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VIA EMAIL & REGULAR MAIL

March 5, 2021

Township of Mansfield
100 Port Murray Road
Port Murray, NJ 07865

Dear Township of Mansfield:

The purpose of this letter is to object and detail my opposition to Resolution #2020-124 and to request that you rescind the resolution.

As a resident of Mansfield Township, I am deeply concerned about the adoption of Resolution #2020-124. As you are aware, I have objected to this resolution several times in the past.

On September 9, 2020, after filing an Open Public Records Request (OPRA) on August 27, 2020, I voiced my reasons for opposing the resolution during the public portion of the open public meeting. I was assured by Mayor Joseph Watters that the Township had only received a model resolution from Planet Networks, Inc., and that "*no application*" and "*no action*" had been taken. Mayor Watters added that "*there was no interest and that no one was going to do anything with it.*"

As a follow up, on February 19, 2021, I submitted a second OPRA request. Responsive records revealed that on December 22, 2020, the Resolution was adopted on motion by Mayor Watters. These acts, in conjunction with other acts described below create the appearance of impropriety. See N.J.S.A. §§ 40A:9-22.1 to 40A:9-22.25; Kane Props., L.L.C. v. City of Hoboken, 423 N.J. Super. 49, 52 (App. Div. 2011).

For these reasons and the reasons below, the adoption of Resolution #2020-124 is indefensible on both legal and ethical grounds:

LEGAL FRAMEWORK FOR OPPOSITION

(1) The memorandum from Michael B. Lavery, Esq. Advising Mansfield Township on Planet Networks' petition for Consent to use the right-of-way contains omissions and misrepresentations of law.

Mr. Lavery's December 3, 2020 memorandum gives short shrift to the critical interplay be-

tween Sections 332(c)(7)(A) and 332(c)(7)(B) of the Telecommunications Act of 1996 (TCA96). His memorandum improperly paints a picture that the Township has no alternative but to surrender control over the Right-of-Way to private companies. Nothing can be further from the truth.

The General Authority under section 332(c)(7)(A) provides Mansfield with many powers to control installations of wireless devices. This section preserves local authority power to enact ordinances that control and regulate the placement of wireless facilities. Municipalities may enact provisions designed to (1) enable carriers to saturate jurisdictions with wireless coverage, (2) minimize the number of facilities needed to provide that coverage; and (3) avoid to the greatest extent possible any unnecessary adverse impacts upon residential districts and residential properties.

Unfortunately the only thing local governments typically hear about is the five limitations of section 332(c)(7)(B). Since these limitations benefit wireless companies, their effects are always exaggerated or deliberately misconstrued by wireless companies and their agents. This is because most town attorneys fail to inform municipalities that enacting and enforcing right-of-way ordinances preserves their local authority to control and limit the placement and impacts of Wireless Telecommunications Facilities (WTF).

Sophisticated local governments on the other hand realize the most finite limitation the TCA96 places on them is that if someone needs a wireless facility to be installed and there's only one place they can install it, then even if it violates their code that they must permit the installation. But this is an extremely narrow exception.

Section 332(c)(7)(A) provides local governments with powers that can override the five limitations in section 332(c)(7)(B). For example, municipalities can demand probative evidence and review whatever evidence they deem necessary. They can analyze and determine what weight should be given to that evidence. If an applicant claims that a significant gap in a specific area exists, local governments can demand hard data such as drive test data showing if there's a gap in coverage, the exact location of the gap, and the geographic boundaries of the gap. Only by demanding this hard data can local governments ascertain whether no other possible site can remedy whatever gap might exist.

(2) Mansfield Township has no obligation to accept the Demands of Planet Networks.

In a 2002 unpublished opinion, the Third Circuit reached an outcome consistent with the United States District Court for the Middle District of Pennsylvania, holding that a party may not maintain a 42 U.S.C.S. § 1983 claim for violation of the Telecommunications Act of 1996, 47 U.S.C.S. § 332(c)(7). *See Nextel Partners Inc. v. Kingston Township*, 286 F.3d 687, 695 (3d Cir. 2002)(citing *Omnipoint Communications v. Foster Township*, 46 F.Supp.2d 396, 298 (M.D.Pa.1999)).

In other words, if Mansfield Township violates the TCA96, gets sued, and loses, the only thing the Planet Networks gets is the permit. By law Mansfield Township would *not pay a penny to Planet Networks*.

These facts further contradict Mr. Lavery's December 3, 2020 memorandum which sheepishly concludes that "[i]f the Township of Mansfield follows the provisions of the cited statutes and abides by the orders issued by the FCC, the Municipality should be free of legal issues."

(3) The Resolution is Not in the public interest

Whether it be in fee simple or by way of easement, Title to streets and highways, is held in trust for the public use. State v. Township of South Hackensack, 65 N.J. 377, 383 (1974). By authorizing Planet Networks "to use the public rights-of-way to place its telecommunication facilities aerially on existing and new utility poles and/or in underground conduit" the Township is failing to exercise ordinary care in maintaining its streets and sidewalks. It is axiomatic that surrendering and impairing its control over the streets by essentially gifting the right-of-way to a private party is not in the public interest. *See McQuillan Mun. Corp.* (3rd Ed), Section 30.73.

Rights-of-way and easements are technically the same insofar as they create a non-possessory interest in the holder to pass over and upon another man's land. Stuyvesant v. Woodruff, 21 N.J.L. 133, 150 (1847). As such, Resolution #2020-124 creates a destructive use for which the lands of property owners were dedicated. Such use is "injurious to the proprietor of the soil [and] cannot be said to be part of the public easement". Faulks v. Borough of Allenhurst, 115 N.J.L. 456, 462-463 (1935).

The New Jersey Appellate Division has held that resolutions must (1) provide a public body's findings and conclusions, expressed by those who vote to adopt the resolution, and (2) that this rationale is conditioned on the premise that those who vote to adopt have read the resolution, understand it, and agree with its contents. Scully-Bozarth Post v. Planning Bd., 362 N.J. Super. 296, 299 (App. Div. 2003).

In contrast, Resolution #2020-124 contains none of said requirements and appears improperly influenced by Planet Networks. It contains no sufficient basis for its adoption. Instead of setting forth the facts and conclusions relied on by Mansfield Township for its adoption, every word is taken verbatim from the sample resolution submitted by Planet Networks in mid-2020.

Unquestionably, Resolution #2020-124 is not in the public interest and appears it was adopted strictly for the private benefit of Planet Networks.

(4) The Resolution's purpose is to provide a Back haul to 5G Technology.

Authorizing Planet Networks to install fiber-optic lines in the right-of-way will create a back-haul network for wireless carriers. Property owners will be subjected to increasing burdens due to maintenance activities. The public rights-of-way will be further subject to the 1996 amendments to the Pole Attachment Act, which requires electric utility companies to grant telecommunications carriers nondiscriminatory access to poles and rights-of-way. 47 U.S.C. § 224 et seq; *See also N.J.S.A. §§ 48:3-18 and 48:3-19.*

This then leads to wireless carriers installing microwave antennas throughout our neighborhoods. Wireless companies install these antennas on existing and "new" utility poles in the public right-of-way. In some cases these antennas may be located 15 to 50 feet from our

residential homes, children's schools, and businesses. These antennas emit millimeter and sub-millimeter microwaves, and operate at extremely high frequencies between 30 GHz and 300 GHz. The radiation exposure from these antennas is continuous, and vastly increases the dose emitted by cell phone towers. The radiation is easily absorbed in your skin, through the cornea of your eye, and is similar to airport passenger screening scanners, which have been linked to cancers.

Besides risks to the health and safety of residents, the antennas will reduce property values. Studies report a 20% drop in property values in cell tower communities. Other studies show 94% of people surveyed would not buy or rent a home next to a cell tower. In addition, according to the U.S. Conference of Mayors, these microwave antennas will have "substantial adverse impacts" on taxpayers, essential local government services, and increase the risk of right-of-way and other public safety hazards.

The abuse of the public rights-of-way described above generally starts with an introductory letter and application sent by the wireless company's lawyer or agent. The letter outrageously requests permission for "non-site specific consent" to locate and operate their equipment in the public right-of-way. This is usually followed by some back-and-forth correspondence between the municipality and the wireless company's lawyer or agent. Following an escrow check paid to the Town for expenses relating to the review of their application, proposed agreement, compliance report, etc., presentations/appearances by the wireless company's lawyer or agent are sometimes scheduled before the governing body. On rare occasions, these presentations may include the public. These activities can lead to additional back-and-forth correspondence regarding questions or concerns presented by the public or governing body. At some point, if there's an agreement, a resolution is then drafted and approved by the governing body.

Limiting and regulating 5G Technology requires well-drafted Ordinances that prohibit the installation of wireless facilities in residential areas, require 1,600 foot setbacks from schools and hospitals, instate time limits for permits, require re-certification fees, etc. Further, although the TCA96 limits a local government's authority to regulate radiation emissions, this limitation is only "to the extent that such facilities comply with the Commission's regulations concerning such emissions". 47 U.S.C. § 332(c)(7)(B)(iv). These words are often overlooked by local governments but provides the basis for ensuring that the FCC and state regulations of radio frequency emissions are strictly followed. *See* 47 CFR 1.1310; N.J.A.C. 7:28-42.3; FCC OET Bulletin 56.

Conclusion

Based on the above, I respectfully request that you repeal Resolution #2020-124 and enact an Ordinance that regulates the installation, operation and maintenance of wireless telecommunications within the Township of Mansfield. To that end, I am providing you with an example of an Ordinance adopted by the Mill Valley City Council located in Mill Valley, CA. The Ordinance was passed on September 6, 2018 by a vote of 5-0.

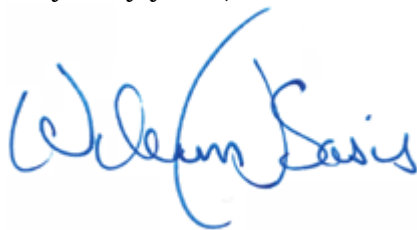
The Ordinance can be accessed at:

http://cityofmillvalley.granicus.com/MetaViewer.php?view_id=2&clip_id=1290&meta_id=59943

The Mill Valley Ordinance exemplifies the utility and strengths available to local authorities under section 332(c)(7)(A) of the TCA96. While it does not prohibit telecommunications facilities in all zoning districts because this would constitute a general ban in violation of Federal law, it prohibits facilities (including Small Cell Towers) in residential zoning districts. By restricting wireless facilities to Commercial and Mixed-Use areas, the Ordinance protects residents from the adverse impacts of wireless telecommunications facilities.

I would appreciate it if you could provide a response as soon as possible. If you require any further information, please do not hesitate to contact me.

Very truly yours,



William N. Sosis, Esq.

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