Advertising Board*, 369 Mass. 206, 219 (1975) (Amendment to the Constitution of the Commonwealth establishing as state policy the right of the people to "the natural, scenic, historic, and esthetic qualities of their environment" reflect "a strong indication that citizens in this State consider visual pollution … to be a detriment to the general welfare"). Because of its strong visual intrusion in a regulated regional landscape, the proposed tower is visual pollution worthy of regional regulation.

(e) *the extent to which a type of development is intended to serve a regional market.* Verizon argues that the proposed tower would serve a "regional market" only indirectly, through connection to its national network, and that its direct impact is more properly deemed "local". However, for the Commission's purposes, even a "local" development has regional impact if it affects more than one town or the shared regional values and policy objectives of the entire Island. As clearly shown on the exhibits to the Affidavit of RF engineer Luis Teves, wireless signals from the proposed tower would serve not only West Tisbury (where the zoning application was originally submitted) but also a meaningful portion of Chilmark, the closest point of which is less than 2300 feet from the proposed site.

(f) *the location of a type of development near a waterway, publicly-owned land, or a municipal boundary.* Verizon misleadingly states that this consideration is "not applicable" and that "no public lands or municipal boundaries are close enough to be impacted," but the proposed site is in fact located within the Coastal DCPC approximately 320 feet from the state-owned waters of Tisbury Great Pond. The Applicant's own supporting materials also include photosimulations showing that the tower would be a highly visible landscape element not only from several public vantage points in West Tisbury, but also from more distant sites across the Chilmark boundary such as Rainbow Farm. Verizon did not provide any photosimulations from the shores or public waters of Tisbury Great Pond, but the proposed 80' tower would also be highly visible from many vantage points on the Pond in both towns.[3]

[3] The Opponents have attempted to remedy this omission by offering their own photographs and photosimulations at Appendix B.

III. The Proposal Does Not Meet the Necessary Conditions for DRI Approval

A. The proposal is incompatible with Coastal DCPC guidelines and the Bylaw.

Contrary to Verizon's unequivocal denials, the proposed tower violates both the guidelines and regulations governing the Coastal DCPC as well as numerous corresponding provisions of the Bylaw, as discussed in greater detail below at Sections IV and V. In particular, the Coastal DCPC expressly prohibits any structures higher than 24' and all above-ground utility installations, except for "non-habitable, minor accessory structures normally used for personal, family and household purposes" allowable by special permit. A longer-term concern is that, because the TCA prohibits discrimination among wireless carriers, any exception to the Coastal DCPC standards granted to Verizon in this instance would likely set a binding precedent entitling other carriers to similar exceptions anywhere else in the DCPC, thus significantly eroding the authority of the Commission and town authorities to enforce the scenic protection provisions and purposes of the DCPC.

B. The proposal cannot satisfy the statutory DRI approval criteria of Chapter 831, Sections 14 and 15.

Chapter 831, Sections 14 and 15, sets forth a series of criteria which the Commission must evaluate and findings which it must issue in order to allow the West Tisbury ZBA to issue the requested Special Permit.

1. Section 14.

Section 14 provides that the Commission may allow the referring agency to grant a permit only by first explicitly finding that:

(a) *the probable benefit from the proposed development will exceed the probable detriment as evaluated pursuant to Section 15.* Verizon's November 20 statement misleadingly claims that the proposed installation "has no quantifiable detriments". While there are obvious benefits from improved cell phone service, Section 15 requires the Commission to explicitly evaluate certain enumerated detriments, and determine whether the proposed development in the proposed location is "essential or appropriate" to the delivery of the probable benefit. Verizon has failed to justify the necessity of the proposed location, for reasons including that it has failed provide the Commission with a thorough evaluation of alternative location possibilities or alternative technical solutions that would avoid violating applicable laws and regulations. However, by its own actions Verizon has previously provided similar improvements in service (from a lower, less visible, "COW" installation) without many of the probable detriments when the President of

the United States was residing in the neighborhood. Accordingly, while Verizon (and perhaps even the ZBA) may *prefer* the proposed development and location over other alternatives, given the avoidable detriments of the facility if built in the proposed location, the Commission cannot reasonably find that building the proposed facility at the proposed 80' height within or near the DCPC is "*essential or appropriate*" to the provision of these benefits as required by this statutory condition.

(b) *the proposed development will not substantially or unreasonably interfere with the achievement of the objectives of the general plan of any municipality or the general plan of the county of Dukes County.* Except for a few cursory observations about some of the economic goals of the 2009 Island Plan (discussed below at Section VI), Verizon has not expressly addressed this issue. The huge physical scale of the proposed development, however, would dominate the local landscape and dwarf the surrounding trees and nearby residential structures, and therefore appears to "substantially or unreasonably interfere" with the objectives of the Coastal DCPC as well as the Island Plan to preserve natural landscapes, as discussed below at Sections IV and VI. Given this and the many other defects in the Application, the Commission cannot reasonably find that it "will not substantially or unreasonably interfere with the achievement of the objectives" of these or of any other applicable plans that include natural or scenic preservation of coastal areas as an objective.

(c) *the proposed development is consistent with municipal development ordinances and by-laws, or, if it is inconsistent, the inconsistency is necessary to enable a substantial segment of the population of a larger community of which the municipality is a part to secure adequate opportunities for housing, education or recreation*. Verizon's November 20 statement misleadingly claims that "the Applicant's proposal is entirely consistent with the Town of West Tisbury's Zoning Bylaws pertaining to wireless installations and will require no variances as proposed." In fact, as discussed below at Section V, the proposed development at the proposed height is not only irreconcilably inconsistent with numerous clear requirements of the Bylaw, but is in fact even beyond the power of the ZBA to approve. Verizon has offered no clear showing of necessity for the inconsistency, nor has in any way attempted to relate its proposal to issues of housing, education or recreation. Given the express contrary provisions of the Bylaw, the Commission cannot reasonably find the required consistency.

(d) *if the proposed development is located in whole or in part within a designated district of critical planning concern, it is consistent with the regulations approved or adopted by the commission pursuant to section ten.* Verizon's November 20 statement describes this point as "not applicable" and flatly states that "the subject site

is not located within any district of critical planning concern." Of all the dubious statements and claims in the Application, this one is so utterly and outrageously untrue that it can only be either a grossly reckless oversight or deliberate, cynical effort to mislead the Commission. In either case, it demands in response a heightened degree of skepticism and scrutiny in examining all of Verizon's other claims and assertions for possible misstatements and misrepresentations. In fact, Verizon's preferred location A as well as the alternative location B for the proposed development are located entirely within the Coastal DCPC, and are not merely discouraged but expressly prohibited by the applicable DCPC regulations. Given the express contrary regulations of the Coastal DCPC, the Commission cannot reasonably find the required consistency.

Because the Commission must find that the proposed development in the proposed location satisfies all of these conditions in order to approve the granting of a Special Permit, but has no reasonable basis for finding that it satisfies any of them, it has no choice but to deny the Application.

2. Section 15.

Chapter 831, Section 15, also provides that in evaluating the probable benefits and detriments of a proposed development of regional impact, the Commission must specifically consider a number of relevant factors, including those discussed below.

(a) *Whether development at the proposed location is or is not essential or especially appropriate in view of the available alternatives on the island of Martha's Vineyard*. The Applicant argues that the need "to close the significant gaps" in its network coverage is essential, but has made no serious attempt to show why the specific proposed development at the specific proposed location is "essential", and that feasible alternatives in other locations with less detrimental consequences are impossible, in order to achieve that result. The Applicant may prefer this structure at this location to other less detrimental alternatives for a variety of its own reasons, but it has already demonstrated through its previous conduct that the proposal and its detriments are in fact neither essential nor especially appropriate.

(b) *Whether development in the manner proposed will have a more favorable or adverse impact on the environment in comparison to alternative manners of development*. Verizon claims, without offering any meaningful supporting argument or evidence, that it "is proposing the most favorable manner to provide its wireless services with the least amount of impact on the environment", but utterly ignores the visual degradation of the environment as a meaningful environmental consequence. Rather than seriously comparing the pros and

cons of this proposal to other feasible alternatives as would be required to support the necessary finding by the Commission, Verizon misleadingly attempts to frame its application as an exclusive, either-or choice between its proposal as submitted and an "effective prohibition" of wireless service (and as a result has drawn a fair amount of support from citizens eager for service improvements but unfamiliar with possible alternative ways of obtaining them). This characterization is really a false dilemma, because Verizon does in fact have other alternatives that it has not seriously analyzed and presented. In any event, in light of actual recent experience with less intrusive "COW" facilities, and even without a more exhaustive hypothetical analysis, it must be concluded that the proposal would indeed have an adverse rather than beneficial impact on the environment in comparison to other alternatives.

(c) *Whether the proposed development will favorably or adversely affect other persons and property, and if so, whether, because of circumstances peculiar to the location, the effect is likely to be greater than is ordinarily associated with the development of the types proposed*. In commenting on this provision, Verizon's November 20 statement focuses only on the supposed advantages of a monopine design over a stealth design. The Opponents disagree, and argue below at Sections V. A. 4. and V. B. 3. that a stealth design is less conspicuous, less inconsistent with the surrounding deciduous forest in the proposed location, and more consistent with the design requirements of the Bylaw. Another matter that Verizon's November 20 statement does not directly address, but that is raised in other supporting material Verizon has submitted, is the potential for adverse effects on property values. Verizon has submitted two studies by appraisers purporting to show in a general way that the proposed development would have no adverse impact on property values. For reasons discussed in greater detail below at Section VII. C., these studies are deeply flawed and do not in fact support their indicated conclusions. Verizon and its appraisers have utterly failed to identify specifically any potentially affected actual properties or to analyze the likely effect of the proposed tower on their values, and the off-Island comparables that are evaluated for comparative purposes appear to possess no valuable view amenities that a wireless tower would impair. In contrast, as discussed further below at Section VII. C., the view amenities of nearby properties owned by the Opponents and others constitute a significant element of their overall values, and because of this, the entirely avoidable impairment to their view amenities would in turn probably impair their property values as well.

(g) *Whether the proposed development will aid or interfere with the ability of the municipality to achieve the objectives set forth in the municipal general plan.*

and

(h) whether the proposed development will further contravene land development objectives and policies developed by regional or state agencies.

As discussed below at Section VI, Verizon discusses the general consistency of improved wireless service with the economic goals of the Island Plan, but ignores the importance of protecting against the detrimental effects of scenic degradation and visual pollution that is another clear goal and priority in the Island Plan. As also discussed below at Section IV, the Application denies, but the proposed tower would utterly contravene, the requirements of the Coastal DCPC. Moreover, the potential forfeiture of regulatory authority over all visually adverse developments by all wireless utilities in the Coastal DCPC (because of the TCA's requirements not to discriminate among rival wireless carriers) would be a severe contravention of the future ability to carry out the purposes of both the plans and the DCPC, and therefore also the land development objectives and policies developed by the Commission, if a precedent is set to ignore DCPC requirements for any one utility.

IV. The Proposal Violates Coastal DCPC Purposes and Is Expressly Prohibited

By a decision issued in December 1975 and amended in July 1976 (the "DCPC Decision"), the Commission designated the Coastal District of Critical Planning Concern ("Coastal DCPC"). Section 2.00 of the DCPC Decision includes within the Coastal DCPC "the land, streams and wetlands of Martha's Vineyard which lie … within five-hundred (500) feet of mean high water of a coastal water body exceeding ten (10) acres in size."

A. Landscape and view preservation is a fundamental objective of the Coastal DCPC.

Preventing the unnecessary degradation of natural views along the shores of Great Ponds has always been one of the paramount objectives of the Coastal DCPC. Section 3 of the DCPC Decision explains "why the area has been designated" and explicitly states:

> Coastal District areas offer irreplaceable views and there exist in the District outdoor recreational opportunities having profound importance to the Island and its economy. … In considering the problems of inappropriate or uncontrolled development within the Coastal District, the Commission finds that so fragile are these lands and waters and the values they create and support that to maintain and enhance the health, safety, and general welfare of Island residents and visitors, and for present and future generations, special development controls within the District must be adopted.

Section 4.14 further states:

> The recreation and sheer aesthetic enjoyment of the pond environ is a major part of the experience of the Vineyard for residents and visitors. … Where public vistas are available across the ponds from public roads, the views incorporating the land, the pond, and the sea are the most pleasant and memorable the Island has to offer and [are] easily altered by incompatible development.

Section 5.00 more specifically recites as a goal of the Coastal DCPC "to … preserve and enhance the character of views".

B. Contrary to Verizon's statements, the proposed tower location is within the Coastal DCPC.

Section 5.00 also establishes a regulatory scheme for development within the Coastal DCPC. Section 5. II. establishes a "Shore Zone" extending 100 feet inland from the shore or nearby bluff, and an "Inland Zone" comprising the remainder of the Coastal DCPC.

The Application proposes three alternative locations on the Subject Property for an 80' high wireless tower.[4] Amazingly, Verizon in its November 20 statement asserts (at page 5) that "the subject site is not located within any district of critical planning concern." In fact, according to diagrams submitted with the Application, the preferred location A and alternate location B are 320' and 440', respectively, from the shore of Tisbury Great Pond and therefore within the Inland Zone of the Coastal DCPC. Only alternate location C is outside the DCPC, but apparently location C is not supported by some members of the public because of its proximity to neighboring houses to the east of Town Cove.

C. Both the proposed tower and its proposed height are expressly prohibited within the Coastal DCPC.

Section 5. III. sets forth the various uses within the Shore and Inland Zones that are permitted as of right, permitted by special permit only, or prohibited. Subsection 5. III. 1. addresses uses within the Shore Zone that are not pertinent here. Subsection 5. III. 2.

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[4] It is not clear whether Applicant is applying for an 80' tower or a 70' tower. Some of the submitted supporting material asserts that 80' is the minimum height necessary to provide the intended services in the proposed location, while other submitted material suggests that Applicant could provide the same services nearly as well from a 70' height, and that the primary purpose of the additional height would be to accommodate additional co-location by competing carriers. The Opponents presume the Applicant seeks approval of an 80' height, but most of our arguments would apply equally to a 70' height. In any event Applicant has not submitted any specific analysis of the minimum necessary height, nor of the service characteristics associated with any specific heights (see Section VII. B.).

addresses uses within the Inland Zone. In addition to uses permitted within the Shore Zone, single family residences up to a maximum height of 18′ in open terrain or 24′ in wooded terrain are permitted under Subsection 5. III. 2. a. 1. The DCPC Decision makes no provision whatsoever for any kind of structure, residential or otherwise, higher than 24′. Under Subsection 5. III. 3. a. 2. "minor accessory structures normally used for personal, family and household purposes" are permissible by special permit only if they are "consistent with the goals of the District and these guidelines", while under Subsection 5. III. 2. a. 3. b. "all other uses not permitted by right or special permit" are expressly prohibited. Because the proposed tower is not a "minor accessory structure normally used for personal, family and household purposes", and is not "consistent with the goals of the District and these guidelines", it is an expressly prohibited use under Subsection 5. III. 2. a. 3. b., and ineligible for such a special permit.

Furthermore, Verizon expressly admits in its November 20 statement that "the Applicant is proposing a wireless telephone *utility pole*". [Emphasis added.] To this point, subsection 5.00. VI. 5. specifically requires that "all utility installations must be underground, unless excepted by special permit." Obviously, an 80′ tall above-ground "utility pole" cannot meet this standard. The special-permit exception is not available in the case of a commercial (rather than personal) installation, either, since only "non-habitable, minor accessory structures normally used for personal, family and household purposes" are eligible for special permits under subsection 5. III. 2. a. 3. a., and "all other uses" are expressly prohibited under Subsection 5. III. 2. a. 3. b. Commercial above-ground "utility poles" such as the proposed 80′ tower, whose intrusive height and appearance is so clearly not "consistent with the goals of the District", are prohibited categorically.

The Commission should be especially reluctant to grant any waiver of these requirements, even if it were possible to make the necessary findings under Chapter 831, since the TCA restrictions on discrimination against Verizon's wireless competitors effectively mean that an exception granted in this case would set a precedent for further visual pollution by competitors elsewhere in the Coastal DCPC.

V. <u>The Proposal Is Impermissible Under the West Tisbury Zoning Bylaw</u>

Section 1.1 of the Bylaw states that its goals include "protecting the Town's rural and natural character, including its farms, forests, wetlands, ponds, beaches, hilltops, and other open spaces," and "providing a scenic and ecologically healthy environment for both year-round residents and the seasonal residents who help to support the economy and tax base of the Town." The Application is subject to the relevant provisions of the Bylaw, including without limitation the provisions of Section 6.1 (Coastal Overlay District) and Section 8.8 (Personal Wireless Service Facilities). Contrary to many of Verizon's representations, as well as the ZBA's comment in its referral letter that the

proposal "meets the general requirement of the bylaw",[5] in fact it violates both the general goals of Section 1.1 and the many specific requirements of Sections 6.1, 8.8, 9.1, and 9.2, including especially height restrictions prohibiting a PSWF from rising more than 15' above the surrounding trees.

A. Section 6.1 (Coastal Overlay District)

To ensure that the Bylaw conforms to the Commission's Coastal DCPC requirements, Section 6.1 establishes a Coastal Overlay District, comprised of a Shore Zone and an Inland Zone corresponding to the same zones under the Coastal DCPC Decision, with development restrictions also substantially corresponding to the similar provisions of the Coastal DCPC. Contrary to Verizon's interpretation as stated in its July 20 Statement in Support of Application for a Special Permit with Site Plan Approval ("July 20 statement"), the requirements of Section 6.1 are in addition to and not pre-empted by any other applicable requirements of the Bylaw. Any proposed structure within the Coastal Overlay District must comply not only with the other provisions of the Bylaw, but must also comply with any more restrictive provisions of Section 6.1.[6]

Moreover, the ZBA must enforce Section 6.1 in a manner consistent with, rather than in conflict with, the requirements of the Coastal DCPC. Chapter 831, Section 5, expressly provides:

> Notwithstanding the provisions of any ordinance or by-law of a municipality on Martha's Vineyard, every municipal land regulatory agency shall be governed by the procedures, standards, and criteria established pursuant to this act in passing on applications for development permits relating to areas and developments subject to this act. … Where there is conflict between a local rule, regulation, ordinance, by-law or master plan, the more limiting or restrictive requirement shall prevail.

Verizon admits in its July 20 statement that the preferred location A for the proposed tower lies within the Coastal Overlay District, but wrongly claims that its proposal complies with the provisions of Section 6.1.

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[5] Subsection 8.8-6. D. 1. requires the ZBA to "notify or cause to be notified all property owners within 500 feet of the property lines of a proposed application." Neighboring property owners Opponents Temple and Cooper may have been entitled to notice of the October ZBA hearing, but received none.

[6] The Coastal DCPC and Coastal Overlay District in West Tisbury are geographically identical, but the DCPC requirements are more restrictive; West Tisbury's Bylaw lacks the DCPC's absolute prohibitions of certain uses. Since the matter is before the Commission for approval as a DRI, we believe the DCPC's stricter requirements should apply. However, the Bylaw's Coastal Overlay District requirements are also presented without applying the absolute DCPC prohibitions to show that the Proposal independently fails to satisfy the Bylaw conditions as well.

1. The location is within the Coastal Overlay District.

As noted above, the Application proposes three alternative locations for the proposed 80′ high wireless tower. The preferred location A and alternate location B are within the Inland Zone of the Coastal Overlay District, while alternate location C is outside the Coastal Overlay District (but apparently not favored by members of the ZBA because of its proximity to houses to the east of Town Cove).

2. A Special Permit is allowable only if landscape and views are protected.

Sections 6.1-5. A. and B. of the Bylaw provide that structures within the Coastal Overlay District such as the proposed tower are not Permitted Uses in the Inland Zone and therefore require a Special Permit. Any Special Permit issued by the ZBA must also satisfy the requirements of subsection 5.00. V. 1. b. of the DCPC Decision, which provides, in relevant part:

> b. Any special permit granting authority shall consider the goals of the District and shall grant a permit only if it finds that the regulations and the proposed development is consistent with the goals of the District and assures protection against adverse environmental effects including:
> …
> 8. unnecessary interruption of the visual amenities of the site.
> 9. construction which is not in harmony with landscape type.

3. Strict height restrictions apply; limited exceptions are not satisfied.

Subsection 6.1-6. A. 1. of the Bylaw specifically limits the maximum height of any structure in wooded landscapes in the Coastal Overlay District to 24′, and more broadly provides that "the objective of this Subsection is to ensure that structures *do not rise above the tree canopy and break the skyline* when observed from a public road or water body." [Emphasis added.] Subsection 6.1-6. A. 3. allows exceptions by special permit "up to the maximum allowed in the respective zoning district", but only in cases where "such proposed height modifications are *consistent with the landscape and the character of the area*." [Emphasis added.] Verizon wrongly claims in its July 20 supporting statement to the ZBA that its proposal complies with this subsection. We strenuously disagree.

Contrary to these express requirements, Verizon proposes an 80′ tower, with fake "monopine" treetop branches rising several feet higher, that would in fact reach as high as 45 feet above the natural tree canopy[7] and break the skyline. It would be a gross

[7] The Application does not determine the actual height of the surrounding tree canopy, and the Applicant has requested a waiver of the Bylaw's requirement (at subsection 8.8-10. C. 3. c.) to do so. Minutes of a February 2012 ZBA meeting mention Verizon's unsupported estimate that the

visual intrusion on the immediately adjacent, visually sensitive natural pond and wetland. As such, it would be jarringly inconsistent, not consistent, with the "landscape and the character of the area". Significantly, although the Application includes photosimulations illustrating the proposed monopine tower from various vantage points, it does not include any illustrations of the structure when viewed either close up or from a distance along the public waters or shore of Tisbury Great Pond itself. We have attempted to provide the photosimulations that Verizon refused to submit (see Appendix B), and they clearly show that the proposed tower would dramatically "break the skyline" and disrupt rather than enhance "the landscape and character of the area" when viewed from the nearby shore or the surface waters of Tisbury Great Pond.

Indeed, although wireless service facilities up to a maximum of 15' above the tree canopy are otherwise allowable by special permit in the RU zoning district (see discussion below at Section V. B.), it is difficult to imagine how *any* visible protrusion above the canopy within the Coastal Overlay District that "breaks the skyline" would be "consistent with the landscape and the character of the area," much less an 80'-85' high structure that reaches as much as 40'-45' above the tree canopy. Similarly, it is difficult to imagine how such a structure would not be an "unnecessary interruption of the visual amenities of the site", and "construction which is not in harmony with landscape type", as required by the Special Permit provisions of the DCPC Decision. As discussed further below at Section VII. B., Verizon has submitted no evidence at all of the minimum height actually necessary for improving its service coverage. The proposed tower is therefore ineligible for a special permit under subsection 6.1-6. A. 3. of the Bylaw.

4. <u>The monopine design is especially intrusive</u>.

Verizon has proposed two alternative designs for the tower: "stealth" and "monopine". The stealth design is visually less obtrusive than the monopine, which includes design elements that attempt to mimic the appearance of a pine tree, by adding artificial branches to the tower that widen (by an estimated factor of at least 5 times[8]) its visual profile and raise its height several feet higher than the basic tower structure. Monopine towers have been installed successfully and (relatively) inconspicuously in other locations, where the surrounding forest is comprised substantially of pines or other evergreens of similar height, and the ZBA in its referral letter to the Commission seems receptive to the Applicant's argument that a monopine tower could mitigate the tower's visual intrusion here.

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trees may be as high as 51', but this estimate does not seem credible. Judging from the scale of photographs of the two-story residential structures of the Subject Property, the typical height of the surrounding trees appears to be closer to 35'-40'.

[8]The detailed dimensions of the monopine are not clearly described, but from the scale of the Applicant's plans it appears to be at least 20' wide, compared with 3.5' for the "stealth" monopole. If the branches are arrayed in a square rather than circular pattern around the central pole, the maximum width from corner to corner might be as much as 28'.

However, the trees surrounding the Applicant's proposed location are deciduous rather than evergreen, and probably no more than half the height of the proposed 80' tower. It is obvious from the Applicant's photosimulations that a significantly taller fake pine tree in their midst would also be jarringly inconsistent, not consistent, with the landscape and character of the area. In fact, the ZBA's referral letter admits that a primary "advantage of the 80' Monopine is" not that it is necessary to place it in the proposed location for effective improvements in service, but "that it creates not only space for the applicants' needs but also 2 co-locations." As discussed below at Section V. B. 1., though, the Application does not properly address co-location as required, and in any event accommodating co-location within the sensitive Coastal Overlay District should not be a valid reason for eviscerating one of the District's most basic purposes and excusing some of its most effective requirements. In order to preserve harmony with the landscape and eligibility for a special permit, and no matter the permissible height, the monopine design should be rejected and only the stealth design considered.

5. Summary.

To summarize, Section 6.1 of the Bylaw prohibits a Special Permit for a tall monopine structure as proposed, because it would be too high and too inconsistent with the landscape and character of the area. Nevertheless, absent a more restrictive application of DCPC guidelines, it would possibly appear to allow a Special Permit for a stealth tower design no higher than the surrounding tree canopy. Any tower rising above the tree canopy would be impermissible, both because a utility tower breaking the skyline necessarily impairs "the landscape and the character of the area", and because the ZBA is required to enforce the broad goals of the Coastal DCPC to preserve coastal views and landscapes from unnecessary degradation.

B. Section 8.8 (Personal Wireless Service Facilities)

Section 8.8 of the Bylaw provides for construction of personal wireless service facilities such as the proposed tower by special permit. Its express purpose, as stated in subsection 8.8-2. A. 2., is "to establish standards for the location, siting and design of PWSFs, and to protect the attractiveness, health, safety, general welfare, and property values of the community." Contrary to representations made in the Application, the proposed tower fails to satisfy certain specific provisions of the Section, and is likely to degrade rather than protect the attractiveness and property values of the community.

1. Co-Location is irrelevant to the Application as submitted and unnecessary to the Proposal.

Section 8.8-7 sets forth requirements in the event that "co-location" of PWSFs is anticipated, i. e., installation of equipment from multiple service providers at a single

location. Section 8.8-7. A. provides that such proposals should be reviewed "on the basis of … the cumulative, worst-case condition", and that when "future co-locatees are unknown, the worst-case co-locatee (e.g., number of antennas, size of equipment shelter, etc.) shall be assumed." Verizon, in its July 20 statement, tries to evade this requirement by declaring these provisions "not applicable" (thereby implying that co-location is not a necessary element of its proposal), but at the same time admitted that "the Applicant is indeed offering space for co-location on its proposed facility." From the minutes of the February and October ZBA meetings, as well as the ZBA's referral letter to the Commission, it appears that the preference for a tower rising as high as possible above the surrounding tree canopy is driven not so much by the Applicant's inability to provide the desired level of service by any other means or from any lower elevation, as by a desire to accommodate the greatest possible number of potential future co-locators (from whom Verizon could presumably collect profitable rents). The Application does not even bother to identify the minimum height sufficient to meet the needs of the Applicant alone in the proposed location, nor any does it offer any substantive, quantifiable comparison of the quality of services that could be offered from another location or locations (for example, by co-locating on the existing PWSF tower on Old Courthouse Road) without exceeding applicable height requirements or guidelines. Given the Applicant's refusal to satisfy the co-location disclosure and analysis requirements of Section 8.8-7. A. and failure to provide any clear analysis of minimum necessary height for its own purposes, the Application lacks any reasonable justification for an exception to applicable height and co-location requirements. The Commission should take Verizon at its word and deem all co-location considerations "not applicable".

2. Opportunity Sites were ignored.

Section 8.8-8. A. sets forth required location standards that must be met or exceeded before a Special Permit can be approved by the ZBA. These standards outline a "directory but not mandatory" preference for facilities located at "Opportunity Sites", which include existing or new utility poles up to 50' in height (which is probably higher than the tree canopy restriction of the Coastal Overlay District) in public or private rights of way, churches, commercial and industrial buildings, and structures up to 125' in height in the Light Industrial District 2 (the Martha's Vineyard Airport). In the area where the Applicant hopes to improve the quality of its wireless service, there are many such Opportunity Sites. However, Verizon has not offered any serious analysis showing why it would be unable to achieve adequate service improvements through the use of available Opportunity Sites, including existing or new utility poles along nearby New Lane.[9] Given local agencies' obligations under the TCA not to discriminate among competing providers, the general vulnerability throughout the Coastal DCPC to scenic

[9] Applicant's only mention of any investigation of a specific Opportunity Site was a seemingly perfunctory inquiry to the West Tisbury Congregational Church.

degradation, and the dangerous precedent that would be set if degradation were allowed in this instance without requiring a showing of unavoidable necessity, the entire Coastal DCPC would be vulnerable to similar degradation by other tall, nonconforming wireless structures in other sensitive locations. The Commission and ZBA should require Verizon to show why it would be impossible to provide adequate improvements in service from Opportunity Sites, including but not limited to utility poles on New Lane and a new or replacement tower at the airport, before considering any request to grant height exceptions or permit scenic degradation elsewhere.

3. Preservation of views and minimization of visual impacts were not seriously considered.

Section 8.8-8. C. provides required design standards for PWSFs, and subsection 8.8-8. C. 2. specifically requires that "the silhouette of the PSWF should be reduced to the minimum visual impact." Similarly, subsection 8.8-8. C. 5. requires that "antennas, including panels, whips, dishes and any array holding several antennas, should be kept as close to the mount as possible", and subsection 8.8-11. E. 7. requires the ZBA to consider "preservation of view corridors, vistas and viewsheds" in assessing the proposed site and alternatives. The apparent purpose of these provisions is to ensure that an otherwise permissible tower is minimally visible and is not located in a spot (such as here) where it can significantly impair a fragile scenic viewshed. In spite of these provisions, as discussed above, the proposed tower height is designed not to minimize the visual impact associated with the immediately intended services, but to maximize the potential for co-location of future equipment of other service providers. Similarly, the apparent motivation for preferring a bulkier monopine rather than less visible stealth design is based in the monopine's capacity to accommodate more (presently unidentified) future users, rather than to serve any immediately identified necessity. Significantly, although the Application includes photosimulations illustrating the proposed 80' monopine tower from various vantage points, it omits any illustrations of the structure when viewed either close up or from a distance along the waters or shore of Tisbury Great Pond itself.[10] To comply with these subsections, Verizon should be required to minimize the silhouette by utilizing the stealth design rather than the monopine, and by keeping the overall height at or below the level of the surrounding tree canopy, unless it is able to demonstrate persuasively both that such a configuration would prevent it from being able to offer adequate services of its own and that no alternative solutions at other locations were possible.

[10] The Opponents have attempted to remedy this omission by offering their own photographs and photosimulations at Appendix B.

4. The ZBA lacks authority under the Bylaw to issue a Special Permit for the proposed 80' height.

Subsection 8.8-8. C. 6. b. requires PWSFs that are not in Light Industrial District 2 to be "surrounded by nearby dense tree growth for a radius of 20 horizontal feet" and to be no more than 80' in absolute height, but also no more than 15' above "ambient tree height". In a naturally forested area this is presumably the height of the surrounding natural tree canopy (compare the "tree canopy" standard at Subsection 6.1-6. A. 1.).[11] Although proposed locations A and B are within the Coastal Overlay District and therefore would not in any event accommodate a tower taller than the surrounding trees (as discussed above), a taller structure would conceivably be permissible in proposed location C, which lies outside the Coastal Overlay District. Nevertheless, the Bylaw specifies 15' above ambient tree height only as an absolute maximum, not as an entitlement. It does not allow the ZBA to approve anything higher, nor does it obligate the ZBA to permit the 15' maximum as a matter of right, nor does it override the independent requirements of subsections 8.8-8. C. 2. and 8.8-11. E. 7. to minimize visual impacts and preserve existing views.

Even if Verizon's casual estimate of a 51' surrounding tree height were correct (which the Opponents doubt; see footnote 7 above), the maximum permissible height at location C would be only 66', not 80'. In any event, Verizon evidently knows that the proposed height would exceed permissible limits. For example, a supporting report by Verizon's consultant Shepherd Associates notes (at page 7) that "according to information provided to me, the facility will be +-25 higher than the average height of the tree canopy."

Verizon has offered no showing whatsoever of the minimum height necessary to provide adequate service improvements specifically from location C (or anywhere else), whether below the ambient tree height or below the maximum additional 15' allowable by the subsection. Yet even if Verizon were able to offer convincing technical evidence that additional height above the 15' limit were necessary to provide adequate service at location C, Subsection 8.8-8. C. 7. clearly specifies that "these standards apply regardless of RF engineering considerations", so the ZBA in fact has no authority under the Bylaw to grant a special permit for any excess height in the designated spot, no matter how desirable the reason. Nevertheless, even in the unlikely circumstance that it were

[11] The subsection does allow for new trees to be "installed" if needed to meet the 20 foot radius requirement. However, Applicant has not proposed installing new trees, nor have its site plans or photosimulations depicted an installation of new trees. In any event, a proposal to insert a small cluster of taller non-indigenous trees into an already mature forested area merely to subvert the evident intent of an otherwise applicable height restriction would in turn violate the requirement of subsection 8.8-8. C. 2. to minimize visual impacts, and the requirement of subsection 8.8-11. E. 7. to preserve existing views.

impossible to provide any improvement in its level of service from a conforming height at this location, this would in no way prevent Verizon from proposing another location or locations (such as Opportunity Sites) where adequate service could be provided feasibly without violating applicable height limits.

5. Verizon has chosen not to provide required siting information necessary to support a fully-informed approval.

Section 8.8-10. C. lists a number of items of information required in order to allow a thorough evaluation of the proposed siting of a PWSF. Rather than complying with this requirement, Verizon requested in its July 20 statement to the ZBA that a large part of it be waived. At least two of these intentional omissions seem especially material:

Sight lines and photographs were not provided. Among the more troublesome omissions of the Application are the sight line representations to surrounding properties, and before-and-after photographs and photosimulations showing the effect of the PWSF on views from surrounding properties, required at subsection 8.8-10. C. 2. Verizon failed to provide a sight line representation from the closest facade of each residential building included on the vicinity plan to the highest point (visible point) of the PWSF, as required by subsection 8.8-10.C.2.a. Indeed, Applicant failed to provide any sight line representations from any of the residential buildings on the vicinity plan, the views from which will all be adversely affected by the PWSF. Verizon tries to justify this omission by claiming that it is unwilling to trespass, but this demurral is not credible; for example, Verizon has made no attempt whatsoever to seek permission from any of the neighboring Opponents for access to any of their properties. In the absence of Applicant's compliance with the requirements of the Bylaws, and based on information in the Application, the Opponents have attempted to provide some of the missing photographs and photosimulations of sight lines from their properties in the attached Appendix B. As the photographs illustrate, the permanent impairment to our properties' view amenities would in fact be dramatic.

Necessary descriptions of vegetation and tree heights were not provided. Similarly, Verizon has failed to satisfy and asked to waive the requirement of subsections 8.8-10. C. 3. c. and 8.8-10. D. 5. for an accurate site plan describing all existing and proposed landscaping and vegetation. As discussed above, determining the height of the surrounding trees is critical, because in the RU district any PWSF more than 15' above the surrounding trees is impermissible. The maximum allowable heights in both the Coastal Overlay District (Locations A and B) and the RU District (Location C) cannot even be determined without knowing the correct height of the surrounding tree canopy.[12] Verizon's misleading justification for requesting the waiver, that "the

[12] The Opponents believe the actual height is 35'-40' based on the scale of the two-story buildings relative to the trees in site photographs. (See footnote 7 above.)

proposed site is located deep within a wooded area on the Subject Property and as such it is already 'landscaped' and hidden from off-site perspectives", is ridiculous on its face, especially since Verizon has cynically refused to provide the required sightline illustrations from neighboring properties that would be necessary to prove (but that, as Appendix B shows, would in fact refute) its assertion.

6. Misleading information is grounds for Special Permit denial.

Subsection 8.8-10. E. 1. provides that "inaccurate, untrue, misleading or false information submitted in pursuit of a special permit by the applicant, the provider company or their agents may be grounds for denial of a special permit." The Commission and the ZBA should consider carefully whether the Applicant's information and representations have been truthful and reliable enough to enable them to reach an informed, objective decision. In particular, the Applicant's statements and supporting information submitted regarding the visibility of the proposed tower, its location within the Coastal DCPC, its compatibility with the surrounding area and with regional land use objectives, its compliance with applicable laws and regulations, its necessity as the only possible solution for the provision of adequate service, its effect on the value of neighboring properties, and the availability of feasible alternatives seem grossly exaggerated and biased, even when read in the most sympathetic possible light.

7. A valid alternatives analysis was not provided.

Section 8.8-11 of the Bylaws sets forth detailed requirements for a "Comparison of Proposed PWSF and Alternatives". In an attempt to comply, the Applicant has presented three alternative sites, all on the Subject Property (location A, location B and location C), and has offered two alternative designs at each site (80' monopine and 70' "stealth"). However, under even the most sympathetic reading, the Coastal DCPC Decision and Section 6.1 of the Bylaw restrict the height of a PWSF tower in location A or B to at most the "ambient tree height", while Section 8.8-8.C.6.b of the Bylaw restricts the height of a PWSF tower in location C to at most 15' above the ambient tree height (as discussed above). In defiance of these height limits, the Application pointedly requests waiver of the Bylaw's requirements to determine the actual tree height, which appears from the scale of site photographs to reach at most about 40' high. Accordingly, the Application as submitted fails to propose even a single conforming alternative, let alone three.

Moreover, as discussed in more detail below at Section VII. B., Verizon has failed to offer any thorough analysis or other persuasive evidence that the proposed exceptions to otherwise applicable regulations are necessary as the only feasible means of providing improved wireless service. (To do so would entail a far more comprehensive analysis of possible alternatives than Section 8.8-11 explicitly requires, presumably because section 8.8-11 contemplates submission of only conforming alternatives.)

8. Summary.

To summarize, the proposal as submitted fails to satisfy the location, height, co-location, design, and site alternative requirements of Section 8-8, and fails to justify (or even identify) any necessary reason why it cannot otherwise comply. In any event, the ZBA has no authority under the Bylaw to waive the Section's strict height restrictions, even if it were otherwise inclined to do so.

C. Sections 9.1 (Site Plan Review) and 9.2 (Conditions for Special Permit Approval) are not satisfied.

Sections 9.1 and 9.2 set forth the review criteria that must be satisfied by express written findings before any Special Permit can be issued.[13] Contrary to Verizon's arguments in its July 20 statement to the ZBA, the Application fails to satisfy many of these criteria and is therefore ineligible for issuance of a special permit. Some of the criteria which the Application fails to satisfy, for reasons discussed elsewhere in this Opposition, include:

> *9.1-1. B. The Site Plan submission shall contain all information necessary to enable the Planning Board to conduct an informed review.* In fact, the Site Plan submission omits much necessary information, including information concerning sightlines to neighboring properties, the height of the surrounding tree canopy, the height of the proposed structure above the tree canopy, and the total above-ground elevation of the proposed monopine design including its top branches.
>
> *9.1-2. A. The proposed use shall … comply with all applicable provisions and requirements of this bylaw.* In fact, the proposed use fails to comply with many of the applicable provisions and requirements, and the Application fails to offer convincing demonstrations of necessity for all of the most significant departures from otherwise applicable standards and requirements.
>
> *9.1-2. B. The proposed use shall … avoid significant detrimental visual and environmental impacts on adjacent uses and on any important natural, historic, or scenic features.* In fact, the proposed use unnecessarily inflicts significant detrimental

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[13] The caption of Section 9.1 is styled, "Site Plan Review When No Special Permit Is Required", but the text of Section 9.1 contains no corresponding exception for Special Permit applications. The distinction appears to involve only whether the proper forum for evaluating the review criteria should be the ZBA or the Planning Board, since compliance with Site Plan Review requirements is also expressly included in the Special Permit review criteria of subsection 9.2-2. B. 1. Section 6.1-7 calls for "Site Plan Review by the Planning Board" in the case of Special Permits "within the Coastal District". We therefore attribute no effect to the caption and assume Section 9.1 applies.

visual and environmental impacts on adjacent uses, and on important natural and scenic features.

9.1-2. E. The proposed use shall … not adversely … degrade any natural resource or ecosystem. In fact, the proposed use adversely degrades the adjacent wetlands and Tisbury Great Pond by introducing otherwise prohibited and severely incompatible visual pollution into the Coastal DCPC.

9.2-2. A. 1. The proposed use is in harmony with the general purpose and intent of this bylaw. In its July 20 statement Verizon argues, in effect, that the service improvements that would be supported by the proposed use would support the general purpose and intent of the Bylaw by contributing to the general prosperity of West Tisbury. Verizon also claims (as it has repeatedly elsewhere) that the proposed tower is "stealth[y] and camouflaged" and "very unobtrusive". In reality, the proposed tower would introduce a giant eyesore into a fragile and protected scenic area twice as high as the surrounding trees, whereas similar service improvements can be provided through other, less detrimental, means. The proposed use is in obvious conflict, not harmony, with the general purposes of Section 1.1 of the Bylaw to "protect the Town's rural and natural character, including its farms, forests, wetlands, ponds, beaches, hilltops, and other open spaces", to "offer opportunities for small businesses in appropriate locations throughout the Town, without changing the attractive rural, agricultural, and residential character of the Town," and to "provide a scenic and ecologically healthy environment for both year-round residents and the seasonal residents who help to support the economy and tax base of the Town." The proposed use is also in obvious conflict with the more specific purpose and intent of Section 8.8 of the Bylaw (regulating PSWFs) "to protect the attractiveness …. and property values of the community."

9.2-2. A. 2. The benefits of the proposed use to the Town outweigh its adverse effects. While improved wireless service carries obvious benefits, the Application makes no honest attempt to identify or measure its adverse effects, much less to balance them against benefits in a meaningful way. Verizon's July 20 statement instead offers the ridiculous assertions that the proposal carries "no adverse effects whatsoever because the facility is proposed to be located deep within a wooded area," even though such adverse effects are plainly evident. Similarly, the July 20 statement asserts that "the real estate reports submitted with this Application indicate the proposed facility will have no deleterious impact on surrounding property values," despite those reports' complete failure to examine any actual surrounding properties (discussed further below at Section VII. C.). The Application also makes no serious attempt to present alternatives to the proposed tower that would provide similar benefits with fewer adverse effects, even though it seems evident that such alternatives are possible. Even in the best

possible light, the benefits of improved wireless service from the proposed tower in the proposed location at the proposed height do not outweigh its combined adverse effects on the coastal landscape, on the enforcement powers of the Commission over the Coastal DCPC, and on neighboring properties. Alternate solutions that entail fewer adverse effects are possible and preferable, and would be even if they might not provide as great an improvement in service.

9.2-2. B. 1. The proposed use is consistent with the purposes and requirements of the applicable land use district, overlay districts, and other specific provisions of this bylaw (including Site Plan Review requirements) and of other applicable laws and regulations. Verizon's July 20 statement falsely claims that "the proposed use is allowed by Special Permit in the subject zoning district" and that "the specific approval criteria required for such installations have been met without variance", and calls the proposal "unobtrusive". In fact, the proposed use is inconsistent with the general purposes of Section 1.1 of the Bylaw to "protect the Town's rural and natural character, including its farms, forests, wetlands, ponds, beaches, hilltops, and other open spaces", to "offer opportunities for small businesses in appropriate locations throughout the Town, without changing the attractive rural, agricultural, and residential character of the Town," and to "provide a scenic and ecologically healthy environment for both year-round residents and the seasonal residents who help to support the economy and tax base of the Town." More specifically, it violates many specific provisions of the Bylaw and other applicable laws and regulations, including the development restrictions of the Coastal DCPC and the Coastal Overlay District, the height restrictions for the RU District of Section 8.8 of the Bylaw, the Site Plan Review criteria of Section 9.1 of the Bylaw (as discussed above), and the DRI approval criteria of Chapter 831.

9.2-2. B. 2. The proposed use is compatible with surrounding uses and protective of the natural, historic, and scenic resources of the Town. Verizon's July 20 statement claims that "the proposed installation will have no impact whatsoever because it will be stealth[y] and unobtrusive". In fact, the proposed use is shockingly incompatible with surrounding residential uses, as well as the scenic resources of Tisbury Great Pond and the Coastal DCPC, towering roughly twice as high as anything else around it. Verizon has deliberately declined to comply with the specific requirements of the Bylaw to submit information pertinent to this determination, such as sightlines and photosimulations from neighboring properties and accurate descriptions and measurements of the natural site vegetation, while similar information and evidence provided by the Opponents disproves Verizon's claim.[14]

[14] See, e. g., Appendix B.

9.2-2. B. 9. g. The proposed use will not cause other adverse environmental effects, including construction which unnecessarily damages the visual amenities of the site and which is not in harmony with the landscape type. Verizon's July 20 statement claims that "the facility will remain deep within a wooded area in the interior of the Subject Property where it will not be visible from off-site," but even Verizon's own photosimulations show this assertion to be untrue. Verizon admits that "a small portion of the top of the tower facility itself may be visible from certain perspectives," but even this grudging admission is disingenuous and misleading, because an 80' high tower would probably be about twice as tall as the surrounding trees. In fact, constructing the proposed use would indeed unnecessarily damage the visual amenities of the site, and would be grossly out of harmony with the landscape, both because of its incompatible scale and because of the inherent disharmony of a single, tall, artificial pine tree standing in an otherwise low, deciduous natural forest.

VI. The Proposal is Incompatible with the Island Plan

Verizon's November 20 statement devotes considerable attention to the purported compatibility of the proposed tower with the "Island Plan". The Island Plan is a forward-looking and well-conceived statement of policy objectives, developed under the Commission's sponsorship, which attempts to balance sometimes complementary, sometimes conflicting policy aspirations on multiple fronts. Unfortunately, in spite of the importance of the evolving telecommunications industry to the Island's cultural and economic future, the Island Plan does not include an express statement of regional telecommunications development policy or goals. As a result, in an attempt to relate the proposed development's service improvements to the Island Plan's stated goals, Verizon understandably frames the relationship in economic terms, and emphasizes its indirect contributions to the Plan's economic growth objectives.

However, Verizon's discussion utterly fails to address the proposed tower's more direct and detrimental physical effects on conflicting objectives of the Plan. The proposed tower is especially incompatible with Section 3 of the Plan, which addresses preservation of the natural environment. In particular, Section 3.4 of the Plan observes that an important concern "is the view from public waters, especially the ponds and ocean. There is concern that development highly visible from the water is undermining the natural character of the Island." As already noted, the proposed tower, if built, would further severely impair, rather than preserve, the public view of the marsh at the head of Town Cove from the waters of Tisbury Great Pond; and by establishing a precedent for other utilities to follow, would also severely impair the Commission's and town agencies' authority to prevent future visual pollution of the coastal landscape by Verizon's competitors. Obviously, the proposal is in direct conflict with the natural preservation goals of the Island Plan.

Although the Island Plan is a useful statement of policy goals sponsored by the Commission, any actual implementation of the Island Plan in policymaking or regulatory rulings by the Commission should keep in perspective the reality that the Plan does not have the force of law. The governing law and ultimate source of authority for the Commission remains Chapter 831. Chapter 831 speaks much more strongly of the Commission's powers and duties to protect fragile landscapes from degradation by economic growth pressures as the Opponents urge, than of any obligation to promote economic growth by sacrificing fragile landscapes as the Applicant urges. Under no circumstances should the Commission be persuaded by Verizon's soothing discussion of the general economic benefits of service improvements to compromise the Commission's superior statutory responsibility to protect the coastal landscape from specific degradations by specific developments in specific locations – especially when no meaningful alternatives have been presented, but the Applicant has already demonstrated by past actions that the very same benefits can be achieved through less harmful alternatives.

VII. Other Flaws in the Application

A. Contrary to Verizon's repeated assertions, the TCA preserves strong local and regional approval powers.

In its Application, Verizon repeatedly suggests that the TCA in effect requires the Commission and the West Tisbury ZBA to allow its Application no matter how flawed it is.[15] This is simply not true, as discussed in detail in the Memorandum of Law in Support of Opposition attached as Appendix C ("Memorandum"). To the contrary, the TCA does not trump state and local land use law, and does not usurp traditional local zoning authority and prerogatives. If the Commission (or the ZBA) exercises its traditional authority under the applicable zoning and land use laws to deny the Application and special permit, on this record there is every reason to expect that its decisions would be upheld in court in any appeal by Verizon.

In the TCA, Congress sought to expand wireless services and increase competition among wireless providers. However, Congress did not "federalize" telecommunications by usurping local land use authority over telecommunication uses. Rather, Congress struck a balance between local authorities and such providers by expressly providing that state and local governments "retain control over the placement, construction, and modification of personal wireless service facilities", subject only to the five procedural and substantive limitations contained in section 332(c)(7)(B) of the TCA. These limitations include:

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[15] See Statement in Support of Application for a Development of Regional Impact July 20, 2012 at pp. 5-7; Memorandum from Gehring & Associates LLC, on Behalf of Verizon Wireless to the West Tisbury ZBA, July 2012 re "Alternative Site Analysis—The Search Area Process" at page 4.

(1) a decision to deny a permit must be in writing and supported by "substantial evidence" in the written record, 47 U.S.C. § 332(c)(7)(B)(iii);

(2) the decision shall not "prohibit or have the effect of prohibiting personal wireless services" in the area, 47 U.S.C. § 332(c)(7)(B)(i)(I); and

(3) the decision shall not "unreasonably discriminate" among providers of functionally equivalent services, 47 U.S.C. § 332(c)(7)(B)(i)(II).

If a permit is denied, and the provider brings a court action to overturn the local decision, the denial is *not* presumptively invalid. Rather, the burden is on *the provider,* not the permitting authority, to prove that one or more of these conditions is met -- in other words, that the locality's decision violates the TCA. In such instances the courts tend to support strong local zoning authority.

In *John Donnelly & Sons, Inc. v. The Outdoor Advertising Board*, 369 Mass. 206 (1975), the Supreme Judicial Court held that local zoning authorities may legitimately regulate based on aesthetic grounds, recognizing that visual pollution is a form of pollution that is a detriment to the general welfare of the citizens of the Commonwealth. Federal courts have recognized that the "limitations upon local authority in the TCA do not state or imply that the TCA prevents municipalities from exercising their traditional prerogative to restrict and control development based upon aesthetic and other considerations, so long as those judgments do not mask, for example, a de facto prohibition on personal wireless services."[16] There are many instances of courts ruling against providers under the TCA and upholding local boards' decisions denying permits to wireless providers.[17] Moreover, as described more fully in the Memorandum, the facts in several of these cases bear a striking resemblance to those underlying the

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[16] *Southwestern Bell Mobile Systems v. Todd*, 244 F.3d 51, 61 (1st Cir. 2001) and cases cited. Verizon has ignored these cases, as well as the many others cited in this Memorandum, choosing instead to bring to the Commission's attention only two less recent and distinguishable district court cases, *Omnipoint Communications MB Operations, LLC v. Town of Lincoln,* 107 F. Supp.2d 109 (D. Mass. 2000) and *OPM-USA-INC. v. Board of County Commissioners*, 7 F. Supp.2d 1316 (M.D. Fla. 1997).

[17] *See, e.g., Green Mountain Realty Corp. v. Leonard,* 688 F.3d 40 (1st Cir. 2012) (upholding denial of permit by Town of Milton, Massachusetts, and the Milton Conservation Commission on aesthetic grounds, remanding for further proceedings); *New Cingular Wireless PCS, LLC v. Fairfax County Board of Supervisors*, 674 F.3d 270 (4th Cir. 2012) and cases cited (upholding denial of permit by Fairfax County, Virginia); *Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d 620 (1st Cir. 2002) (upholding denial by Town of Pelham, New Hampshire); *Southwestern Bell Mobile Systems v. Todd,* 244 F.3d 51 (1st Cir. 2001) (upholding denial of permit by Town of Leicester, Massachusetts); *Town of Amherst N.H. v. Omnipoint Communications*, 173 F.3d 9 (vacating district court decision requiring town to issue permit, and remanding the case to the district court for further proceedings).

Application. Verizon has ignored all of these cases, as well as the many others cited in the Memorandum, yet these cases strongly indicate that a denial of Verizon's pending Application would be similarly upheld in the federal courts, given the many facts in the present record that are substantially similar.

In an appeal to the courts, Verizon simply would not be able to maintain its burden of showing that a denial by the Commission or the ZBA violated the TCA. First, Verizon has not provided the Commission or the ZBA with "substantial evidence" that the proposed nonconforming location and design, and the corresponding variances needed, are necessary to its provision of service (as discussed at Section VII. B. below). Second, nothing in the ZBA's or the Commission's conduct, nor in the applicable Bylaw and regional regulations, would indicate an arbitrary and categorical "effective prohibition" of personal wireless services in general, as opposed to the due exercise of appropriate statutory responsibility to protect a specifically designated area of "critical planning concern". Finally, denial of a Special Permit in a protected coastal area, consistent with longstanding regional planning regulations and objectives, when no competitor has ever sought one before, in no way amounts to "unreasonable discrimination" in favor of competitors.

If anything, the most worrisome concern involving the TCA's "unreasonable discrimination" and "effective prohibition" tests is that, if the Commission were to exempt Verizon from the usual standards and requirements for the Coastal DCPC, or if the ZBA were to exempt Verizon from it usual zoning requirements, competitors would be able to claim unreasonable discrimination in the future if they were not afforded the same exemptions. If that were to happen, an important source of authority to preserve the scenic coastal qualities of the Island would be forever lost.

B. Verizon's site selection analysis fails to demonstrate the necessity of both the proposed location and the proposed height.

Verizon has submitted a memorandum from Gehring & Associates (the "Site Analysis Memo") and an affidavit from Egor Evsuk (the "Evsuk Affidavit") purporting to show that the proposed locations and designs are necessary to improved wireless service, and that denial of the Application would therefore constitute impermissible discrimination and/or effective prohibition under the TCA. To the contrary, not only does the site selection process described fail to demonstrate any such necessity, but it in fact demonstrates that Verizon failed to explore feasible alternatives in good faith. Instead of engaging in a thorough evaluation of all alternatives, these two documents reveal that Verizon ignored multiple other potentially feasible sites in West Tisbury while adopting a number of self-imposed, yet unnecessary, constraints that preclude any credible argument that the selection process identified the proposed location and design as the only feasible possibility. A much more exhaustive search process would have been needed, whether to support an argument for preemption of local authority under

the TCA, or even to justify a variance from otherwise applicable town and regional land use requirements.

1. The investigation of alternative locations was not diligent or thorough.

The Site Analysis Memo acknowledges that the Subject Property is "located at the southern end of the Search Area," not an ideal location.[18] Yet the Applicant failed to contact any landowners having an interest in fewer than ten acres within the Search Area as part of the site review process. The Site Analysis Memo notes only that a "relatively large parcel (i.e., over 10 acres) would be preferred," but not that a parcel of such size would be necessary to provide the relevant services. The arbitrary decision to contact only private landowners within the Search Area holding parcels of ten acres or more excluded many possible sites within the Search Area and without the adverse impacts, or with fewer adverse impacts, than those presented by the proposed site. In particular, this decision reveals an utter disregard for the Bylaw's explicit "directory" preference for locations at Opportunity Sites, which include locations on utility poles within public or private rights of way that would not appear in any list of privately held lots larger than 10 acres.

Moreover, even within the narrow list of properties that were identified, Verizon failed to determine and compare their relative suitability, and to pursue a transaction with the owner or owners of the most suitable properties. Instead, it apparently solicited landowners only through blind form letters, to which "only the Doane family responded favorably". There was apparently no effort made to follow up more diligently with other owners who at first did not respond to the blind solicitation, or to propose specific leasehold and rental terms that might entice an otherwise reticent owner.[19]

2. No alternative technical solutions were considered.

The only technical solution to improving its wireless service that Verizon apparently considered seriously was a monopole tower transmitting from a high elevation in a single location. However, Verizon has offered nothing to show that a single tall tower is the only feasible means to provide the proposed wireless services.

In Chilmark and Aquinnah, several wireless carriers are working with a provider of a Distributed Antenna System (DAS) to provide functionally equivalent service on a

[18] The Site Analysis Memo states that Verizon's RF engineer determined a target "Search Area", but the actual boundaries of the Search Area are not specified.

[19] As discussed at Appendix C, federal courts have held wireless carriers to a much higher standard of exhausting other alternatives in order to sustain a claim of effective prohibition under the TCA.

series of much less visually intrusive small antennas mounted on utility poles.[20] According to a May 30, 2012, article in the *Martha's Vineyard Times*, "Rich Enright, a Verizon Wireless official from Westboro, said the company would not join the DAS because the … rent was too high, adding, however, that *Verizon would be willing to create its own system.*" {Emphasis added.] Presumably, if Verizon were willing to build its own DAS system in Aquinnah and Chilmark, it should be willing to do so in West Tisbury as well. However, only a few weeks later the Site Analysis Memo and Evsuk Affidavit made no mention of any consideration given to alternative systems such as DAS, and contain no analysis or data whatsoever comparing the service coverage of a DAS solution or any other multi-sited solution on shorter, less conspicuous mounts. This omission also casts serious doubt on the Site Analysis Memo's contention that "[t]he 'cheapest' site to construct is not always chosen; instead the site with the least environmental impact is always preferred."

Significantly, wireless service has been provided though temporary, less conspicuous towers known as "COWs" on the Subject Property in the past, including at times when the President of the United States was residing in the neighborhood. We understand that these temporary towers were dismantled prior to, and the wireless coverage services provided by such towers ignored in, the Radio Frequency analysis performed by the Applicant. In fact, Verizon's site plans shows the location of one of these temporary towers that was removed prior to conducting the RF study. The ZBA minutes reflect that the Applicant's engineer Luis Teves was asked why a COW could not be part of an alternate solution, and he responded not that its height was too low, but only that Verizon did not own many of them. He apparently did not address the question of why a permanent but similarly less obtrusive installation would be adequate. The alternatives offered by a COW solution, or by a similarly inconspicuous temporary solution such as satCOLT, particularly as a bridge to the newly emergent wireless technologies such as small cell that may soon render 80' towers obsolete, should also have been considered as part of a thorough alternative site analysis.

3. <u>The site selection process disregarded important zoning requirements</u>.

The Site Analysis Memo emphasizes "zone-ability" as one of the most important criteria in the site selection process, and states:

> "Zone-able" is defined as a site with a reasonable probability of expedited permitting success, requiring the least relief necessary (i. e. fewest variances). Factors that influence a site's "zone-ability" include harmony with the express terms of the zoning bylaws, neighborhood impact, visibility and the mitigation of environmental disturbance.

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[20] West Tisbury opted out of an original proposal to join Chilmark and Aquinnah in their DAS system. However, that decision does not preclude the feasibility of a smaller system covering only underserved areas of West Tisbury.

Nevertheless, as discussed above at Sections III, IV, and V, all of the final proposed alternatives violate numerous town zoning and regional DCPC and DRI requirements. Evidently the site consultant either utterly misunderstood, or else utterly ignored, the actual zoning and regional land use requirements applicable in West Tisbury generally and to the Subject Property specifically. Apparently no consideration was given, for example, to the effect of Coastal Overlay District and Coastal DCPC requirements, and (as discussed above) arbitrary site selection criteria excluded most Opportunity Sites from consideration. Of particular note too is the fact that the Site Analysis Memo takes no notice whatsoever of the prevailing tree heights at prospective sites in its attempt to identify "zone-able" locations. Since the Bylaw's height restrictions for PSWFs in the RU district are so explicit (no higher than 80', and no higher than 15' above surrounding trees), any reasonably conscientious search for a "zone-able" location within the RU district for an 80' monopole would have identified tree height as close to 65' as possible an important search criterion. Merely adding tree heights and rights of way to the search criteria, and excluding Coastal District locations from the chosen Search Area, would have yielded a much more genuinely "zone-able" list of prospective sites.

4. Verizon has not shown why the proposed height is necessary.

Verizon has submitted an affidavit by its RF engineer Luis Teves which concludes that "without the proposed facility, Verizon Wireless will be unable to provide reliable wireless communication services in this area of the Town of West Tisbury." However, there is no evidence in Teves's affidavit (or anywhere else in the Application material) to support his conclusion. The affidavit only states that "an analysis of this proposed location has indicated that the antennas located on a tower facility, as shown on the submitted plans, will work to satisfy the specific coverage and capacity requirements for Verizon Wireless' Network in this location," and that "any reduction in the proposed height and/or antenna configuration would result in coverage footprint shrinkage." Verizon's plans, however, show the proposed co-location of future providers' antennas at a height of only 57' – strong implicit evidence that effective service can indeed be provided from lower heights and the proposed 80' height is not at all necessary. Neither Teves's affidavit nor the two site selection documents offer any comparison of the feasible areas of coverage at other heights or in other locations, nor addresses whether lower heights would provide inadequate coverage. Absent any such supporting proof, and in the face of directly contrary evidence, the conclusion is simply not credible.

5. Verizon's site selection analysis appears to have been inappropriately constrained by other unnecessary preferences.

The Site Analysis Memo and Evsuk Affidavit also describe other unnecessary, self-imposed limitations on Verizon's site selection process. One such is the desire to acquire a "commercially reasonable leasehold interest with the fewest deviations from the company's standard lease." The Site Selection Memo does not offer a copy of the

standard lease or a discussion of the range of prevailing leasehold rental rates, nor does it compare the terms of the Subject Property leasehold to the terms offered (if in fact any were offered) to owners of other prospective locations, so it is not possible from the evidence provided to determine whether in fact Verizon in fact pursued any "commercially reasonable" alternatives. We note, however, that in the case of the Chilmark and Aquinnah DAS system mentioned above, Verizon refused to participate based on its objections to the rent involved, even though the commercial reasonableness of the terms was demonstrated by the willing participation of competing providers.

Furthermore, the Site Analysis memo's discussion of its "constructability" criterion includes several references to "co-locators", indicating that the capacity of a site to accommodate other providers was another important (but not explicitly identified) criterion for site selection. As previously discussed, co-location capacity also appears to have been a more important concern than necessary service improvements in choosing the proposed height of the tower. Although (as discussed above at Section V. B. 1.) Verizon represented co-location as "not applicable" in its Application to the ZBA, it has not offered any evidence that it seriously sought any alternatives that did not support co-location. Like the other discretionary constraints in Verizon's site selection process discussed above, a search process skewed toward bargain rents, one-sided leasehold covenants, and co-location may identify sites that are especially attractive to Verizon, but it does not prove any necessity to depart from applicable Bylaw, DCPC, or DRI requirements.

The many deficiencies in Verizon's alternative site analysis make it impossible to conclude that an 80' tower on the Subject Property is the only feasible way to provide the purportedly needed wireless service improvements. Consequently, Verizon's arguments that a denial of the application would constitute either "unreasonable discrimination" or "effective prohibition" under the TCA,[21] or even that it has shown sufficient necessity to waive applicable regional and town requirements, have no merit whatsoever, and appear intended only to mislead and intimidate the Commission, the ZBA, and the public.

C. Verizon's property value analysis is invalid and unreliable.

Many of the Opponents are neighboring property owners whose properties possess valuable view amenities, including views of the head of Town Cove and the Subject Property. These Opponents apprehend that the proposed tower would significantly impair their views and property values, contrary to the stated purpose of property value protection recited in subsection 8.8-2. A. 2. of the Bylaw and the goal of "maintenance of sound … private property values" recited in Section 1 of Chapter 831.

[21] See Memorandum of Law at Appendix C.

Verizon has submitted studies by two off-Island appraisal firms (Shepherd Associates, located in Newton, Mass., and Real Estate Consultants of New England, located in Concord, N. H.) that purport to show that wireless towers do not generally impair property values, and therefore would not in this case.

Opponent Ian McIsaac has spent a 30 year professional career in real estate investment and finance, including over 20 years as a licensed real estate broker in Massachusetts,[22] and most of those 30 years as a senior real estate investment officer in large financial institutions[23] with direct review and approval responsibility for appraisal reports. His professional opinion, given below, discusses why the analytical methods employed by both appraisal firms are fatally defective, and therefore their conclusions are meaningless:

> The Shepherd report examines several pairs of comparable Vineyard and suburban Boston properties located nearer and farther from various wireless towers. It finds no discernible difference in the property values that can be directly attributed to the proximity of the towers, and concludes that the proximity of the towers *per se* has no effect on value. The Real Estate Consultants report employed a more eclectic approach, identifying recent sales of properties located near existing or wireless towers in suburban Boston and rural New Hampshire, and then interviewing the brokers or principals to conclude either anecdotally or by prior sales data that proximity to the towers *per se* had no effect on sale price. It also compared the relative value of three properties in New Hampshire, and conducted a survey of municipal and private sector appraisers asking whether they were "aware of any property value loss due to the ability to see any part of a cell tower from a residential property". (However, the report's heavy reliance on subjective, anecdotal testimony, primarily from interested parties, calls the reliability of the data collected into serious question.)
>
> Although superficially the reports arrive at similar conclusions and therefore might seem to validate one another, they reach the same conclusions because they are both analytically flawed in the same critical ways. First, unlike the properties most likely to be affected by the proposed Verizon tower, the photos of the properties selected show that neither consultant selected comparable properties where a significant view amenity was a meaningful contributor to the property's value, and where the construction of the tower significantly degraded the valuable view.[24] Instead, only properties without valuable view amenities were analyzed, so that the nearby towers would not have impaired a meaningful element of the properties' value in any event. Second, the before-and-after effect of constructing a tower where none had existed before was not examined; the only factor considered was proximity

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[22] His Massachusetts broker's license is currently inactive.

[23] He is currently a Managing Director, Senior Credit Officer, and Portfolio Manager in the Commercial Real Estate Investment Department at NewStar Financial. Previous employers included John Hancock Financial Services, New England Life, and Manulife Financial.

[24] The only property with a significant view amenity mentioned in either report appears to be 164 Oak Hill Road in Springfield, N. H. (on page 31 of the Real Estate Consultants report), which notes, "This home has a grand view to the west. The tower is located behind this home, up a steep hill to the east."

to the tower *per se*. Third, neither study attempted to identify the actual impact of the proposed tower on the actual properties in West Tisbury most likely to be affected by its construction. Instead, they drew abstract conclusions from unrelated examples without even bothering to compare the characteristics of any of the ostensible "comparables" directly to any of the actual properties at issue. Fourth, although each report briefly discusses the general characteristics of the Martha's Vineyard real estate market as a resort and vacation destination, neither one analyzes the specific effect of seasonal buyers and renters in the market or the effect of a degraded view on achievable rents from vacationing tenants, and neither one identifies comparable properties where seasonal resort attributes, including scenic views, contribute meaningfully to either value or rent potential.

In the case of the Opponents' properties, as their photosimulations show, the natural view of the pond and marsh supposedly protected by zoning and DCPC regulations is indeed a potentially significant contributor to property value, and would indeed be severely impaired by the introduction of an outsized and incompatible utility tower. If the consultants had been asked to determine whether permanent impairment of valuable *view amenities* impairs property values, rather than whether mere proximity to *wireless towers* or ability to see them does, and had been asked to evaluate the before-and-after effects of view impairment on property values, they most likely would have been unable to reach the same conclusion. The analytical methods employed by the consultants in fact seem deliberately and disingenuously designed to *avoid* reaching the conclusion that a wireless tower might impair property values, rather than honestly designed to discern the likely effect on the actual values of the actual properties affected, whether positive or negative.

A more reliable value analysis would have identified those specific properties in West Tisbury, including the Opponents' and others, most likely to be affected by the construction of a new wireless tower in close proximity. It would then have more specifically identified the nature of the potential effects of the tower on property value and rent potential: not only mere proximity, but also noise pollution, radiation, view impairment, and other conceivable effects. It would then have attempted to find comparable sales and rentals of comparable properties with characteristics that matched the identified characteristics of the affected properties as closely as possible.

Presumably, of the several factors identified, impairment of a valuable view would likely be expected to have the greatest potential to affect both seasonal rent potential and overall value, and would have been easiest to identify. For example, the Town of West Tisbury Assessor's Office specifically recognizes the contribution of view and waterfront amenities to overall property values in its valuation protocols for tax purposes, and routinely assigns valuation premiums (and higher taxes) to properties with view and waterfront amenities. From these assessors' valuations and photographic before-and-after simulations alone, at least a rough estimate of the effect of view impairment on value might have been derived. Similarly, a comparison of the value and rent potential of seasonal rental resort properties on Martha's Vineyard or elsewhere that were otherwise comparable to each other, except for differences in the quality of their view amenities, would not have been difficult to conduct, and would likely have revealed very meaningful differences applicable to the Opponents' properties.

Unfortunately, exact measurement of the likely change in value (whether detrimental, neutral, or advantageous) would probably be very difficult to conduct, because there are probably very few truly comparable instances of before-and-after property sales where the actual effect of the introduction of a wireless tower into a legally protected view amenity could be measured. Nevertheless, Ian McIsaac's brief professional critique should at least be sufficient to refute any presumption that the conclusions of Verizon's consultants are reliable, and sufficient to demonstrate the very real risk that impairment of neighboring properties' valuable view amenities might in turn impair the associated property values and seasonal rent potential.

VIII. Conclusion

The Application should be denied. For all the reasons argued above, the Commission must find that the Application fails to satisfy the statutory standards for approval of a DRI under Chapter 831, the requirements of the Coastal DCPC, and the requirements of the Bylaw. The Opponents ask the Commission to rule accordingly.

Conditions for Resubmission should be required. Section 8.6 of the DRI Regulations allows resubmission of a denied application, but warns that applications which remain substantially unchanged are likely to be denied again. The Opponents also request and recommend that the Commission issue clear conditions for any denied (or withdrawn) and resubmitted application to the Commission as a DRI or to the ZBA for Special Permit approval, including without limitation that:

1. In addition to the alternatives analysis specifically required in the Bylaw, the application should include a more comprehensive analysis of the wireless service "gap" area of West Tisbury and conceivable alternatives for reducing it, and must specifically include a thorough analysis of whether alternatives using Opportunity Site locations (including construction of a taller tower in Light Industrial District 2, and multiple Opportunity Sites if a single site is deemed inadequate) as defined in the Bylaw are feasible.

2. Proposed PWSFs should be located at one or more Opportunity Sites, unless it is persuasively demonstrated by the alternatives analysis that no such solution is feasible. In such event, the alternatives analysis should be deemed incomplete if it does not seriously and thoroughly analyze the feasibility of (a) co-location on the existing PSWF tower at Old Courthouse Road, (b) permanent low-impact alternatives, including but not necessarily limited to DAS and small cell, (c) supplementing existing service with COW, satCOLT, or similar less-intrusive equipment from one or more locations on a temporary or semi-permanent basis while other longer-term alternatives are pursued, and (d) a combination of the foregoing alternatives if no single one can feasibly support adequate improvements in service.

3. Feasible solutions that do not require waivers or exceptions from applicable laws and regulations should be deemed presumptively preferable to solutions requiring such waivers or exemptions, regardless of other factors, including discretionary preferences of the applicant. Feasible solutions in forested areas that do not exceed the height of the surrounding natural tree canopy (even if they require multiple locations) should be deemed presumptively preferable to solutions in visually sensitive forested areas visibly exceeding the height of the natural tree canopy from any affected public or private locations.

4. If the alternatives analysis persuasively demonstrates that there is no feasible way to reduce Verizon's service "gap" without a waiver of otherwise applicable requirements, waiver of the requirement of subsection 8.8-10. A. 3 of the Bylaw that a DAS proposal be submitted by two or more co-applicants should be deemed presumptively preferable to waiver of height or design restrictions for a monopole.

5. No application requesting a waiver of the prohibition on above-ground utilities in the Coastal DCPC should propose a height greater than (a) the maximum applicable to residential structures or (b) the average height of the surrounding tree canopy if the PWSF is located in a forested location and otherwise invisible to surrounding properties and publicly accessible sites, unless it is persuasively demonstrated by the alternatives analysis (a) that no solution utilizing locations outside the Coastal DCPC is feasible, and (b) that the proposed height is the minimum necessary to provide adequate improvements in service, even under alternatives that include multiple locations.

6. Any application for a PWSF in any visually sensitive location should satisfy all applicable aesthetic conditions without compromise or waiver. The application should specifically identify and thoroughly address, including through photosimulation, the visual impacts of the proposal from (i) each affected public property and highway, (ii) each affected private property, and (iii) the Shore Zone and public waters of the Coastal DCPC, and show that available strategies for minimizing them to the greatest extent possible have been diligently pursued. Without limiting the generality of the foregoing, failure to satisfy the provisions of the Bylaw's submittal requirements at Section 8.8-10. C. concerning sightlines to affected properties and descriptions of surrounding vegetation, landscaping and tree heights should be grounds for denial.

7. A monopine design should be prohibited as inconsistent with the scenic preservation purposes of Chapter 831, the Island Plan, the West Tisbury Master Plan, the Bylaw, and (if applicable) the Coastal DCPC, unless it is (a) located in a

forested area among similar conifers and (b) consistent with the height of the surrounding conifers.

8. Any application for a PSWF should either (a) fully address and satisfy all co-location requirements of the Bylaw, or (b) include an explicit affirmation that the proposed facility will not be used for co-location, and will be ineligible in the future to be permitted for co-location.

9. Capacity to support co-location should not be considered as a necessary element of any application, nor a sufficient justification for waivers of otherwise applicable restrictions. In the case of an application for co-location submitted by multiple applicants, the alternatives analysis should not be limited to alternatives supporting co-location only, but should also consider alternatives that satisfy the independent service needs of each applicant without co-location.

10. Providing all proposed service improvements from a single PWSF location, rather than multiple locations, should not be considered an essential or necessary element of any application, nor a sufficient justification for waivers of otherwise applicable restrictions.

11. Any application for a PWSF located outside the Coastal DCPC, but exceeding the height of the surrounding trees, should (a) include photographic or other evidence sufficient to establish that the structure will not be conspicuous from any water surface or Shore Zone of the Coastal DCPC, and (b) demonstrate persuasively by the alternatives analysis that the proposed height is the minimum necessary to provide adequate improvements in service, even under alternatives that include multiple locations.

In the event that the Commission decides to allow Verizon to supplement or amend the Application as submitted (instead of denying it and requiring resubmission), we also request that the hearing be continued and the record be held open for a sufficient time after Verizon submits any supplementary information to allow the public to respond.

APPENDIX A

OPPONENTS

James L. Cooper, Jr. and **Dina Elboghdady** own the property at 11 Factory Brook Road (Map 32, Lot 83) in West Tisbury, and are co-owners of the licensed dock on Tisbury Great Pond at the end of Runner Road.

Alan K. Temple and **Margaret S. Temple** own the property at 1 Factory Brook Road (Map 32, Lot 108) in West Tisbury, and and are co-owners of the licensed dock on Tisbury Great Pond at the end of Runner Road.

Ian M. Temple, Polly L. Peterson, Peter N. Temple, Polly L. Temple, Patrick J. Temple, and **Elizabeth E. Temple** are the sons and daughters-in-law of Alan and Margaret Temple, and have been regular visitors to the Temple property for many years.

Christopher C. McIsaac and **Ian S. McIsaac** own the property at 34 Runner Road (Map 32, Lot 107) on Tisbury Great Pond in West Tisbury, and are co-owners of the licensed dock on Tisbury Great Pond at the end of Runner Road.

Suzanne E. Durrell is the wife of Ian S. McIsaac.

Betsy C. McIsaac is the former owner and a current seasonal tenant in the McIsaac house. She has resided there seasonally since 1971, and currently resides there for approximately six months each year.

Tracey E. Braun and Christopher C. McIsaac own the property at 21 Runner Road (Map 32, Lot 75) in West Tisbury, and are co-owners of the licensed dock on Tisbury Great Pond at the end of Runner Road.

Kirk M. Reische and **Eric Reische** own the property at 71 Runner Road (Map 32, Lot 106) in West Tisbury, and are co-owners of the licensed dock on Tisbury Great Pond at the end of Runner Road.

Richard Reische and **Diana Reische** are the former owners and current seasonal tenants in the Reische house. They have resided there for over 35 years.

Stephen Cohn is a co-owner of the property at 6 Little Sandy Road (Parcel ID 010-004-00) on Tisbury Great Pond in Chilmark.

Margaret R. Weiss and **Frederick L. Weiss** own the property at 81 Old Fields Path (Parcel ID 010-005-00) on Tisbury Great Pond in Chilmark.

Susan B. Whiting and **Phillips Harrington** own the property at 35 Old Fields Path on Tisbury Great Pond in Chilmark.

APPENDIX B

SIGHT LINES AND PHOTOSIMULATIONS

FROM NEARBY LOCATIONS

Index to locations of photographs.

View across Town Cove from the Cooper Residence.

Existing as of December 31,2012. Taken by James Cooper

Photosimulation of 80 foot Monopine at Location A

View across the head of Town Cove from the Temple residence.

Existing as of November 11, 2012. Taken by Alan Temple

Photosimulation of 80 foot Monopine at Location A

View across the head end of Town Cove from the Temple Residence (wider angle).

Existing as of December 31, 2012. Taken by James Cooper

Photosimulation of 80 foot Monopine at Location A

View across Town Cove from the McIsaac Residence.

Existing as of November 11, 2012. Taken by Alan Temple

Photosimulation of 80 foot Monopine at Location A

View across Town Cove from the McIsaac Residence (wider angle).

Existing as of December 31, 2012. Taken by James Cooper

Photosimulation of 80 foot Monopine at Location A

View across Town Cove from "32 Runner Road" (as identified by Verizon). (Note: The pictured location is a subdividable homesite on the southeastern corner of the McIsaac property, across Runner Road from the Reische property.)

Existing as of November 11, 2012. Taken by Alan Temple

Photosimulation of 80 foot Monopine at Location A

Pond View 1: View toward the head of Town Cove taken from the dock at the end of Runner Road.

Existing as of November 11, 2012. Taken by Alan Temple

Photosimulation of 80 foot Monopine at Location A

Pond View 1: View toward the head of Town Cove from dock at the end of Runner Road (wider angle).

Existing as of December 31, 2012. Taken by James Cooper

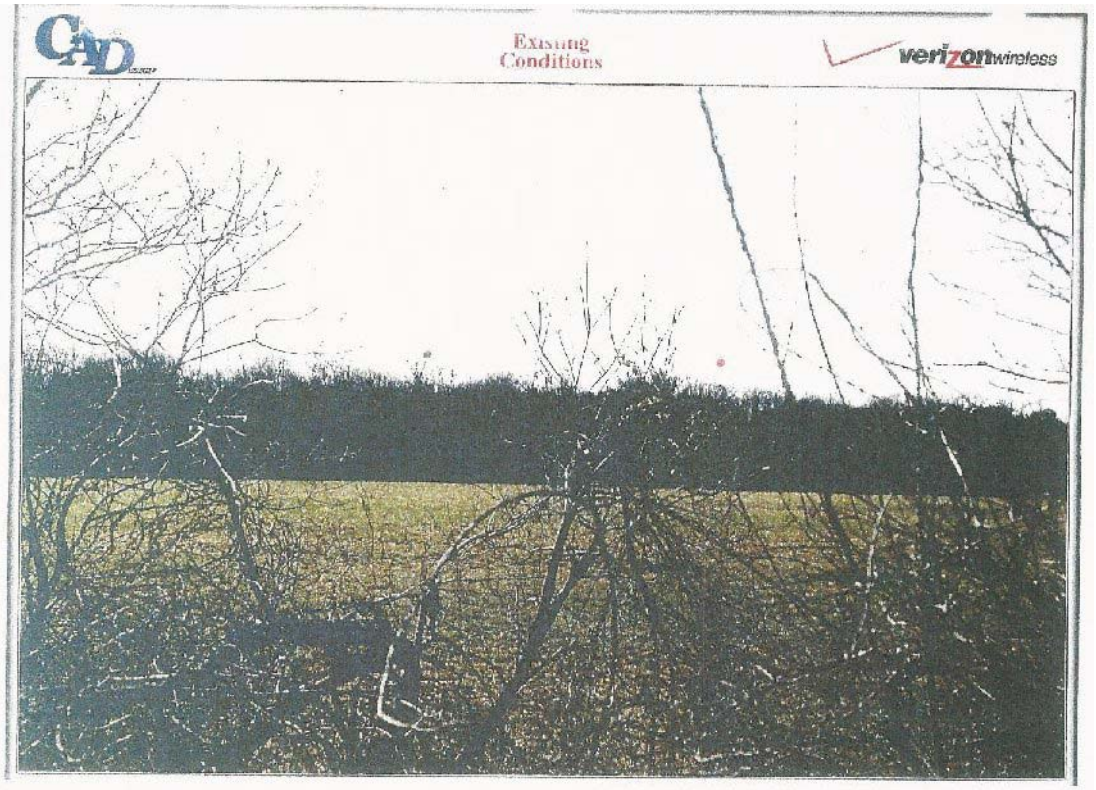
Photosimulation of 80 foot Monopine at Location A

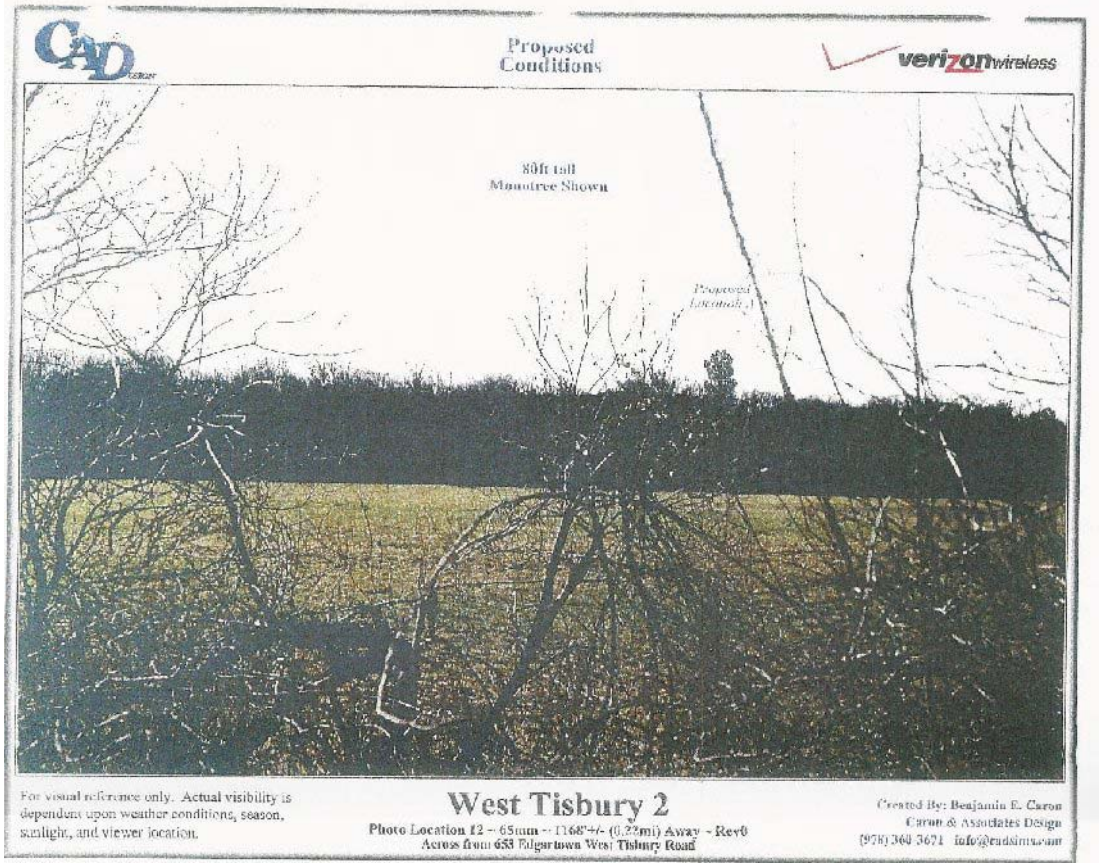
Pond View 2: View north up Town Cove from the mouth of the Tiasquam River near Blue Heron Farm, Chilmark (approximately ½ mile from Location A).

Existing as of August 22, 2009. Taken by Stephen Cohn.

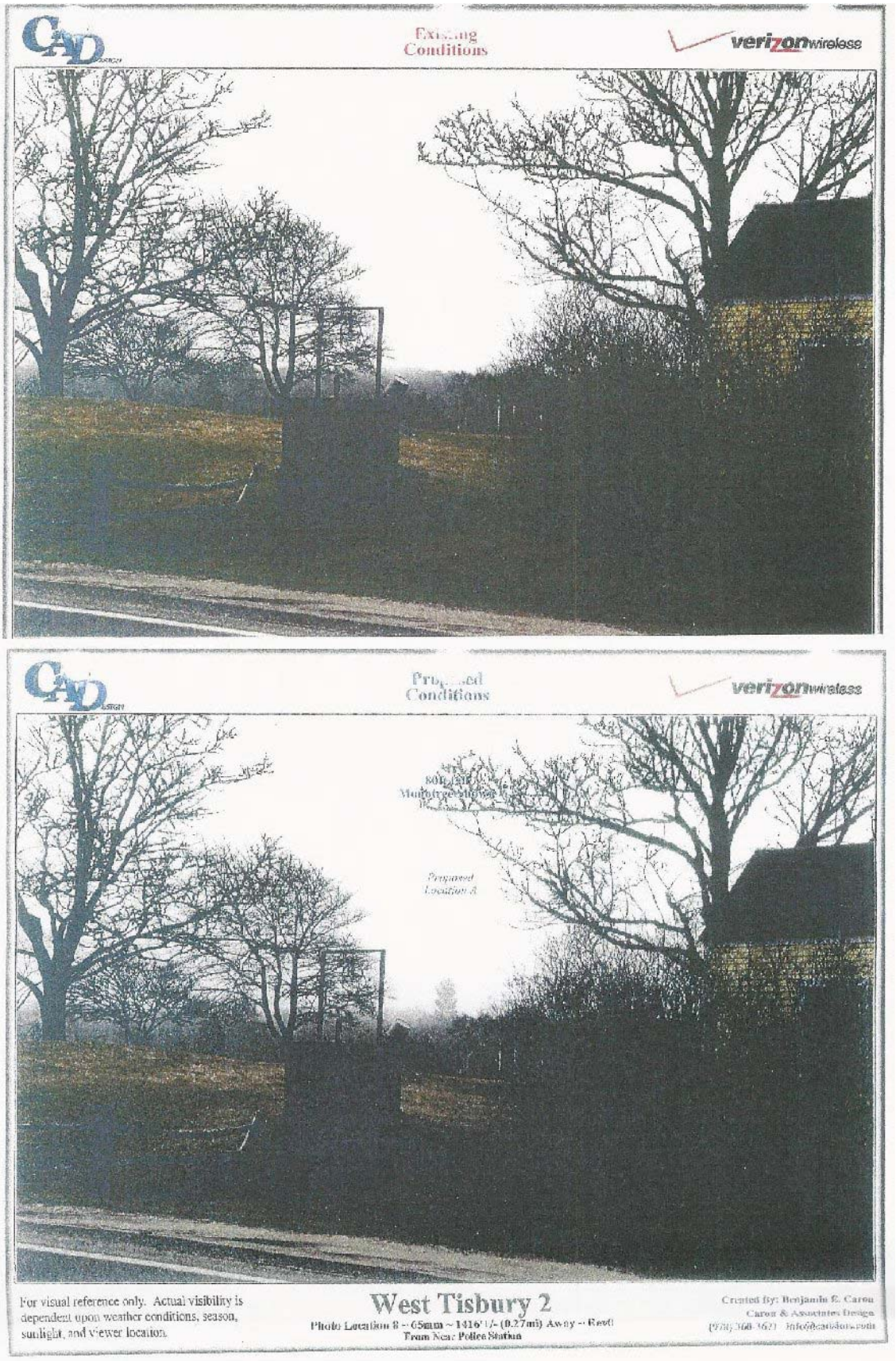
Photosimulation of 80 foot Monopine at Location A

Similarly, the following pairs of photographs from Verizon's Application illustrate that the proposed tower would be highly visible, not inconspicuous, from other locations:

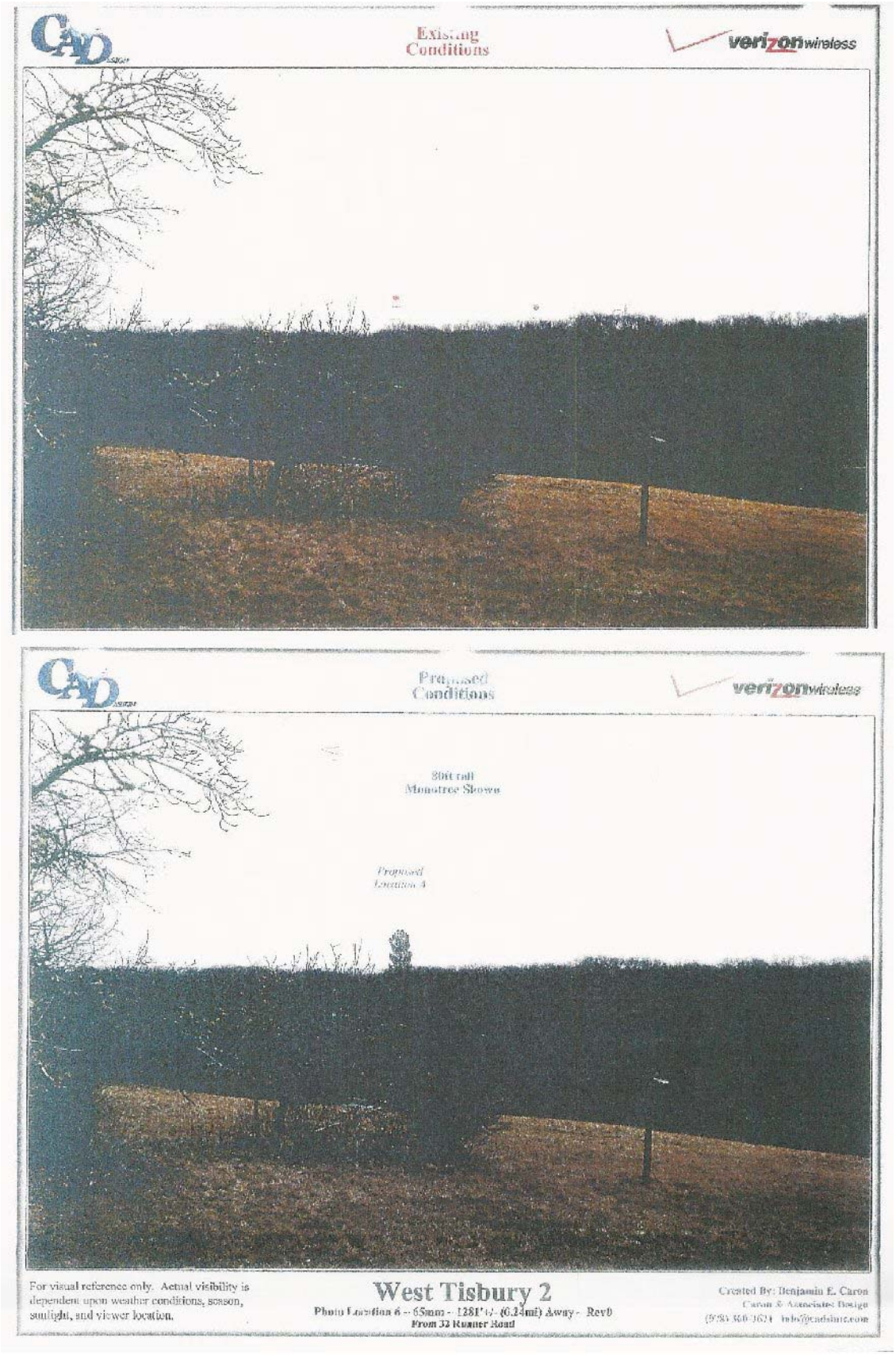




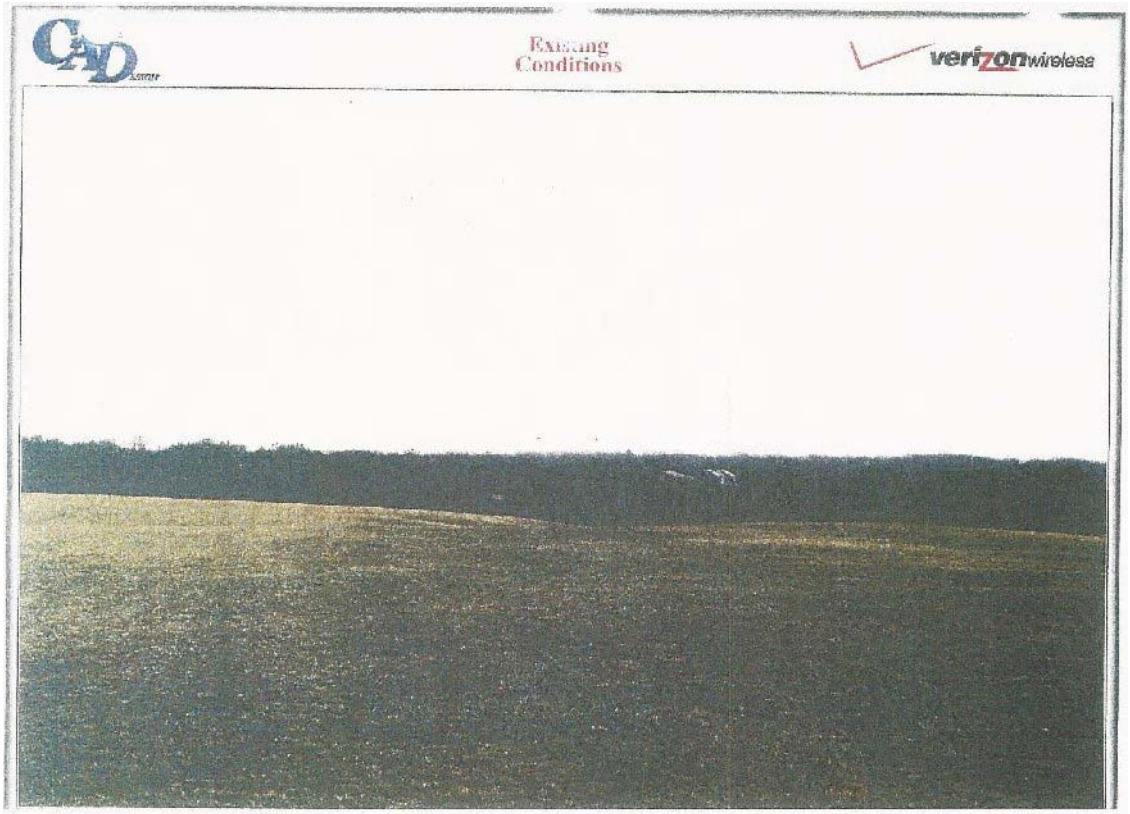
As seen from Edgartown Road

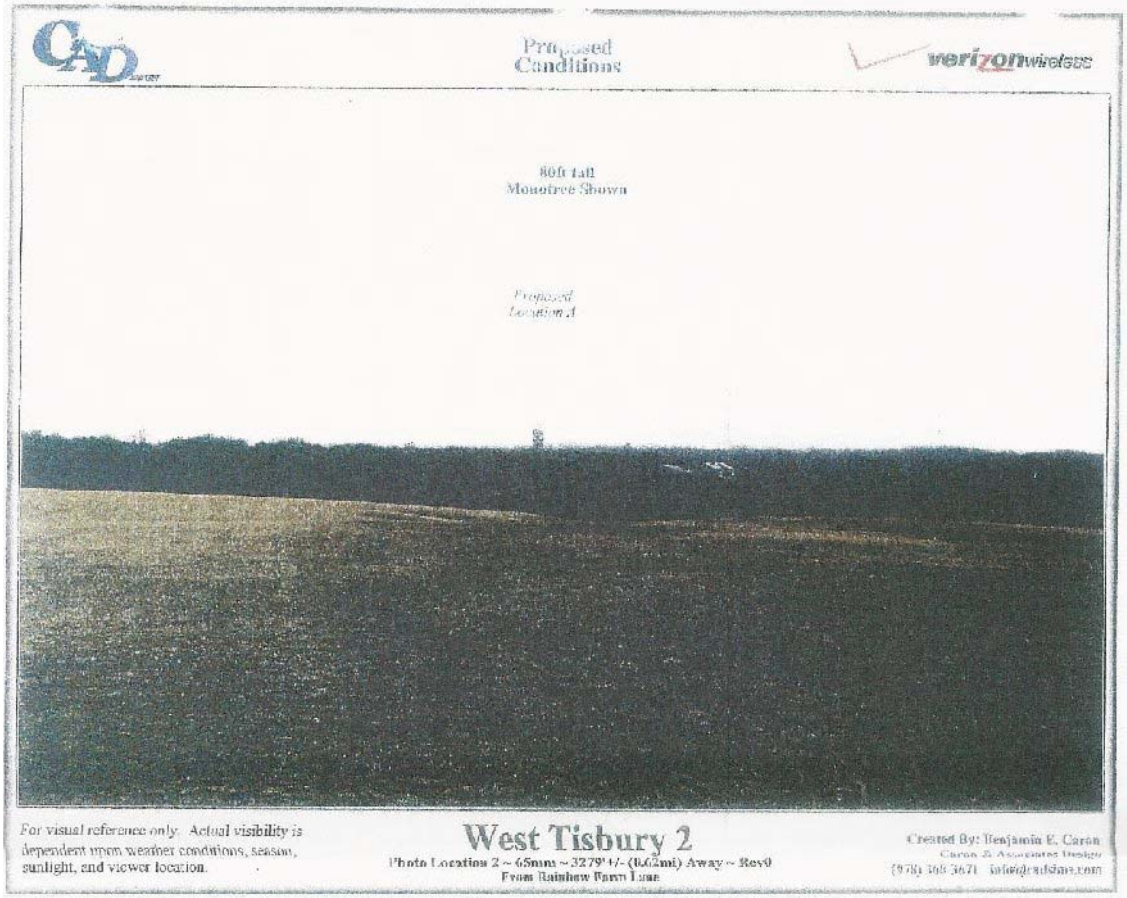


As seen from the West Tisbury police station



As seen from "32 Runner Road"





As seen from Rainbow Farm in Chilmark (approximately 0.62 miles away).

APPENDIX C

MEMORANDUM OF LAW

MEMORANDUM

To: The Martha's Vineyard Commission

From: Suzanne E. Durrell, Esq.[1]

Re: The Federal Telecommunications Act of 1996

Date: January 24, 2013

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I. Introduction

In the Telecommunications Act of 1996, 47 U.S.C. §§ 151, *et seq*. ("TCA"), Congress sought to expand wireless services and increase competition among wireless providers. However, Congress did not "federalize" telecommunications by usurping local land use authority over telecommunication uses. Rather, Congress struck a balance between local authorities and such providers by expressly providing that state and local governments "retain control over the placement, construction, and modification of personal wireless service facilities", *id.* at § 332(c)(7)(A), subject only to the five procedural and substantive limitations contained in section 332(c)(7)(B) of the TCA. *See Southwestern Bell Mobile Systems v. Todd*, 244 F.3d 51, 56-57 (1st Cir. 2001) and cases cited. *See also Green Mountain Realty Corp. v. Leonard*, 688 F.3d 40, 48-49 (1st Cir. 2012); *Town of Amherst, New Hampshire v. Omnipoint Communications*, 173 F.3d 9, 12 (1st Cir. 1999). These limitations include:

(1) a decision to deny a permit must be in writing and supported by "substantial evidence" in the written record, 47 U.S.C. § 332(c)(7)(B)(iii);

(2) the decision shall not "prohibit or have the effect of prohibiting personal wireless services" in the area, 47 U.S.C. § 332(c)(7)(B)(i)(I); and

(3) the decision shall not "unreasonably discriminate" among providers of functionally equivalent services, 47 U.S.C. § 332(c)(7)(B)(i)(II).

If a permit is denied, and the provider brings a court action to overturn the local decision, the burden is on *the provider* to prove that one or more of these conditions is

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[1] Attorney Durrell is the principal of Durrell Law Office and one of the Opponents to Verizon's Application. She founded her private practice in 2002 after a thirteen year career with the United States Department of Justice (including serving as Chief of the Civil Division of the United States Attorney's Office for the District of Massachusetts and as a Deputy Associate Attorney General of the United States). Prior to joining the United States Department of Justice, she served for several years as an Assistant Attorney General for the Commonwealth of Massachusetts, and as an associate at the Boston law firm of Hill & Barlow.

met, in other words, that the locality's decision violates the TCA. *See, e.g., Green Mountain Realty Corp., supra*; *Southwestern Bell Mobile System, supra.*

In its pending Application, Verizon strongly suggests or argues that the Martha's Vineyard Commission's ("Commission") and the West Tisbury Zoning Board of Appeals' ("ZBA") hands are effectively tied by the TCA, and thus Verizon's Application cannot be denied.[2] As discussed below, this is simply not true under the standards set by the United States Court of Appeals for the First Circuit (which has controlling authority over the Commonwealth of Massachusetts for these purposes) for deciding challenges under the TCA. Indeed, there are many instances in this Circuit (and others) of courts ruling against providers and in favor of local boards who denied wireless providers' applications. Moreover, the facts in several of these cases bear a striking resemblance to those underlying the Application and the Statement in Opposition.

II. The Federal Telecommunications Act of 1996 Supports Strong Local Authority to Deny the Pending Application for a Special Permit.

As noted above, the TCA does not trump local use law; instead it strikes a balance between localities and such providers by expressly providing that state and local governments "retain control over the placement, construction, and modification of personal wireless service facilities". And, there are many cases where courts have upheld local boards' decisions denying wireless providers' applications that did not meet the local zoning and land use requirements. *See, e.g., Green Mountain Realty Corp., supra*, 688 F.3d 40 (upholding denial of permit by Town of Milton, Massachusetts, and the Milton Conservation Commission); *New Cingular Wireless PCS, LLC v. Fairfax County Board of Suprervisors*, 674 F.3d 270 (4th Cir. 2012) and cases cited (upholding denial of permit by Fairfax County, Virginia); *Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d 620 (1st Cir. 2002) (upholding denial by Town of Pelham, New Hampshire); *Southwestern Bell, supra*, 244 F.3d 51 (1st Cir. 2001) (upholding denial of permit by Town of Leicester, Massachusetts); *Town of Amherst, New Hampshire, supra*, 173 F.3d 9 (vacating district court decision requiring town to issue permit, and remanding the case to the district court for further proceedings).[3]

Notably, the courts have recognized that the "limitations upon local authority in the TCA do not state or imply that the TCA prevents municipalities from exercising their traditional prerogative to restrict and control development based upon aesthetic and other considerations, so long as those judgments do not mask, for example, a de facto

[2] *See* Statement in Support of Application for a Development of Regional Impact July 20, 2012 at pp. 5-7; Memorandum from Gehring & Associates LLC, on Behalf of Verizon Wireless to the West Tisbury ZBA, July 2012 re "Alternative Site Analysis—The Search Area Process" at page 4.

[3] There are, of course, also cases in which the local board's denial was overturned by the courts, however, those cases (some of which are discussed herein) involve very different facts and circumstances than those in this Application and record.

prohibition on personal wireless services." *Southwestern Bell, supra*, 244 F.3d at 61 and cases cited.[4] *See generally John Donnelly & Sons, Inc. v. The Outdoor Advertising Board*, 369 Mass. 206 (1975) (holding that local zoning authorities may legitimately regulate based on aesthetic grounds, recognizing that visual pollution is a form of pollution that is a detriment to the general welfare of the citizens of the Commonwealth). There are many cases where a local authority has exercised its prerogative, denied a permit for a wireless facility, and had its decision upheld in federal court. For example:

Green Mountain Realty Corp. v. Leonard, 688 F.3d 40 (1st Cir. 2012)

The Application was for a 140 foot tower/monopole with room to accommodate up to 5 antennae in Milton, Massachusetts on a site in close proximity to the Blue Hills Reservation (a state park) and a residential neighborhood. The tower would be visible from several areas within the Reservation, including two of its highest hills, and would be visible from the neighborhood. Both the Milton Zoning Board of Appeals and the Milton Conservation Commission denied approval, citing among other factors:

- the monopole would be widely visible from the Reservation and would substantially detract from the view, vistas, and natural setting of the Reservation
- given the monopole's aesthetic impact on the Blue Hills Reservation and the neighborhood, denial was necessary to protect the character and aesthetic beauty of the Blue Hills Reservation
- the visibility of the tower from the neighborhood would substantially detract from the character of the neighborhood
- the monopole would effectively deprive the neighborhood residents of one of the primary reasons they moved to the area
- the monopole was not in harmony with the Town's zoning by law
- the proposal did not promote the safety, welfare, or aesthetic interests of the Town

The district court upheld the denial on aesthetic grounds. The United States Court of Appeals for the First Circuit affirmed that part, but remanded for the district court to consider if the denial was an effective prohibition under the TCA (*see generally* discussion, *infra*, on the effective prohibition limitation of the TCA).

[4] Verizon fails to mention these cases, as well as the many others cited in this Memorandum, choosing instead to bring to the Commission's attention only two less recent and distinguishable district court cases, *Omnipoint Communications MB Operations, LLC v. Town of Lincoln,* 107 F. Supp.2d 109 (D. Mass. 2000) and *OPM-USA-INC. v. Board of County Commissioners*, 7 F. Supp.2d 1316 (M.D. Fla. 1997).

Second Generation Properties, L.P. v. Town of Pelham, 313 F.3d 620 (1st Cir. 2002)

The proposal was for a 250 foot cell tower (later reduced to 199 feet) to be located outside of the Town of Pelham, New Hampshire's designated Telecommunications Overlay Zone (which was zoned commercial and industrial) and placed instead in a residential zone. The wireless carrier presented testimony that purported to show that the presence of a cell tower would have no impact on property values and that the alleged gaps in service could not be covered by existing towers or new 190 foot towers in the Overlay Zone. The Zoning Board of Appeals denied the special permit and the court upheld the denial. Among the factors supporting the denial were:

- the tower would interfere with views and spoil the pristine character of the neighborhood
- residents of aptly named Scenic View Drive would look out over the top of a cell tower
- a Zoning Board member who was a realtor strongly criticized the methodology used in the carrier's expert's study on the impact o cell towers on property values and a property owner was told by local real estate firms that property values would decrease some fifteen percent.
- in such a pristine (residential) setting, a 250 foot tower would be an obtrusive (commercial) use
- the property was located in a section of town that is prized for its spectacular views of the surrounding countryside
- the area has no towers or other non-conforming commercial uses
- several of the residences that would be affected had deed restrictions protecting their views

Southwestern Bell Mobile Systems v. Todd, 244 F.3d 51 (1st Cir. 2001)

The proposal was for a 150 foot tall lattice telecommunications tower sited in the approximate center of the Town of Leicester, Massachusetts, atop a 50 foot tall hill in an open field. The site already had two 40 foot tall water towers that would be only 130 feet from the tower, and some high tension electrical wires. Two subdivisions were located nearby; some houses would be only 200-300 feet away from the tower. The tower would be about 350 feet from a street. The Zoning Board of Appeals denied the application for a permit, the district court upheld the denial on aesthetic grounds, and the First Circuit affirmed. Among the factors considered by the board and the courts were:

- the tower was not appropriate for this particular location in the center of town, where there were no trees, the tower would be visible in all seasons, and would be seen daily by 25% of the town's population
- the tower would be plainly visible to purchasers who had put deposits on houses to be built in the nearby subdivision (and one such purchaser testified that he

had placed a deposit unaware that the tower was proposed in such close proximity to the property)
- the tower was of a different magnitude than anything else in the area including the water towers and the electric wires
- the tower was out of keeping with residential uses in close proximity to it

New Cingular Wireless PCS, LLC v. Fairfax County Board of Supervisors, 674 F.3d 270 (4th Cir. 2012)

The application was for a 15 foot tall storage shed and an 88 foot tall tower disguised as a tree (i.e. a tree monopole) to be erected behind a Masonic Lodge in an otherwise residential neighborhood in Fairfax County, Virginia, about 100 feet from two nearby residences. The "tree monopole" would extend some 38 feet above the closest tree, with existing trees averaging only about 40 feet in height. Supplemental vegetation would not reach a sufficient height to minimize the visual impact. The Planning Commission recommended to the County Board of Supervisors that the application be approved. But, the Board denied the permit, the district court upheld the denial, and the district court opinion was affirmed by the United States Court of Appeals for the Fourth Circuit. Among the relevant factors were:

- the tree monopole would not be in harmony with the zoning objectives and the comprehensive plan for that geographical area
- the monopole would not be in keeping with the community
- the monopole would tower above the nearby trees
- the monopole would disrupt the neighborhood and the country-like setting
- close neighbors would see the monopole all the time

T-Mobile Northeast LLC v. The Town of Islip, Long Island, F.Supp.3d , 2012 WL 4344172 (E.D.N.Y. September 21, 2012)

The application was for a 120 foot monopole stealth structure (painted brown in an effort to have it blend in with the surrounding trees and forest), at a Girl Scout Camp located in a residential zoning district on a heavily wooded property of about 94 acres in Islip, New York, surrounded by camp ground, nature preserve, and residential uses. The site was about 125 feet from the Sans Souci Nature Preserve and the Sans Souci Lakes, an area that is remarkably similar, visually and geologically, to the headwaters of Town Cove in West Tisbury, as shown in the photographs attached as an Addendum to this Memorandum. The Planning Board denied the permit and the district court upheld the denial. Among the factors considered by the board and the court were:

- the monopole would adversely affect the nature and character of the hamlet—the tower would be taller than anything else in town and would be about 60 feet taller than the other trees

- the monopole would forever change the skyline when looking out over the Sans Souci Preserve and Lakes
- the monopole would impact those who use the park and the lake preserve, and their ability to enjoy its natural and undisturbed beauty would be substantially and deleteriously impacted
- the monopole would be even more visible in the winter
- the monopole was about 60 feet taller than the tallest real tree around it
- there would be significant adverse aesthetic impacts to nearby residential properties with the views and character of the area and landscape negatively impacted (leading to concerns about property values by residents who know the local terrain and the sightlines of their own homes)
- the monopole would have a negative impact on the nature and character of the community
- the monopole would undermine efforts to preserve the town's heritage with organized beautification efforts

Wireless Towers, LLC v. City of Jacksonville, Florida, 712 F.Supp.2d 1294 (M.D. Fl. 2010)

The proposal was for a 160 foot "low impact" stealth tower on an undeveloped parcel of land in an agricultural zone where the surrounding trees were about 60-80 feet tall. The proposed site was across from a State Park and an ecological and historical Preserve with a creek/waterway used by park goers as a kayak trail, and near a subdivision for 398 homes. The Planning Commission denied the permit on aesthetic grounds, and the district court upheld the Commission decision. Among the factors noted by the local authorities and the court were:

- the tower would have a negative impact on the viewshed of the Preserve, and on its natural character
- the tower would detract from the scenic viewshed the Preserve was intended to protect
- the tower would interfere with views of park users, including boaters, fishermen, birdwatchers, and kayakers (the creek is prime location for aquatic users of the Preserve and there is a public boat ramp and a designated kayak trail)
- the height of the tower was excessive for the area given the height of the trees; the tower would rise above the tree line and be clearly visible
- the tower would be incompatible with the character and aesthetics of the surrounding area, especially given its height, design, and the sensitivity of the affected land
- the tower would impair the public's ability to enjoy the pristine, natural character of the Preserve if natural views were impaired by permanent man made elements

- the tower would adversely affect the general character and aesthetics of the surrounding neighborhood and area

As these cases show, there is every reason to believe that a denial of Verizon's pending Application would be similarly upheld in the federal courts given the many facts in the record that are substantially similar to the facts of these other cases. As discussed next, Verizon would not be able to maintain its burden of showing that a denial by the Commission or the West Tisbury ZBA violates the TCA.

III. A Decision to Deny the Special Permit Would not Violate the TCA.

The ZBA and Commission denial decisions should be upheld in any court challenge by Verizon under the TCA because: (1) there would be "substantial evidence" in the written record before the Commission (and the ZBA) to support a written denial of the Application under the ZBA's By-law and the Commission's requirements; (2) the denial would not "prohibit" or "have the effect of prohibiting" Verizon from providing service in the area; and (3) the decisions would not "unreasonably discriminate" against Verizon in comparison to other wireless providers in West Tisbury.[5] Each of these limitations will be discussed in turn.

A. There Would be Substantial Evidence in the Record to Support a Decision to Deny the Special Permit.

The burden would be on Verizon to demonstrate that a denial of the Application under the applicable ZBA and Commission zoning and land use rules is *not* supported by substantial evidence. *See, e.g., Green Mountain Realty Corp. v. Leonard*, *supra*, 688 F.3d at 50 and cases cited. This Verizon will not be able to do as there will be more than "substantial evidence" in the written record that the Application does not merit approval under these governing laws. *See, e.g.*, Statement in Opposition by James L. Cooper, Jr., et al. ("Opposition"); *Southwestern Bell Mobile Systems, supra,* 244 F.3d at 59-60 and cases cited (substantial evidence review under the TCA does not create substantive federal limitation upon local land use regulatory power, but is instead directed to those rulings the locality is expected to make under state and local zoning and land use laws).

Under the "substantial evidence" standard, courts defer to the local decision, reviewing it only to make sure that the record of evidence before the local board contains "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 60. While the court is not simply a "rubber stamp" for the locality, its review function is very narrow, and the court is not to substitute its

[5] Neither the Commission nor the ZBA needs to address or decide any of these TCA conditions or limitations; rather, these would be decided by a court at a later time if and when Verizon invoked the TCA to challenge a denial of the special permit.

judgment for that of the board. *Id.; Green Mountain Realty Corp. v. Leonard*, *supra*, 688 F.3d at 50-51. The Commission and the ZBA will need to be considerate, deliberate, thoughtful and fair, but presumably that would be true in any case.

The evidence here would amply support a ZBA or Commission decision to deny the special permit. *See, e.g., discussion and cases, supra;* Opposition; Exhibit A hereto (photographs comparing the proposed site in the *Town of Islip* case, *supra,* with the proposed site here, in Town Cove); *Green Mountain Realty Corp. v. Leonard*, *supra*, 688 F.3d 40, 50 (substantial evidence supported board's decision to reject proposed wireless facility near the Blue Hills Reservation on aesthetic grounds); *New Cingular Wireless, supra*, 674 F.3d at 274-275 (substantial evidence supported board's denial of permit on grounds that proposed wireless facility would not be in harmony with the zoning objectives and the Comprehensive Plan for that geographical area); *Southwestern Bell Mobile Systems, supra,* 244 F.3d at 60-62 (substantial evidence supported board's decision to deny application on aesthetic grounds and the board was entitled to make an aesthetic judgment about the visual impact without justifying its judgment by reference to economic or other quantifiable data).

B. A Decision Denying the Permit Would not Necessarily "Prohibit or Have the Effect of Prohibiting" Verizon From Providing Personal Wireless Service in the Area.

The burden would be on Verizon to prove that a denial would necessarily prohibit or have the effect of prohibiting personal wireless service by Verizon in the area of West Tisbury. *See, e.g., Green Mountain*, *supra,* 688 F.3d at 57-60 and cases cited; *Southwestern Bell, supra*, 244 F.3d at 58, 63; *Town of Amherst, supra,* 173 F.3d at 14-16; *New Cingular Wireless, supra*, 674 F.3d at 275-277; and discussion above. To do so, Verizon would have to prove in court that: (1) there is a "significant gap" in its coverage in the area; *and* (2) there are *no feasible alternatives* to its proposed solution. *See, e.g., Green Mountain, supra; Southwestern Bell, supra,* 244 F.3d at 48.[6] This Verizon will not be able to do.

1. <u>Verizon has not Produced Sufficient Evidence of a Significant Gap in Coverage in West Tisbury</u>.

Under the TCA, a "significant gap" is one which is "'large enough in terms of physical space and number of users affected' to distinguish it from 'a mere, and statutorily permissible, dead spot.'" *Green Mountain, supra*, 688 F.3d at 57-58, quoting from *Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d 620, 631 (1st Cir. 2002).

[6]The court would consider this issue *de novo*, meaning that any party (*e.g.*, Verizon, the Town, the ZBA, the Commission, or the Opponents) could introduce new evidence in court that was not in the written record before the Commission or the ZBA. *See, e.g., Green Mountain, supra*, 688 F.3d at 58. The discussion below is necessarily based on the evidence that is expected to be in the written record with the Commission and the ZBA.

As the First Circuit noted in *Green Mountain*, federal law contemplates and allows that areas with adequate coverage will still include "dead spots" (defined by federal regulation as "small areas within a service area where the field strength is lower than the minimum level for reliable service"), and the fact that there are dead spots *does not mean that service is per se inadequate*. *Green Mountain, supra*, 688 F.3d at 57-58 and authorities cited. *See also New Cingular Wireless PCS, LLC, supra*, 674 F.3d at 275-277 quoting from *T-Mobile Northeast, LLC v. Fairfax County Board of Supervisors*, 672 F.3d 259, 267-268 (4th Cir. 2012) (the TCA "'cannot guarantee 100 percent coverage …we emphasize that [a carrier's] burden to prove a violation of the [TCA] is substantial and is particularly heavy when [the carrier] already provides some level of wireless service to the area …[the carrier] must show a legally cognizable deficit in coverage amounting to an effective absence of coverage'".).

In assessing this issue, courts should consider, for example, "the physical size of the gap, the area in which there is a gap, the number of users the gap affects, and whether all of the carrier's users in that area are similarly affected by the gaps." *Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 49 (1st Cir. 2009) and cases cited. In addition, the courts may find relevant "data about percentage of unsuccessful calls or inadequate service calls in the gap area." *Id*.

Verizon has presented a site map with coverage areas and gaps, but little if any data of the type the courts assess to determine whether a carrier has proven that a "significant gap" exists. *See* discussion, *supra*. Moreover, that site map shows that even with the proposed tower, Verizon would still have coverage gaps to some degree in West Tisbury. Perhaps more importantly, that map reflects coverage only as it existed after a temporary tower in the area near the proposed Site was dismantled; it may well be that with that type of visually unobtrusive system (or something substantially similar), the coverage gap is closed.

2. <u>Verizon has not Shown that it has Thoroughly Investigated the Possibility of Other Viable Alternative(s) to the Proposal in its Application and that its Proposal is the Only Feasible Alternative</u>.

If Verizon challenges the denial in court, it will bear the burden of proving that it is effectively being prohibited from providing service in West Tisbury. *See, e.g., Green Mountain*, *supra,* 688 F.3d at 57-59 and cases cited. The First Circuit has identified two circumstances where there is a prohibition in effect: (1) where the town sets or administers criteria which are impossible for any applicant to meet; and (2) where the existing application is the only feasible plan. *See, e.g*., *Green Mountain*, *supra,* 688 F.3d at 58 quoting from *Town of Amherst, supra,* 173 F.3d at 14 (to prevail, provider must "show from language or circumstances not just that this application has been rejected but that further reasonable efforts are so likely to be fruitless that it is a waste of time even to

try."); *Omnipoint Holdings, supra*, 586 F.3d at 50-53. As the First Circuit emphasized in *Town of Amherst*:

> Omnipoint may think that even from an aesthetic standpoint, its solution is best. But subject to an outer limit, such choices are just what Congress has reserved to the town…. Omnipoint did not present serious alternatives to the town…. This one proposal strategy may have been a sound business gamble, but it does not prove that the town has in effect banned personal wireless communication…. It is too early to give up on the Board…. The [TCA's] balance of local autonomy subject to federal limitations does not offer a single 'cookie cutter' solution for diverse local situations… [b]ut Congress conceived that this course would produce (albeit at some cost and delay for the carriers) individual solutions best adapted to the needs and desires of particular communities.

Id. at 14-17.

Verizon must prove that it has "investigated thoroughly the possibility of other viable alternatives." *Omnipoint Holding, supra*, 586 F.3d at 52, quoting *VoiceStream Minneapolis, Inc v. St. Croix County*, 342 F.3d 818, 834-835 (7th Cir. 2003). For purposes of the TCA, the burden is *not* on the local authorities to present alternatives. *Southwestern Bell, supra*, 244 F.3d at 63. The court's analysis of feasibility can include not just alternative sites, but less sensitive sites as well as alternative design systems, alternative tower designs, placement of antennae on existing structures, varying tower heights, number of towers, foregoing co-location, and other factors. *Town of Amherst, supra,* 173 F.3d at 14.-15; *Omnipoint Holdings, supra,* 586 F.3d at 49.

The courts demand a serious and thorough effort by the carrier, as can be seen from the following five cases. In three of these cases the court found the wireless carrier did not carry its burden, while in the other two cases, the court found that the carrier was prohibited or effectively prohibited from providing service. From this comparison, it is clear that Verizon has not made a serious and thorough effort and thus has not met its burden to date.

No Effective Prohibition

In *Town of Amherst, supra,* 173 F.3d at 14-15, the First Circuit vacated the district court's decision against the Town and remanded for further proceedings because: (a) the carrier practically admitted that lower towers were technically feasible; (b) it appeared that lower towers could be used and possibly re-sited if co-location were sacrificed; (c) it was unclear that locating a tower in a historic district was technically essential; and (d) Omnipoint did not present serious alternatives to the town.

In *New Cingular Wireless PCS, LLC, supra*, 674 F.3d at 276-277, the Fourth Circuit affirmed a district court decision upholding the county board's denial of a permit. The court found that AT&T's "evidence" that it had examined numerous other locations, but

they were unusable or unavailable, was inadequate particularly since as to one of the locations (a national park), the carrier did not even try to obtain permission, but rather simply presented wholly speculative assertions by a consultant based on a competitor's prior experience with a national park claiming that the park would be loath to give permission and the process can take years to process with no certainty of outcome.

In *Second Generation Properties, supra,* 313 F.3d at 635, the First Circuit affirmed the district court decision upholding the local board's denial of the permit to locate a tower in a residential zone instead of in the Telecommunications Overlay Zone which was zoned commercial and industrial, stating, in part:

> Dispositively on the effective prohibition issue, the record shows that [the carrier] Second Generation has not met its burden to show that there are no other potential solutions to the purported problem. Specifically, Second Generation failed to show that a taller tower (for which a height variance would be needed) could not be built in the [Telecommunications] Overlay Zone [designed for new PSWF installations] to remedy the alleged gap. Nor did it show that no other feasible sites existed outside of the [Telecommunications] Overlay Zone or that the ZBA would deny variances for such sites. Second Generation's own experts acknowledged that its land was not the only location where a tower could provide coverage in the purported gap and that its proposed tower was likely taller than necessary to service the alleged gap. Second Generation also failed to explore whether existing towers in nearby jurisdictions (which enabled U.S. Cellular customers to obtain roaming service) could provide other carriers with coverage in the purported gap.
>
> Though Second Generation has not on this record demonstrated that this individual denial of a permit constituted an effective prohibition, it appears there may be a coverage problem requiring a solution. Nothing in the Town's actions thus far shows an unwillingness to acknowledge a problem or to permit the crafting of a solution. The record suggests a range of possible solutions, none yet determined to be infeasible, ranging from more co-location on existing towers in nearby towns, to the construction of less aesthetically disruptive towers in Pelham, to the placement of towers along median strips. Those are the sorts of choices and trade-offs which the Act permits towns to make in the first instance. [citations omitted]. In this situation, the heavy artillery of federal preemption is simply unwarranted.

Effective Prohibition

In contrast, here are two cases where the court found an effective prohibition.

In *Omnipoint Holdings, Inc. v. City of Cranston, supra*, 586 F.3d at 52, the First Circuit held that the district court did not commit clear error in overturning the board denial where the carrier's final plan, which was not its optimal plan, showed that it had systematically searched for solutions to the gap problem using technologically reliable criteria and methodologies. It had considered different types of solutions including adding to existing wireless towers, adding to existing structures of the needed height, including utility poles, and new construction of facilities on unoccupied land. It showed

it had made financial offers according to its usual rates, increased its rates, and then offered an extraordinary bonus in an unsuccessful effort to reach a contract on its optimal location. Finally, it reached an agreement with a church to construct a 90 foot tower disguised as a flagpole. Under these circumstances, the First Circuit held that the district court did not commit clear error in overturning the board denial.

In *National Tower, LLC v. Plainville Zoning Board of Appeals,* 297 F.3d 14, 23-25 (1st Cir. 2002), the First Circuit affirmed a district court opinion overturning a board's denial of a carrier's application because it did not allow *any* towers in its commercial zoning district *even by* permit or variance. As a result, it was fruitless for the carrier to try any further to get a permit for its chosen site. This amounted to an effective prohibition. The district court recognized a theoretical issue of a potential inconsistency between the need to protect sensitive historical or environmental sites and the "no alternative site" theory of effective prohibition, but the First Circuit reserved the issue of what the proper analysis would be if, in fact, there were such a conflict in a case.

Viewed from the perspective of these cases, it is clear that Verizon cannot show that it has: (a) "thoroughly investigated" alternative systems and locations, including less sensitive sites, and different tower heights or designs or alternative technologies; and (b) that either the proposed location/site or the proposed 80' tower represent the *only feasible plan* to address Verizon's asserted wireless communications gap in West Tisbury. *See generally* Opposition at Section VII.B and discussion below.

The Site Analysis Memo submitted by Verizon acknowledges that the Doane property is "located at the southern end of the Search Area," not an ideal location. Yet the Applicant failed to contact any landowners having an interest in fewer than ten acres within the "Search Area" as part of the site review process. The determination to contact only landowners within the "Search Area" holding parcels of ten acres or more was arbitrary. Applicant's Site Acquisition Consultant in his Affidavit of July 11, 2012 notes only that a "relatively large parcel (i.e., over 10 acres) would be *preferred*," (emphasis added), not that a parcel of such size is necessary to provide the relevant services. The Applicant's failure to contact landowners having potentially viable sites within the Search Area and without the adverse impacts, or with fewer adverse impacts, than those presented by the proposed Site demonstrates that the Applicant has not met the alternative site analysis burden to show that the local authority's denial decision would effectively prohibit its services in the area.

Moreover, the Applicant has not made clear what, if any, steps it took beyond merely mailing out letters to certain landowners: for example, what rent or other financial incentives were offered, and what lease terms were offered. The Site Analysis says that one of Verizon's criteria is "leasibility" which it defines as "the ability to acquire a commercially reasonable leasehold interest, with the fewest deviations from the company's standard lease, with a willing landowner within a reasonable period of

time." *See* Site Analysis at p. 2. However, Verizon has not stated what terms it offered and how hard it tried to find other sites. Its lack of effort compares unfavorably to the extraordinary efforts made by the carrier in the *Omnipoint Holdings, Inc. v. City of Cranston*, *supra,* 586 F.3d 38 (discussed above).

Verizon's Site Analysis also sets forth "zone-ability" as one of its three search criteria, but here remarkably, Verizon chose a site on which two of the three locations (including the proposed Location A) are within an especially protected scenic areas (the Coastal DCPC and Coastal Overlay District) and therefore are *not "zone-able" by Verizon's own definition* (*see* Site Analysis Memo at p. 2) because: (a) the site does not have a reasonable probability of expedited permitting success, requiring the least relief necessary (i.e. fewest variances); (b) the site lacks harmony with the express terms of the West Tisbury zoning bylaws; (c) there is neighborhood impact; (d) the tower will most certainly be visible; (e) there will be environmental disturbance; and (f) there will be impact on historic and environmental resources. *See, e.g*., discussion in Section II, *supra*.

Verizon's Site Analysis Memo further states that the third criteria Verizon uses in choosing a site is "constructability", *id*., however, Verizon's proposal does not match its own criteria in two respects. First, Verizon recognizes that "The 'cheapest' site to construct is not always chosen; instead the site with the least environmental impact is always preferred." Yet, here Verizon has chosen a site with obvious environmental concerns given the Coastal District and the visibility of the tower and effect on the nature and character of the area. *See* discussion, *supra*. Second, Verizon suggests that a key component of "constructability" is access for its "co-locators", but the Application is not presented as one for co-location, and co-location is not necessary to the provision of *Verizon's* services which is the relevant consideration under the TCA. Therefore, such considerations when choosing a site were completely inappropriate.

Remarkably, the Affidavit of the Site Acquisition Consultant attached to the Site Analysis Memo opines that "The Doane property is heavily wooded and therefore affords maximum screening and shielding to neighboring and abutting properties." *Id.* at paragraph 18. The evidence, including Verizon's own photosimulations, demonstrate that he is mistaken. Furthermore, the consultant states: "In my professional opinion the property chosen is the best candidate. The Doane property is a highly leasable [implying that Verizon received very favorable terms], zone-able [it is not], and constructible [it is not] location to site a new wireless facility in harmony [it is not] with the Town's Bylaws." *Id*. at paragraph 19. These statements are misleading: the term "highly leasable" suggests that Verizon obtained much more favorable terms than necessary (*compare, e.g., Omnipoint Holdings, supra*, 538 F.3d 38 discussed above where the carrier offered unfavorable and nonstandard financial and other terms to landowners); and the consultant is patently wrong on all other points for the reasons discussed above. Nor does he ever say that Location A is the "only feasible option" which is the operative legal standard under the TCA.

In addition to the inadequacies with respect to site and location, the Applicant has also failed to demonstrate that an 80' tower (monopine or stealth) or even a lower tower, is the only feasible system or plan to provide the allegedly necessary and proposed wireless services. In Chilmark and Aquinnah, for example, wireless carriers are working with a provider of a Distributed Antenna System ("DAS") to provide functionally equivalent service on a series of much less visually intrusive small antennas mounted on utility poles. Verizon made it clear as recently as May 2012, that while it is not joining *that* DAS plan because the rent was "too high", Verizon is *"willing to create its own [DAS] system."* http://www.mvtimes.com/2012/05/30/aquinnah-chilmark-throw-switch-improved-wireless-service-10870/ (quoting Rich Enright, a Verizon official, emphasis added). Yet, Verizon's Alternative Site Analysis Memo dated just two months later in *July 2012* makes *no mention* of alternative systems such as DAS and contains *no analysis or data* whatsoever regarding the relative economic impact of a DAS solution, or any other multi-sited solution on shorter, less conspicuous mounts, as opposed to an 80' tower solution.

Even if Verizon were to demonstrate some additional cost of an alternative system relative to a single 80' tower, Applicant's own Alternative Site Analysis (p. 2) notes that "[t]he "cheapest" site to construct is not always chosen; instead the site with the least environmental impact is always preferred." Further, that Site Analysis refers to "commercially reasonable leasehold interests", *id*.; by definition, if Verizon's competitors are willing to pay certain rent for DAS, that rent is commercially reasonable. The failure to mention DAS or consider it as an option purely because the rent its competitors would pay was "too high" (and because by inference Verizon may prefer a tower with co-location from which it can collect rent from other carriers) also renders the existing Alternative Site Analysis deficient.

Moreover, Verizon has provided wireless service through a temporary, smaller and unobtrusive Cell on Wheels ("COW") tower mounted on a utility pole on the Doane property in the past. Indeed, Applicant's recent provision of enhanced service using a COW that was inconspicuous from the Pond during President Obama's vacations in the neighborhood would seem to be dispositive evidence that feasible alternatives that are less visually intrusive to the Coastal DCPC and the Coastal Overlay District are indeed available. Apparently, this temporary tower was dismantled prior to the Radio Frequency analysis performed by the Applicant. The alternatives offered by a temporary COW solution, or by a similarly inconspicuous solution of similar height, particularly as a bridge to the newly emergent wireless technologies that will soon render 80' towers obsolete, should also be considered as part of a proper alternative site analysis.

Nor is there anything prohibiting Applicant from resubmitting an application for alternate facilities located in preferred Opportunity Sites (as defined in the By-law) such as commercial and institutional buildings, churches, existing or new utility poles within

existing public or private rights of way, or, in order to expand its service network to cover the asserted coverage gap. For example, the Applicant appears to have taken *no* steps to determine what, if any, Opportunity Sites were available, other than the church, but even the casual inquiry of the church was insufficient. *Compare, e.g., Omnipoint Holdings,* discussed *supra.*

In sum, the deficiencies in Applicant's Alternative Site Analysis make it impossible to conclude that an 80' tower located on the proposed Doane property is the only feasible plan for providing wireless services to address the asserted coverage gap in West Tisbury. Consequently, Applicant cannot demonstrate at this time any basis for an "effective prohibition" by the Commission or the ZBA in violation of the TCA.

C. The Decision Denying the Permit Would Not "Unreasonably Discriminate" Against Verizon Compared to Other Wireless Providers in West Tisbury.

1. Denial of the Permit Would not "Unreasonably Discriminate" Against Verizon.

While Verizon has suggested in its Application that this limitation would apply here, *see* fn. 2, *supra*, that argument is specious. Verizon has offered no evidence whatsoever that its service is presently inferior to that of competitors.[7] The fact is that Verizon would simply not be able to prove that the denial of a permit unreasonably discriminates among providers of functionally equivalent services, i.e. other wireless providers.[8] Indeed, any such argument borders on frivolous since there isn't a shred of evidence that any other provider has sought to, or been permitted to, place any PWSF in the Coastal DCPC or the Coastal Overlay District, let alone a grossly nonconforming facility.

2. If Anything, Allowing the Application Would Require the Coastal DCPC (and the Coastal Overlay District) to be Opened to Development by Other Wireless Carriers.

If Verizon is allowed to build the proposed tower in a Coastal DCPC and Coastal Overlay District or in a residential zone close to these areas, then other carriers will argue they are being "unreasonably discriminated" against if they are not allowed to do the same to keep the competitive field level under the TCA. In short, allowing Verizon's proposal would open the floodgates to other providers seeking to build towers in the Coastal Overlay District and in the Coastal DCPC or other locations that are aesthetically

[7] Indeed, Verizon is a co-locator on the Airport tower and on the tower on Fire Tower Hill.
[8] As with an "effective prohibition" challenge under the TCA, a challenge under this section would also be de novo in the district court with any party able to offer new evidence. *See* fn.6, *supra*.

out of character in the landscape and visually disruptive not only to West Tisbury, but to other parts of the Island as well.

The TCA's limitation on "discrimination" among providers seeking to do the same as Verizon would then prevent the Commission and town authorities on the Island from regulating such developments, all to the detriment of the aesthetic beauty and the character of the landscape of the Island. The Commission and the ZBA would effectively be tying their own hands with respect to future applications.

IV. Conclusion

In its Application, Verizon strongly suggests that the TCA requires the Commission and the West Tisbury ZBA to allow its Application no matter how flawed it is. To the contrary, the TCA does not trump state and local land use law and does not usurp traditional local zoning authority and prerogative. Instead, the TCA strikes a balance between localities and such providers by expressly providing that state and local governments "retain control over the placement, construction, and modification of personal wireless service facilities", subject to certain limitations. If the Commission (and the ZBA) exercise their traditional authority under their applicable zoning and land use laws to deny the Application and special permit, there is ample reason to expect that their decisions would be upheld in court if they were challenged by Verizon.

ADDENDUM

COMPARATIVE PHOTOGRAPHS OF SANS SOUCI LAKE FROM *TOWN OF ISLIP* CASE and TOWN COVE, TISBURY GREAT POND

Sans Souci Lake, Islip, Long Island, New York

Town Cove, Tisbury Great Pond (Doane property in center of photo)