

MINUTES OF THE 1147th SPECIAL MEETING
OF THE BOARD OF TRUSTEES OF THE VILLAGE OF KINGS POINT
September 30, 2021
Adopted on October 25, 2021

The 1147th meeting of the Board of Trustees of the Village of Kings Point was called to order by Mayor Michael C. Kalnick at 6:05 p.m. on September 30, 2021, at the Village Hall of the Village of Kings Point, 32 Steppingstone Lane, Kings Point, New York 11024.

PRESENT: Michael C. Kalnick, Mayor
David Harounian, Deputy Mayor
Hooshang Nematzadeh, Trustee
Kouros Torkan, Trustee
Ira S. Nesenoff, Trustee

ALSO PRESENT: Gomie Persaud, Village Clerk Treasurer
Stephen G. Limmer,
Esq., McLaughlin & Stern, LLP, General Counsel

ABSENT: None

Village Clerk/Treasurer Gomie Persaud advised the Board that she had given the required notice of the special meeting in accordance with the Open Meetings Law.

Trustee Kouros Torkan introduced **Bill No. 14 of 2021**, a local law amending Chapter 116, Penalties and Liability through Accessorial Conduct, of the Code of the Village of Kings Point. Upon motion by Trustee Hooshang Nematzadeh, seconded by Trustee Ira S. Nesenoff, by Resolution # **2021-145**, the Board unanimously found that the adoption of Bill No. **14 of 2021**, as a local law, would not be an “action” as defined in 6 NYCRR Part 617 and no environmental review is required, and authorized General Counsel to prepare, mail, and publish all of the necessary legal notices for a public hearing for Bill No. 14 of 2021, a local law amending Chapter 116, Penalties and Liability through accessorial conduct, of the Code of the Village of Kings Point on **October 25, 2021, at 6:00 p.m.** A copy of the Bill is on file with the Village Clerk.

Trustee David Harounian introduced **Bill No. 15A of 2021**, a local law amending subsection F of §117-2, Exterior maintenance, of the Code of the Village of Kings Point. Upon motion by Trustee Ira S. Nesenoff, seconded by Trustee Kouros Torkan, by resolution # **2021-146**, the Board unanimously found that the adoption of Bill No. **15A of 2021**, as a local law, would be an unlisted action as defined in 6 NYCRR Part 617 and would not have an adverse impact upon the environment if enacted, authorized the Mayor to execute a Short Environmental Assessment Form to that effect, and authorized General Counsel to prepare, mail, and publish all of the necessary legal notices for a public hearing for Bill No. 15A of 2021, a local law amending subsection F of §117-2, Exterior

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maintenance, of the Code of the Village of Kings Point on **October 25, 2021, at 6:00 p.m.** A copy of the Bill is on file with the Village Clerk.

Trustee Ira S. Nesenoff introduced **Bill No. 16 of 2021**, a local law amending Chapter 137, Subdivision of Land, of the Code of the Village of Kings Point to require Community Benefit Fund Fees. Upon motion by Trustee David Harounian, seconded by Trustee Kouros Torkan, by resolution # **2021-147**, the Board unanimously found that the adoption of Bill No. **16 of 2021**, as a local law, would be an unlisted action as defined in 6 NYCRR Part 617 and would not have an adverse impact upon the environment if enacted, authorized the Mayor to execute a Short Environmental Assessment Form to that effect, and authorized General Counsel to prepare, mail, and publish all of the necessary legal notices for a public hearing for Bill No. 16 of 2021, a local law amending Chapter 137, Subdivision of Land, of the Code of the Village of Kings Point, to require Community Benefit Fund fees, on **October 25, 2021, at 6:00 p.m.** A copy of the Bill is on file with the Village Clerk.

Mayor Michael C. Kalnick stated that General Counsel, at his request, had drafted a proposed decision, dated 9/21/2021 12:22 PM, denying the Extenet Systems Inc. application and asked the Trustees if they had read the proposed decision. After all of the Trustees acknowledged they had read the proposed decision, he asked if any Trustee wanted to move its adoption. Upon motion by Trustee Hooshang Nematzadeh, seconded by Trustee Kouros Torkan, by Resolution # **2021-148**, the Board unanimously adopted the following resolution:

WHEREAS, the application of Extenet Systems Inc. has come before this Board to install 31 Small Wireless Facilities [the “Facilities”], as such have been defined by the Federal Communication Commission [“FCC”], within the Village of Kings Point [the “Village”]; and

WHEREAS, the application was submitted to the Village on November 19, 2020; and, WHEREAS, the FCC has set forth a requirement, in substance, that such applications are required to be reviewed by the Village as to their completeness within 10 days; and,

WHEREAS, at the request of the Village, that 10-day period was extended to December 8, 2020; and

WHEREAS, the Village determined that the application was not complete and, after additional information was provided and revisions were made, the Village found the application to be complete on February 1, 2021; and

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WHEREAS, the FCC requires, in substance, that the Village take action on the application within 60 days after the application is found to be complete, the “Action Date”, which would have been April 1, 2021; and

WHEREAS, because of the Covid-19 pandemic, at the request of the Village for public safety reasons, the applicant entered into two tolling agreements with the Village so that a public hearing on the application would not have to be held when it was not safe: the first, dated April 7, 2021, extended the Action Date to August 18, 2021, and the second, dated August 18, 2021, further extended the Action Date to September 17, 2021; and

WHEREAS, after due notice, a public hearing on the application was held August 24, 2021, at which all persons attending were given an opportunity to be heard and, after no one else sought to be heard, the public hearing was closed, and the decision on the application was adjourned to the September 13, 2021, meeting of this Board; and

WHEREAS, on September 13, 2021, at this Board’s meeting, the applicant made a short presentation and numerous residents and an attorney on behalf of some residents spoke in opposition to the application, and

WHEREAS, the applicant filed Part 1 of a Short Environmental Assessment Form [“SEAF”]; and

WHEREAS, the FCC, in 47 C.F.R. § 1.1307, has set forth those types of facilities that may significantly affect the environment and thus require the preparation of SEAFs, which, by not including the type and location of Facilities in this application, has implicitly found that this application does not require the preparation of a SEAF; and

WHEREAS, the FCC regulations provide, in 47 C.F.R. § 253(a), that:

No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the regulations contained in this chapter concerning the environmental effects of such emissions.

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And,

WHEREAS, the applicant has provided certifications by an engineer that the emissions from the Facilities comply with those regulations; and

WHEREAS, this Board understands the sincere health concerns and fears of some Village residents of the effects of radio frequency emissions from the proposed Facilities and this Board does not have the expertise to know if those concerns and fears are warranted; however, as noted above, this Board is without the power to deny the application based upon the effects of the proposed radio frequency emissions; and

WHEREAS, this Board finds that the application is what has been denominated as an unlisted action by the Department of Environmental Conservation ["DEC"] and, after reviewing the application and the information in the SEAF, to the extent that this Board is not permitted by the FCC to review the environmental effects of the emissions of the Facilities if they comply with the subject regulations, has found that the application, if granted, will not result in any significant adverse environmental impacts; and

WHEREAS, General Counsel to the Village has prepared a proposed SEAF Part 2 for the Mayor to sign, in substance, finding that the application, if granted, will not result in any significant adverse environmental impacts; and

WHEREAS, this Board is allowed by the FCC to review the aesthetics of the Facilities, so long as the Board does not impose restrictions that would materially inhibit the wireless service; and

WHEREAS, at the request of this Board, to the extent feasible, the applicant attempted to place its Facilities along property lines and not directly in front of any dwellings, and at the request of certain residents whose dwellings are located in close proximity to some of the Facilities, the proposed locations of Nodes 4, 8, and 12, were relocated; and

WHEREAS, Nodes 5, 6, 9, 15 and 17 are located on private roads within the area owned by Kennilwood Owners' Association; and

WHEREAS, the applicant has stated that a 4G frequency would be used and the Village Code requires, in part:

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Not more than 30 days and not less than 10 days before each anniversary of the issuance of the permit, the applicant shall provide a certified current report from a qualified engineer or other professional acceptable to the Village confirming that:

- (a) The wireless facility is not emitting a radiofrequency radiation or other frequency or transmission signal greater than approved by the Federal Communications Commission;
- (b) The wireless facility is not emitting a radiofrequency radiation or other frequency or transmission signal different from that approved by the Village; and
- (c) A current report as to all adverse health impacts from the wireless facility and that the adverse health impacts are no greater than those at the time the permit was issued; and

WHEREAS, the applicant has stated: it would not be using the 5G radiofrequency; the 5G radiofrequency would not work within the Village because of the topography, winding roads, and significant trees within the Village; the 5G radiofrequency could not be used with the proposed Facilities without installing additional antennas on additional poles; and it would not convert the frequency to the 5G radiofrequency without a new application to this Board, which would require a new public hearing; and

WHEREAS, this Board has reviewed and considered the undated Memorandum In Opposition submitted to this Board by Andrew J. Campanelli, Esq., on September 13, 2021, which relies in part, substantially, but not entirely, on the issue of aesthetics, on the 2nd Circuit United States Court of Appeals decision in *Omnipoint Communications, Inc., v. The City of White Plains*, 430 F3d 529, decided in 2005; however, since that case was decided, the FCC adopted new rules regulating the review by municipalities of Small Wireless Facilities in 2018, and those rules, as noted above, prohibit this Board from imposing restrictions that would materially inhibit the proposed wireless service; and

WHEREAS, this Board has viewed and considered the letter dated September 16, 2021, from Lucia Chiochio, Esq., on behalf of the applicant and in response to the memorandum from Andrew J. Campanelli, Esq. [the “attorney for some of the residents”],

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NOW THEREFORE, in addition to the foregoing recitals, this Board makes the following findings:

1. This Board acknowledges that it agreed in its tolling agreement with the applicant that it would not require the applicant to provide any further information; however, after that agreement, the applicant provided information that showed that the information that had been provided prior to that agreement was, if not false, extremely misleading. Specifically:
 - A. The “Proposed Coverage Map” submitted with the application showed, what implied, was substandard coverage, less than (DL)(dBm) of 95, where each of the proposed Facilities was to be installed.
 - B. After that submission and agreement, residents who lived near the alleged insufficient coverage stated that they did not have substandard coverage.
 - C. An attorney for some of the residents alleged that Verizon’s website shows more than substandard coverage for the four locations in close proximity to his clients and submitted a document purportedly as proof of his statement.
2. The foregoing raised the issue of whether the Facilities were required to fill gaps of service and whether a denial of the application would violate Federal law by prohibiting personal wireless services by materially inhibiting the applicant’s client, Verizon, from providing that service.
3. Many residents of the Village are concerned about:
 - A. adverse health impacts from the radio frequency emissions from the Facilities;
 - B. the adverse aesthetics of the Facilities; and
 - C. the reduction to the value of their residential properties from the Facilities.
4. As to those concerns:
 - A. The FCC has precluded this Board from denying the application because of any alleged adverse health impacts from the radio frequency emissions from the Facilities.

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- B. The FCC has precluded this Board from denying the application because of aesthetic concerns if it would materially inhibit the wireless service.
- C. This Board finds that, despite its concerns on behalf of the residents, the application, specifically for Small Wireless Facilities, cannot legally be denied because of alleged impacts on property values.

5. This Board acknowledges that it cannot deny the application merely because of community opposition; however, because of those real concerns of the Village residents, this Board, as their representative, must take a hard look to determine if a denial of the application would violate Federal law by materially inhibiting wireless service at the locations proposed for each of the Facilities..

6. The attorney for some of the residents referred this Board to an FCC *Mobility Fund Phase II Coverage Maps Investigation* Staff Report, which appears to have been issued on December 4, 2019 [the “Report”].

7. The Report, in its conclusion on page 52, 73, stated that:

It is incumbent upon mobile providers to accurately model their networks, to test and test these models and to improve continually the accuracy of their projections to that their submissions can be confidently relied upon the Commission, USAC, and the public.

8. The Report, on page 52, 75, states that coverage maps are not sufficiently accurate to address disputes at the margins.

9. And, on page 52, in 78 of the Report, it states that mobile data coverage collections should include “actual speed test data that verifies the accuracy of their propagation models.”

10. In responding to the foregoing, the applicant submitted documents labeled “Data Radio Mode – LTE Con”, “UE App Throughput DL”, and “UE RSRP” [the “Data Documents”].

11. However, the Data Documents do not show the data for all of the proposed locations for the Facilities, and, therefore, are insufficient, in and of themselves, to support the alleged gaps and the need for all of the Facilities.

12. In order for this Board to adequately address whether the denial of

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the application would materially inhibit the federally mandated wireless service, this Board adopted the recommendation of the FCC staff and requested the applicant provide actual speed test data that verifies the accuracy of their propagation models.

13. The applicant did not agree to and did not produce actual speed test data.

14. The applicant stated that it did not have that data, it was the proprietary data of its client, Verizon.

15. This Board does not understand why Verizon would refuse to provide that data to the applicant or why, if Verizon did provide it to the applicant, the applicant is unwilling to share it with this Board.

16. This Board is left with the question of whether that data truly supports the propagation map and, therefore, finds that the applicant has not made a sufficient showing that a denial of its application would materially inhibit wireless service in violation of federal law.

17. Additionally, five of the proposed 31 cells are proposed to be located on private roads owned by the Kennilwood Owners' Association.

18. Without that owner's agreement and authorization, which, to date, to this Board's knowledge, has not been given.

19. Without that authorization, no permit can be issued by the Village for those five Facilities¹.

20. Since it is this Board's understanding that the effectiveness of the Facilities is based upon the spacing of each of the Facilities, it is not known how, if at all, the proposed placement of those Facilities will have to be changed if those five Facilities cannot be installed.

21. This Board is aware that, pursuant to its tolling agreement with the applicant, it was required to render its decision on or before September 17, 2021.

¹ There was a typographical error in the draft approved and paragraphs 18 and 19 should have been combined to read "Without that owner's agreement and authorization, which, to date, to this Board's knowledge, has not been given, no permit can be issued by the Village for those five Facilities.

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22. This Board purposely withheld rendering its decision by that September 17, 2021, date so that it did not prematurely deny the application without first reviewing and considering the aforesaid letter dated September 16, 2021, from Lucia Chiocchio, Esq., on behalf of the applicant, and giving the applicant time to provide the requested actual speed test data to show that its application should be granted.

23. Having reviewed and considered that letter and not having received the requested additional data, this Board must now act on the application.

NOW THEREFORE, BE IT RESOLVED:

ONE: The Mayor is authorized to sign Part 2 of the SEAF as prepared by counsel.

TWO: The application is denied without prejudice to the applicant filing a new application with sufficient information to show that a denial of the application would materially inhibit the provision of wireless services at the location of the then proposed Small Wireless Facilities.

There being no further business to come before the Board, the Mayor adjourned the meeting at 6:10 p.m.

Gomie Persaud
Village Clerk-Treasurer