

HARDING TOWNSHIP BOARD OF ADJUSTMENT MINUTES
REGULAR MEETING
JULY 20, 2023
7:30 PM

CALL TO ORDER AND STATEMENT OF COMPLIANCE

The Board Chair, Mr. Flanagan, called the meeting of the Board of Adjustment to order at 7:30 and announced that adequate notice of the meeting had been made in accordance with the New Jersey State Open Public Meetings Act.

PLEDGE OF ALLEGIANCE

REGULAR MEETING

ROLL

Ms. Taglairino called the roll. It went as follows:

Mr. Cammarata	Present	Mr. Newlin	Present	Mr. Maselli	Excused
Mr. Addonizio	Excused	Ms. Sovolos	Excused	Mr. Boyan	Excused
Mr. Rosenbaum	Present	Mr. Symonds	Present	Mr. Flanagan	Present

Board Attorney, Mr. Hall, Board Engineer Mr. Fox, and Ms. Taglairino were also present.

ADMINISTRATIVE

MINUTES

June 15, 2023

Mr. Rosenbaum made a motion to approve the June 15, 2023 minutes. The motion was seconded by Mr. Flanagan. On a voice vote all eligible members approved the minutes.

PENDING REQUEST

FOR WITHDRAWAL

Application BOA #05-23 Jason Doctor

The Board deferred the request until the August meeting to settle the outstanding technical review invoice for the account.

RESOLUTIONS

Resolution BOA# 17-18

New York SMSA Limited Partnership d/b/a Verizon Wireless

Mr. Mlenak was available on the phone for the adoption of resolution.

Mr. Flanagan made a motion to adopt Resolution BOA #17-18 New York SMSA Limited Partnership d/b/a Verizon Wireless. It was seconded by Mr. Newlin. A roll call vote went as follows:

For: Flanagan, Rosenbaum, Newlin, and Symonds

Against: None

Resolution BOA # 09-2023

2022 BOA Annual Report Resolution

Mr. Flanagan made a motion to adopt the 2022 Annual Report Resolution. The motion was seconded by Mr. Newlin. On a voice vote all members approved the resolution.

OLD BUSINESS

Application BOA #05-23

McFiddish, LLC

14 Sand Spring Land, B19/L2

Applicant is requesting variance relief for lot coverage, building coverage, and side setbacks as per N.J.S.A.40:55D-70(c).

Presenting:
Peter Dorne, Owner

Mr. Flanagan noted on the record that he visited the site after the site inspection.

- Mr. Dorne presented proposed plans for a barn with a pool house on the rear of the property. The variance relief being sought is for side setbacks, height, building and lot coverage.
- There was a discussion regarding elements that could be turned into an accessory dwelling.
- The height being sought is 30.5 ft. where 25 ft is permitted unless the structure is solely agricultural.
- Mr. Dorne cited design as being the factor for the height.
- Mr. Symonds had an issue with the height and lighting.
- Mr. Cammarata had concerns about the fireplace and height.
- There was a discussion about the cupola height.
- Mr. Rosenbaum would like to see the ridge line lowered.

The application was carried until the August 17, 2023 meeting with no further notice.

The meeting adjourned at 8:36.

Lori Taglairino

Respectfully submitted by Lori Taglairino, Board of Adjustment Secretary

HARDING TOWNSHIP BOARD OF ADJUSTMENT RESOLUTION

Approval of Use Variances & Site Plan Approval
New York SMSA Limited Partnership d/b/a Verizon Wireless
Application No. BOA 17-18
8 Millbrook Road - Block 17, Lot 1
Adopted July 20, 2023

WHEREAS, New York SMSA Limited Partnership d/b/a Verizon Wireless (“**Verizon**”) applied to the Harding Township Board of Adjustment (“**Board of Adjustment**”) for a variance pursuant to *N.J.S.A. 40:55D-70(d)(1)* from Section 225-151 of the Land Use and Development Ordinance, which prohibits wireless telecommunications towers in the PL Zone, to permit construction of a 140’ high wireless telecommunications tower with a fenced equipment compound at the base of the tower within a leased area of approximately 1,620 square feet on property containing the Township’s Department of Public Works and associated improvements as well as a historical structure that will remain, that is located in the PL Zone, at 8 Millbrook Road and is designated on the Township Tax Map as Lot 1 in Block 17 (“**DPW Property**”); and

WHEREAS, pursuant to Township Ordinance No. 06-15, adopted by the Township Committee on December 14, 2015, the Township solicited sealed bids for a lease agreement over a portion of the DPW Property for the development and placement of a wireless communications facility (the “**Township RFP**”); and

WHEREAS, the Township RFP required, inter alia, that the successful bidder “shall be required to obtain final site plan approval for the installation of the communication facility and tower from the Township’s Board of Adjustment, including a use variance if required”; and

WHEREAS, Verizon was the sole bidder in response to the Township RFP and executed a lease agreement with the Township dated June 14, 2018 (the “**Lease**”), which stated that it was “contingent upon [Verizon] obtaining all certificates, permits and other approvals, including site plan approval and use variance from the Township of Harding Zoning Board of Adjustment and any and all necessary approvals from the New Jersey Historic Preservation Office, as the Property is located within the Township’s Historic District . . . [.]”

WHEREAS, accordingly, Verizon’s application sought preliminary and final site plan approval pursuant to a site plan set prepared by James C. Murawski of E2 Project Management LLC, dated October 25, 2018, revised through March 4, 2019, consisting of a title page, tax/zoning map and property owners list sheet, overall site plan, enlarged site plan and elevation, equipment details, construction details, and landscape plan (collectively, the “**Site Plan**”); and

WHEREAS, the Board of Adjustment deemed the initial application complete at a meeting on December 20, 2018, at the Harding Township Municipal Building, for which public notice and notice by applicants were given as required by law; and

WHEREAS, the Board of Adjustment conducted a public hearing on the initial application at 27 regular and special meetings that took place either in person at the Harding Township Municipal Building, virtually using the Zoom platform as a result of the Coronavirus 2019 pandemic, or a hybrid (as more particularly set forth in the Denial Resolution (hereinafter defined)) for which public notice was given as required by law; and

WHEREAS, the Board of Adjustment also conducted site inspections of the DPW Property and surrounding residential properties in connection with the application at special meetings on January 27, 2019, and July 10, 2021, for which public notice was given as required by law; and

WHEREAS, at the meeting on May 10, 2022, the Board of Adjustment denied the application for preliminary and final site plan approval with *N.J.S.A. 40:55D-70(d)* use variance relief on a vote of 5 to 2, which resulted in denial of the application; and

WHEREAS, at the Board of Adjustment’s regular meeting on June 16, 2022, the Board of Adjustment adopted a Resolution denying Verizon’s application (the “**Denial Resolution**”, a copy of which is affixed to this Resolution as Exhibit A), which, *inter alia*, set forth the Board of Adjustment’s findings and reasons for denial; and

WHEREAS, Verizon timely filed a complaint in the Federal District Court of New Jersey against the Board of Adjustment and the Township of Harding (“**Township**”) bearing the docket 2:22-cv-04531-JMV-MAH, seeking, *inter alia*, a Judgment and Order: (1) finding that (a) the Board of Adjustment’s denial of the application was in violation of § 332(c) of the Telecommunications Act of 1996, 47 *U.S.C.* §§ 253(a) and 332(c), and was arbitrary, capricious, and unlawful, under New Jersey Municipal Land Use Law, *N.J.S.A. 40:55D-1*, *et seq.*, and (b) that the Board of Adjustment’s and Township’s code requirements were federally preempted and the imposition of escrow charges and application fees were unreasonable, excessive, and prohibitive, thus materially inhibiting and effectively prohibiting Verizon’s ability to provide personal wireless services and telecommunications services to the public in violation of §§ 253(a) and 332(c)(7)(B)(II) of the Telecommunications Act; and (2) directing the Board of Adjustment to immediately issue approval of the application and all other local approvals (the “**Litigation**”); and

WHEREAS, in an effort “to avoid the delay, expense, inconvenience, and uncertainty of protracted litigation, the [Board of Adjustment, the Township, and Verizon] agreed to settle this action pursuant to the terms and conditions set forth” in a Stipulation of Settlement and Consent Order executed by the parties on March 17, 2023, and so ordered by the Court on March 21, 2023 (the “**Consent Order**”, a copy of which is affixed to this Resolution as Exhibit B); and

WHEREAS, pursuant to *Whispering Woods at Bamm Hollow, Inc. v. Township of Middletown Planning Board, et al.*, 220 *N.J.Super.* 161, 170-72 (1987), and its progeny, the Consent Order was contingent upon the Board of Adjustment’s review and approval of the Consent Order at a duly noticed public hearing; and

WHEREAS, pursuant to the terms of the Consent Order, the Board of Adjustment conducted a public hearing on the Consent Order at three (3) regular and special meetings that took place on May 18, 2023, May 30, 2023, and June 5, 2023, and for which public notice was given as required by law (the “**Whispering Woods Hearing**”); and

WHEREAS, at the meeting on June 5, 2023, the Board of Adjustment voted to approve the Consent Order and Verizon’s application for preliminary and final site plan approval with *N.J.S.A. 40:55D-70(d)* variance relief with various conditions of approval as outlined herein.

NOW, THEREFORE, BE IT RESOLVED by the Harding Township Board of Adjustment, this 20th day of July 2023, that the Board of Adjustment's approval of the Consent Order and the application of New York SMSA Limited Partnership d/b/a Verizon Wireless for preliminary and final major site plan approval and *N.J.S.A. 40:55D-70(d)* variance relief is hereby memorialized as follows:

I. Incorporation of Record

1. Pursuant to Paragraph 4 of the Consent Order, the underlying record that led to the denial of the application was incorporated by reference into the record for the Whispering Woods Hearing.

2. Except as otherwise provided for herein, the findings of fact and recitation of the evidence and exhibits in the record during the original hearing that are set forth in the Denial Resolution are hereby incorporated as if fully set forth herein. The statement of reasons for the denial in the Denial Resolution are hereby replaced by the statement of reasons for approval of the Consent Order and the application as set forth herein.

II. Additional Findings of Fact and Statement of Reasons

3. Richard L. Schneider, Esq., of Vogel, Chait, Collins & Schneider, PC, represented Verizon during the Whispering Woods Hearing.

4. Robert F. Simon, Esq., of Herold Law, PA, represented the following individuals and entities objecting to the Consent Order and application during the Whispering Woods Hearing: James M. Carifa and Sarah G. Conine (7 Lees Hill Road), Neil O'Donnell (28 Millbrook Road), Livio Saganic and Christel Engel (32 Millbrook Road), and Harsh and Nina Bansal (6 Coppertree Lane)(collectively, the "**Whispering Woods Objectors**").

5. In support of Verizon's application, and in addition to the 34 exhibits presented during the initial hearing (described more fully in the Denial Resolution), Verizon entered the following exhibits into the record during the Whispering Woods Hearing:

- A-35: Consent Order
- A-36: Revised Site Plan sheet set, revised through March 2, 2023
- A-37: Photo simulation of proposed wireless communications tower in the style required by the Consent Order
- A-38: Revised landscaping plan sheets L-1, L-2, and L-3, revised through May 25, 2023
- A-39: Memorandum from John Linson dated May 22, 2023

6. In support of Verizon's application and the Consent Order, Verizon presented testimony by the following individuals during the Whispering Woods Hearing¹:

6.1. Mr. James Murawski of E2 Project Management LLC, who was accepted by the Board of Adjustment as an expert in civil engineering, testified during the Whispering Woods Hearing on May 18, 2023. Mr. Murawski was also subject to cross-examination by Mr. Simon and members of the public on May 18, 2023. Mr. Murawski testified during the Whispering Woods Hearing, in part, as follows:

6.1.1. Mr. Murawski described the revisions made to the Site Plan in furtherance of the Consent Order. These revisions included (i) relocating the compound and proposed tower to within 3.5 feet of the recycling shed (which is as close as Mr. Murawski and Board Engineer Fox agreed it could be) such that the center of the proposed tower is now 72.3 feet from the nearest residential property line, which was now possible due to the geotechnical analysis conducted into the soil of the DPW Property since the original hearing, (ii) depicting the tower in the style of "stealth tree" that is shown on the photograph attached as Exhibit 2 of the Consent Order (the "**Tree Photograph**") and the specifications prepared by the tower manufacturer, TAPP, attached as Exhibit 3 to the Consent Order (the "**Tree Specifications**"), and (iii) reducing the height of the cable bridge within the proposed compound to seven (7) feet above ground level;

6.1.2. Mr. Murawski testified that the height of the proposed tower would be 80 feet, with an additional six (6) feet of "tree branching" on top for a total height of 86 feet.

6.1.3. With respect to the design of the tower, Mr. Murawski testified that while the tower depicted in the Tree Photograph was between 60 to 70 feet tall, the proposed tower in this application would "look exactly" like the tree in the Tree Photograph even at a height of 86 feet to the top of branching.

¹ The summaries of the testimony provided by the witnesses identified in this resolution are not reflective of all testimony provided relative to the Board of Adjustment's determinations in this matter. A record of the full testimony provided in this application are set forth in the transcripts of the public hearing meetings that are part of the record and are incorporated into this resolution.

6.1.4. Mr. Murawski testified that the tree branching shown in the Site Plan would begin at approximately 40 feet above ground level. Upon questioning from the Board, Verizon agreed to a condition of approval to have the tree branching begin at approximately 30 feet above ground level.

6.1.5. Mr. Murawski testified that the equipment compound can potentially accommodate up to 2 other providers of wireless communications services.

6.1.6. Mr. Murawski described the design of the proposed tower as a stealth tree pole and described the differences in design to that of a monopole or flagless flag pole design. Mr. Murawski testified that stealth tree designs required additional 6' of branching on top of the height of the tower.

6.1.7. Mr. Murawski testified as to the sound associated with the proposed generator and concluded that the generator would comply with all requisite noise regulations.

6.1.8. Mr. Murawski identified the landscaping that is proposed to be included as part of the application, as depicted on Sheets L-1, L-2, and L-3 of the revised Site Plan, but deferred detailed testimony to Mr. Reynolds.

6.1.9. During Mr. Murawski's testimony, Verizon, through its counsel, stipulated that the personal wireless services to be provided by the proposed wireless telecommunications facility will be at the 700 and 850 MHz frequency bands (alternatively known as the cellular frequency band), the 1900 MHz frequency band (known as the PCS frequency band), 2100 MHz frequency band (known as the AWS frequency band) and, in the 3.5 GHz frequency band. The tower services include "Nationwide 5G" as defined by Verizon.

6.2. Mr. Jeffrey D. Reynolds, who was accepted by the Board of Adjustment as an expert in landscape architecture, testified during the Whispering Woods Hearing on May 18, 2023, and May 30, 2023. Mr. Reynolds was also subject to cross-examination by Mr. Simon and members of the public on May 18, 2023, and May 30, 2023. Mr. Reynolds testified during the Whispering Woods Hearing, in part, as follows:

6.2.1. Mr. Reynolds identified the landscaping plan shown on Sheets L-1, L-2, and L-3 of the revised Site Plan. Mr. Reynolds acknowledged Mr. Fox's memorandum dated April 21, 2023, in which Mr. Fox concludes that the proposed landscaping plan met with his and the Township's satisfaction.

6.2.2. Mr. Reynolds testified that the purpose of the planting schedule on the landscaping plan was to shield of buffer the visuals from the adjacent properties with evergreen plantings. The plantings would all be planted at 5-6 feet in height, except for the proposed Norway Spruce trees which would be 8-10 feet in height and grow between 2 to 3 feet per year (although Mr. Reynolds acknowledged that it may be less than that as was the testimony of Mr. Linson (see below)). With this rate of growth, Mr. Reynolds testified that there would be a "very, very good buffer screen" within 10 to 15 years.

6.2.3. Following Mr. Reynolds' testimony on May 18, 2023, and due to concerns by the Board and members of the public related to Mr. Reynolds' proposed tree spacing, the Board requested that Mr. Reynolds consult with the Township's Tree Conservation Officer, Mr. John Linson, and return at the May 30, 2023, meeting.

6.2.4. Mr. Reynolds testified that on May 22, 2023, he attended a meeting at the DPW Property with the Township's Tree Conservation Officer, Mr. John Linson, the Township Engineer, Mr. Paul Fox, and Jason Smolinski, of E2 Project Management LLC, to discuss Verizon's landscaping plan. On May 22, 2023, Mr. Linson provided a mark-up of the Site Plan and memorandum (together, the "**Linson Memorandum**") to the Board in which Mr. Linson commented on Verizon's tree removal and planting plan. Mr. Linson identified concerns and provided Mr. Reynolds with recommendations for improving the landscaping plan.

6.2.5. At the meeting on May 30, 2023, Mr. Reynolds testified about the changes made to the landscaping plan (Sheet L-2) in response to the meeting on May 22, 2023, and the Linson Memorandum, to provide for the screening of the proposed tower to the adjacent residential lots.

6.2.6. Mr. Reynolds testified that several trees have died since the original hearing and that Sheet L-1 depicts the number of trees that are proposed to be removed both because of their health or as a result of the placement of the compound. In total, 33 trees have either already been removed or are proposed to be removed. Among those proposed to be removed, only five (5) of the trees to be removed are healthy and native.

6.2.7. Mr. Reynolds testified that while the tree identified on Sheet L-1 as tree number 46 will not impact the proposed development, since Mr. Linson identified it as a "liability to the [Township]" in the Linson Memorandum, that Verizon would agree to remove it at no cost to the Township.

6.2.8. Mr. Reynolds testified that while the tree identified on Sheet L-1 as tree number 59 has useful life ahead of it, it is in poor condition and Verizon was requesting the Board to agree to have it removed. If removed, Verizon would plant an additional four (4) new trees in its place. Ultimately, the Board determined that because of the useful life left in the tree, and the number

of years it would take for new plantings to grow to a level that could provide the same level of screening, that tree number 59 should not yet be removed as part of this approval.

6.2.9. Mr. Reynolds testified that with respect to the tree removal, the only deviation from the recommendations in the Linson Memorandum that Verizon proposes would be the removal of the tree identified on Sheet L-1 as tree number 34. In the Linson Memorandum, Mr. Linson identified that tree as being proposed for preservation, to which Mr. Linson agreed. However, Mr. Reynolds testified that to plant the buffer correctly with adequate spacing, tree number 34 should also be removed. Mr. Linson later testified that he was in agreement with the removal.

6.2.10. Mr. Reynolds testified that, not counting the four (4) trees that would have been planted had the Board determined to remove tree number 59, a total of 53 new plantings are proposed as part of the project, all as identified on Sheet L-2.

6.2.11. Mr. Reynolds agreed on behalf of Verizon that it was willing to provide a two-year guarantee on the plant material as a condition of approval. Mr. Reynolds identified a note reflecting such agreement on Sheet L-3.

6.3. Mr. William Masters who was accepted by the Board of Adjustment as an expert in professional planning, testified during the Whispering Woods Hearing on May 30, 2023, and June 5, 2023. Mr. Masters was also subject to cross-examination by Mr. Simon and members of the public on May 30, 2023, and June 5, 2023. Mr. Masters testified, in part, as follows:

6.3.1. Mr. Masters testified that was asked by Verizon to provide an updated photo simulation of the DPW Property with an overlay of the proposed 80 foot tall tower (86 feet to top of tree branching) in the style depicted in the Tree Photograph and Tree Specifications. Mr. Masters presented the photo simulations (Exhibit A-37) and identified the locations of the vantage points for each of the eight (8) locations included.

6.3.2. Mr. Masters acknowledged that the photo simulations were based off of the crane test performed on February 27, 2018. Mr. Masters did not alter the photographs to remove either the trees that have already been removed or are proposed to be removed, nor did he alter the photographs to add the plantings proposed to be made. The Board acknowledged the parameters of the simulations. He further testified that the difference in location of the tower from the location during the crane test and the current location accounted for less than .1 feet at the scale of the photographs, so were of no material difference.

6.3.3. Mr. Masters testified that the revisions to the Site Plan and the conditions accepted by Verizon and the Township in the Consent Order further bolstered his prior professional opinion that Verizon's application should be approved pursuant to the balancing test laid out by the New Jersey Supreme Court in *Sica v. Wall Township Board of Adjustment*, 127 N.J. 152, 603 A.2d 30 (1992) ("*Sica*"). Specifically, Mr. Masters testified that tree design proposed was the "best looking tree pole that [he's] seen in [his] 27 years of doing wireless telecommunications applications in terms of its aesthetic appearance." Further, Mr. Masters pointed to the availability of collocation and the enhanced landscaping plan proposed, which he opined was "the most elaborate landscaping plan that [he'd] been involved with . . . in the last 27 years of doing these types of applications."

7. The Board called the Township's Tree Conservation Officer, Mr. John Linson, to testify before the Board during the Whispering Woods hearing on May 30, 2023. Mr. Linson was also subject to cross-examination by Mr. Simon and members of the public on May 30, 2023. Mr. Linson testified, in part, that he was satisfied with the revised landscaping plans (Exhibit A-38) which were improved following his meeting with Mr. Reynolds on May 22, 2023. He added that the spacing between the proposed plantings is adequate to allow for the best chances of survival and growth. Mr. Linson also answered questions from the Board regarding the health of tree number 59 and whether steps can be taken by the Township to extend its life.

8. In opposition to the Consent Order and Verizon's application, and in addition to the 9 exhibits presented by the Objectors (the members of which were identified in the Denial Resolution) during the initial hearing (described more fully in the Denial Resolution), the Objectors entered the following exhibit into the record during the Whispering Woods Hearing:

O-1: Handout from Mr. Peter Steck dated June 5, 2023, consisting of nine (9) sheets identified as pages P-1 through P-9

9. In opposition to the Consent Order and Verizon's application, the Objectors presented testimony by Mr. Peter Steck who was accepted by the Board of Adjustment as an expert in professional planning. Mr. Steck testified during the public hearing on June 5, 2023. Mr. Steck was also subject to cross-examination by Mr. Schneider on June 5, 2023. Mr. Steck testified, in part, as follows:

9.1.1. Mr. Steck testified that he did not believe the reduction of height of the proposed tower to 86 feet (to top of tree branching) should be considered a change to the application since Verizon agreed during the initial hearing and presented exhibits agreeing to a tree at the same height.

9.1.2. Mr. Steck questioned the credibility of the Tree Photograph since nobody that testified for Verizon had personally seen the tree in person and he found it "suspicious" that you could not see cellular antennae in the Tree Photograph.

9.1.3. With respect to the historic district, Mr. Steck reiterated his prior arguments during the initial hearing noted that the DPW Property is labeled a "key contributing property" within the New Vernon Historic District.

9.1.4. Mr. Steck testified that the proposed replacement trees will still not be sufficient to screen the tower, only the equipment and only after time to allow the trees to grow to a mature height.

9.1.5. Mr. Steck testified as to his belief that if other cellular communications providers were to collocate, it would result in additional trees needing to be removed.

9.1.6. Mr. Steck testified that there exists a large storage container and other equipment on the site that would need to be removed and that the site plan doesn't address that cleanup.

9.1.7. With respect to the *Sica* balancing test, Mr. Steck opined that Verizon had not met its burden. In sum, Mr. Steck opined that the changes made to the application and Site Plan are insufficient to overcome the findings of fact that underlined the Board's prior denial of the application

10. The following interested parties testified during the public hearing on June 5, 2023: Alex Anastasiou (35 Post House Road); Leslie Ann Wade (1 Village Road); Jim Kovacs (17 Village Road); Christina McKittrick (14 Millbrook Road); Scott Noyes (22 Sand Spring Road); Jane Riley (Youngs Road); Elizabeth Nicholson (44 Youngs Road); Madeline Devine (Lees Hill Road); Larry Wepler (Lees Hill Road); Linda Meister (4 Fawn Hill Drive); Aja Blanco (14 Lees Hill Road); Sarah Conine (7 Lees Hill Road); James Carifa (7 Lees Hill Road); John Wilkerson (Long Hill Road); Livio Saganic (32 Millbrook); Doris Dinsmore (Red Gate Road); Justine Kovacs (207 Village Road); Harsh Bansal (6 Coppertree Lane); Christina McKittrick (14 Millbrook Road); Nora Carifa (7 Lees Hill Road); and Tyler Carifa (7 Lees Hill Road). In sum, many members of the public opposed the application due to the negative impacts it will have on their properties from an aesthetic point-of-view, a life safety point-of-view, their property values, and the impact on the historic and residential nature of the area. Some commented that they would have been accepting of the application had the design been of a "flagless flagpole" rather than a "stealth tree" design.

11. At the outset of the Whispering Woods Hearing, the Board of Adjustment Attorney, Steven G. Mlenak, Esq., provided an overview of legal criteria applicable to hearings held pursuant to a settlement agreement with an applicant.

12. Township Planner McKinley Mertz, P.P., attended the Whispering Woods Hearing and provided comments and answered questions throughout.

13. Township Engineer Paul Fox, P.E., commented on the application in memorandum dated April 21, 2023, which concluded that the landscaping proposed met with Mr. Fox's and the Township's satisfaction. As set forth above, the proposed landscaping was further revised pursuant to the Linson Memorandum, with such further revisions also meeting Mr. Fox's and the Township's satisfaction. Mr. Fox attended the Whispering Woods Hearing and provided comments and answered questions.

14. At the public hearing on June 5, 2023, Mr. Schneider and Mr. Simon gave summations of their respective positions on the Consent Order and application to the Board of Adjustment.

15. The State of New Jersey encourages parties to a lawsuit to resolve their differences by way of settlement. Often, this means that parties reconsider their prior determinations to avoid the uncertainty, time, and expense of a protracted litigation. In the Litigation, Verizon brought a federal challenge against the Board of Adjustment and the Township seeking a judgment from the District Court of New Jersey reversing the Board's prior denial of the application and requiring approval of a tower at 140 feet in height without conditions imposed by the Board. Through the Consent Order, Verizon was agreeable to constructing a tower at 80 feet in height (86 feet with tree branching), with all of the conditions of approval as set forth herein.

16. The Board of Adjustment carefully considered all objections and concerns, and for the reasons set forth on the record and herein, the Board of Adjustment concluded that the concessions by Verizon evidenced through the revisions to the Site Plan, together with the conditions of approval set forth in the Consent Order and memorialized herein, Verizon has met its burden under the *Sica* balancing test to obtain variance relief under *N.J.S.A. 40:55D-70(d)(1)*, as well as preliminary and final site plan approval.

16.1. Positive Criteria. The Board finds that Verizon meets the so-called "positive criteria" for approval of the application, for the reasons set forth herein:

16.1.1. The New Jersey Supreme Court has held that an applicant demonstrates that a wireless communications facility ("WCF") promotes the general welfare if the applicant holds an FCC license to provide wireless service. *Smart SMR v. Fair Lawn Board of Adjustment*, 152 N.J. 309, 336 (1998). Verizon holds an FCC license to provide wireless service.

16.1.2. Unlike typical inherently beneficial uses, WCF applicants must still prove that the proposed site is particularly suited for the proposed WCF. In order to prove particular site suitability, the applicant must prove (i) that there is a gap in their wireless service, (ii) the signal strength level necessary to fill the gap, (iii) that the placement of the antennas at the subject location and at the proposed height will improve mobile wireless communications by filling the gap in service, and (iv) whether the same result could be achieved by placing the antennas on some other existing structure or by erecting the tower in a more suitable alternate site.

16.1.3. Verizon has demonstrated that there is a gap in the wireless service, the signal strength level necessary to fill the gap, and that the placement of the antennas at the DPW Property at 80 feet will improve mobile wireless communications by filling the gap in service.

16.1.4. With respect to whether the same result could be achieved by placing the antennas on some other existing structure or by erecting the tower in a more suitable alternate site, the applicant has the burden to prove “that the proposed facility is the least intrusive means of filling a gap with a reasonable level of service.” *Cellular Tel. d/b/a AT&T Wireless v. Ho-Ho-Kus Board of Adj.*, 197 F.3d. 64, 70 (3d Cir. 1999). Whether a site is particularly suitable does not require an applicant to demonstrate that there are no other viable locations for the project. *Price v. Himeji*, 214 N.J. 263, 292-293 (2013). Rather, the carrier must show a “reasonable and good faith effort to find an alternative, less-intrusive site.” *Ocean County Cellular Telephone Co. v. Lakewood Board of Adj.*, 35 N.J. Super. 514, 528 (App. Div. 2002).

16.1.5. The Board finds that the record reflects that Verizon has made a good-faith effort to locate an alternative suitable site, and that the DPW Property is particularly suited for the proposed WCF.

16.1.6. In the Denial Resolution, the Board determined that Verizon had not met its burden of demonstrating particular suitability based, in part, on the Board’s finding that Verizon had not explored alternative technologies. The Litigation challenged the Board’s ability to make such a finding and, pursuant to the settlement reached in the Consent Order, the Board accepts that Verizon was not subject to demonstrate same. As part of the Consent Order, as memorialized in the conditions of approval set forth in Section 17 of this Resolution, prior to obtaining building permits for construction, Verizon is required to perform an RF analysis of such technologies and produce a written report for the Board which could then be reviewed and considered by the Township and/or the School District.

16.1.7. The Board is further satisfied that Verizon undertook a reasonable and good faith effort to identify an alternative less intrusive site for the proposed wireless communications facility. The Board is satisfied that the Harding Township Elementary School was not willing to make available the property pursuant to a public bid as required and therefore it is not an available site.

16.2. Negative Criteria. The Board finds that Verizon now meets the so-called “negative criteria” for approval of the application, for the reasons set forth herein:

16.2.1. An applicant must also demonstrate that so-called negative criteria in order for the Board of Adjustment to issue a “d(1)” “use” variance. Pursuant to the last unlettered paragraph of *N.J.S.A.* 40:55D-70, “no variance or other relief can be granted without a showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance.” For applications involving wireless communications facilities, the courts have adopted the *Sica* balancing test, for evaluating evidence presented under the negative criteria prong. The first prong of the *Sica balancing* test is to identify the public interest. The second prong is to identify the detrimental effects. The third prong is to determine whether reasonable conditions can reduce detrimental effects. The fourth prong is to balance the public interest with the detrimental effects, as mitigated by the reasonable conditions. Thus, for an application to be approved, the Board must balance the positive and negative criteria and determine whether, on the balance, the “d” variances can be granted without causing substantial detriment to the public good and substantial impairment to the intent and purpose of the zone plan and the zoning ordinance. *Sica, Ibid.* at 166.

16.2.2. On balance, the Board finds that with the concessions by Verizon evidenced through the revisions to the Site Plan, together with the conditions of approval set forth in the Consent Order and memorialized herein, the record weighs in favor of approval of the application.

16.2.3. With respect to the public interest, the Board finds the benefit that the WCF would bring to the community, both locally and regionally (including those traveling along the roadways within the gap area), to be significant. With the WCF, the gap will be filled with reliable coverage at each of Verizon’s frequency bands. The Board further acknowledges the public safety benefits that come with reliable service, as testified to by Chief Heller during the initial hearing. Finally, the public is served by the improvements proposed to the DPW Property by Verizon including, but not limited to, the cleanup of the current condition behind the recycling shed, the installation of a comprehensive landscaping plan, and the commitment to maintain same.

16.2.4. With respect to the detrimental effects, the Board has previously identified in the Denial Resolution the following as detrimental effects associated with an approval of such application: (i) the impact to the intent and purpose of the Master Plan and Zoning Ordinance which encourage the preservation of the rural character of the area, (ii) the negative visual impact of the tower, (iii) the impact to the New Vernon Historic District, (iv) the insufficiency of the setbacks from the proposed tower to the adjacent residential properties, and (v) the insufficiency of the landscaping plan to buffer the adjacent residential properties from the WCF.

16.2.5. The Board finds that many of these detrimental effects have been eliminated or mitigated through the revisions to the Site Plan and the conditions of approval to which Verizon has agreed. These factors include, but are not limited to, the following:

16.2.5.1. The negative visual impact of the tower is greatly reduced by an improved tree designs. The style of tree proposed as depicted in the Tree Photograph and Tree Specifications is of high quality and appropriate for the area. The record contains evidence that the design of the tower as a “tree” as opposed to a “flagless flagpole” is important to reduce the need for future extension as a “tree” design allows for more efficient spacing between the antennas with co-locators.

16.2.5.2. The landscaping plan proposed is markedly improved from the original application and serves to buffer and screen the WCF from the adjacent residential properties as much as is possible given the site constraints. Further, the landscaping proposed to be installed on the DPW Property shall be maintained pursuant to Paragraph 2 of the Consent Order.

16.2.5.3. The tower is set back further from the nearest property line as close as possible to the recycling shed. Increasing the set back as much as possible was an important issue to the Board of Adjustment – and one that was not able to be discerned during the initial hearing prior to the completion of Verizon’s geotechnical analysis. While the Board would have preferred an even greater setback, a greater setback would transcend the lease area which would have required a re-bid of the RFP which was outside of the control of the Board of Adjustment and not supported by Verizon or the Township.

16.2.5.4. Under the terms of the original application, Verizon would have had the right to extend the height of the tower to support a co-locator without the review and approval of the Board of Adjustment. Under the terms of the Consent Order, the amendment of the Lease now requires Verizon and a Co-Locator (as such term is hereinafter defined) to return to the Board of Adjustment if an extension of the tower height is sought, and includes Verizon’s waiver of its rights under the law to extend the tower height in the Consent Order. The right of the Board to review any request to extend the tower height beyond 80 feet (86 feet with tree branching) was and is of significant importance to the Board of Adjustment.

16.2.5.5. Verizon’s agreement to perform an RF engineering analysis for the Harding Township Elementary School (as more thoroughly described below) is of significant public value.

16.2.6. The Board acknowledges the significant benefits to the public contained within the Consent Order by settling the Litigation. Had Verizon prevailed in the Litigation, it could have resulted in a tower at up to 140-feet in height, with no stealth design, no enhanced landscaping plan, no restriction of future extension under federal and state law, and none of the other conditions imposed upon Verizon as set forth herein. As set forth above, the settlement of litigation is a promoted public policy of the State of New Jersey, and one in which was a relevant factor to the Board of Adjustment to avoid the uncertainty in both cost and outcome.

16.2.7. While not dispositive, the Board further considered the fact that the Township Committee was supportive of the cell tower application in its decision. The Township Committee issued an RFP for the location and executed a lease agreement with Verizon for a tower up to 140-feet in height. The Township further approved and executed the Consent Order.

16.2.8. When balancing the public interest with the detrimental effects, as mitigated through the conditions imposed herein, the Board finds that Verizon has met its burden under the *Sica* balancing test and the application should be approved.

16.2.9. In sum, the proposed WCF is necessary to remedy a significant gap in personal wireless services, is the least intrusive alternative available to remedy the gap in service, and without the WCF, Verizon would be materially inhibited from providing its services.

III. Conditions of Approval

17. The approval of Verizon’s application for (d)(1) variance relief for a use variance permitting the proposed WCF on the DPW Property, together with preliminary and final site plan approval, is conditioned upon the following:

17.1. Payment of any technical review fees limited to review of the building permit and certificate of occupancy for the improvements.

17.2. Verizon shall obtain a building permit and any other necessary approvals to construct the improvements.

17.3. These approvals are based on and authorize only the specific improvements proposed by the applicant as set forth in the testimony, application, and plans, as required to be revised.

17.4. The reports and plans shall be corrected to address any discrepancies and inconsistencies with these final approvals, subject to review and confirmation by the Township Engineer prior to issuance of a building permit.

17.5. Verizon shall construct the proposed improvements in the manner and location as set forth in the Site Plan submitted as Exhibit A-36 and the landscaping improvements submitted as Exhibit A-38. Any significant deviations from those submissions shall require Verizon to return to the Board of Adjustment for consideration.

17.6. The height of the tower shall not exceed 80 feet in height, or 86 feet with the tree branching.

17.7. The tower shall be constructed and maintained in a high-quality manner such that it is consistent with the specific design style shown in the Tree Photograph and Tree Specifications, except that the tree branching shall begin at an elevation of 30 feet above ground level, which final specifications shall be subject to the reasonable approval of the Township Engineer.

17.8. All plantings to be made by Verizon shall include a two-year guarantee consistent with Sheet L-3 of Exhibit A-38.

17.9. All cable bridges shall be installed at a maximum height of seven (7) feet.

17.10. Prior to issuance of any building permit for the Facility, the Township and Verizon Wireless shall amend the Land Lease Agreement to provide that the maximum height of the tower shall be 80' in height (plus 6' of faux tree branching for a total height of 86'). The amendment to the Land Lease Agreement shall be conditioned on the construction of the Facility pursuant to the Resolution, as defined below, and the terms of the Consent Order. If during the term of the Land Lease Agreement, the Township and Verizon Wireless agree to amend the Land Lease Agreement (including any lease extension or replacement thereto) for purposes of extending the tower to a height greater than permitted hereunder to allow for co-location by a third-party company providing personal wireless services (the "Co-Locator"), then Verizon Wireless and the Co-Locator must first obtain Board of Adjustment approval from the Board of Adjustment of such proposed extension by way of an application to amend the Board of Adjustment's approval of the tower set forth in this Consent Order, on notice to the public in accordance with the MLUL. In the event of a conflict between this provision and the MLUL relative to jurisdiction of the Township or the Zoning Board, the MLUL shall control. The Board of Adjustment shall retain jurisdiction of such application. Verizon Wireless hereby waives any applicable right or authority under the law to extend the height of the tower without further zoning approval under applicable law but Verizon Wireless shall have the right to the highest mounting height on any approved tower height increase.

17.11. Prior to issuance of a building permit, and subject to prior written approval by the Harding Township Board of Education for any access needed on its property outside of the public right-of-way, Verizon shall investigate the engineering feasibility of improving service capacity at the Harding Township Elementary School (the "**School**") property through the installation of ODAS units (similar to the ODAS units Verizon Wireless intends on installing elsewhere in the Township) on or near the School property. Such investigation shall at least include: (i) an RF analysis for each relevant frequency band, (ii) identification of the ODAS technology and equipment considered, and (iii) a determination of the site approvals that would be required from the Township and/or School for the installation. The investigation should conclude with a written report submitted to the Board of Adjustment that includes the preceding information and is reasonably accepted by the Township Engineer. Submission of such report would be considered satisfaction of this condition, and there is no obligation for Verizon to install the ODAS.

17.12. The maintenance exercise of any emergency generator shall only occur on Monday to Friday and between the hours of 10 a.m. and 4 p.m. and for a duration not to exceed thirty (30) minutes and shall otherwise comply with Township Ordinance Section 225-116, as well as any current or future ordinance regulating noise, to the extent applicable.

17.13. Verizon shall comply with all applicable laws in constructing the improvements approved herein.

17.14. Verizon agrees to make all improvements at its sole cost and expense, including the removal of trees identified for removal on Sheet L-1 of Exhibit A-38 (including tree number 46).

17.15. Verizon agrees to work cooperatively and in good faith with the Township's Tree Conservation Officer to maintain and take reasonable steps necessary to extend the lifetime of tree number 59 (as shown on Sheet L-1 of Exhibit A-38).

17.16. Verizon shall submit post-construction as-built plans for review and approval by the Township Engineer prior to the issuance of a certificate of occupancy.

17.17. These approvals shall expire unless the authorized construction is commenced within one year from the date of receipt of all final non-appealable Governmental Approvals from any agency with jurisdiction or any court of competent jurisdiction.

18. An oral resolution to approve the Consent Order and the application for (d)(1) variance relief for a use variance permitting the proposed WCF on the DPW Property, together with preliminary and final site plan approval subject to the conditions set forth herein, was made by Chairman Flanagan, Seconded by Vice Chairman Rosenbaum, and adopted by a vote of 7 to 0 at the meeting on June 5, 2023.

IV. Vote on Resolutions

For the Oral Approval Resolution: Addonizio, Boyan, Flanagan, Newlin, Rosenbaum, Sovolos, and Symonds

Against the Oral Approval Resolution: None.

For the Form of the Written Resolutions: Flanagan, Newlin, Rosenbaum, and Symonds

Against the Form of the Written Resolution: None.

The Consent order is on file with the Township.

HARDING TOWNSHIP BOARD OF ADJUSTMENT

RESOLUTION NO. 09-2022

ANNUAL REPORT RESOLUTION FOR 2022

Adopted July 20, 2023

WHEREAS, in accordance with N.J.S.A. 40:55D-70.1, the Harding Township Board of Adjustment conducted a review of its decisions on applications for variances during calendar year 2022 and discussed recommendations to the Township Committee and Planning Board concerning potential amendments to the Township Land Use and Development Ordinance;

NOW, THEREFORE, BE IT RESOLVED by the Harding Township Board of Adjustment, this 20th day of July, 2023, as follows:

1. The Board of Adjustment hereby adopts as its annual report for calendar year 2022 the attached Memorandum prepared by Gary T. Hall, Esq., Board of Adjustment Attorney, dated April 10, 2023, and after due deliberation and discussion presents the recommendations articulated below.
2. The Board of Adjustment acknowledges the recent adoption of an ordinance amending the zoning regulations applicable to children's play equipment structure in response to a prior recommendation by the Board of Adjustment.
3. The Board of Adjustment recommends that consideration be given to the half story definition to clarify whether the percentage calculation should be based on the entire area of the floor below or only the portion of the floor area below the area subject to potential half story classification.
4. In connection with residential building height, although not the subject of recent variance applications, the Board of Adjustment notes that the zoning regulations do not address the potential for a flat roof contrary to some other municipalities that impose different maximum height standards.
5. The Board of Adjustment acknowledges that in response to a recommendation last year consideration was given to zoning regulations that would allow temporary retention and occupancy of a residence while a new residence is being constructed on the same property, which has been the subject of temporary use variance approvals. The Board of Adjustment recommends continued consideration of this subject.
6. The Board of Adjustment repeats its prior recommendation that consideration be given to review and potential update of the zoning regulations applicable to wireless telecommunications facilities to ensure that they are consistent with current technology and wireless telecommunications business practices.
7. The Board of Adjustment notes that conditional use variance applications continue to be submitted for accessory residences.
8. The Board of Adjustment recommends that consideration be given to the front yard accessory structure restriction in the context of flag lots, since the current front yard restriction is based on street frontage.
9. The Secretary of the Board of Adjustment is hereby directed to transmit copies of this Resolution, including the attached Memorandum, to the Township Committee and Planning Board.

For the Resolution: Cammarata, Flanagan, Newlin, Rosenbaum & Symonds.

Against the Resolution: None.