MEMORANDUM

TO: **Town of Mashpee Planning Board**

FROM: **Blue Sky Towers II, LLC ("Blue Sky" or "Applicant")**

PROPERTY OWNER: **Town of Mashpee**

SITE ADDRESS: **101 Red Brook Road**

ASSESSOR'S LOT I.D.: **Map 104, Lot 2**

This memorandum is submitted in connection with the pending application before the Planning Board ("Board") for a special permit for a multi-user Wireless Communications Facility in response to comments and questions from the Board and members of the public.

Relief Needed

A Wireless Communications Facility is allowed by special permit in the R-3 Zoning District. Statements made by the public that the proposal is not allowed in the proposed location are false.[1] Further, members of the public repeatedly misstate that the public voted down the Application at Town Meeting in October of 2018. Again, this statement is without merit. Article 14 of the 2018 October Town Meeting Warrant sought to amend the Wireless Facility Overlay District. While it is true that if the article had passed the proposed property would have been included in the Wireless Facility Overlay District, a "no" vote was in no way fatal to the Application. The only impact of the 2018 Town Meeting vote was that the Applicant was required to obtain a variance for height from the Zoning Board of Appeals because it is outside of the Wireless Overlay District. The Applicant obtained said variance on February 27, 2019 by unanimous vote of the Mashpee Zoning Board of Appeals.

Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 (Public Law 112-96 or "P.L. 112-96")[2]

The Board requested that the Applicant provide a brief overview of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012. Section 6409(a) of P.L. 112-96 builds on the existing legal framework of the Telecommunications Act of 1996 ("TCA) by requiring zoning authorities to approve most applications for the collocation of wireless equipment. In October of 2014, the FCC unanimously approved rules interpreting Section 6409(a). As stated by the Hon. Fred Upton, the Chairman of the Committee on Energy and Commerce for the U.S. House of Representatives, the purpose of the law is to streamline "the

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[1] Town of Mashpee Zoning Ordinance, §174-25(H)(9)

[2] *Middle Class Tax Relief and Job Creation Act of 2012*, Pub L. No. 112-96, 126 Stat. 156 (2012).

process for siting of wireless facility by preempting the ability of State and local authorities to delay collocation of, removal of, and replacement of wireless transmission equipment."[3]

Under Section 6409(a), a zoning or permitting application must be approved if the following three criteria are met:

(a) the installation involves a modification of an existing wireless tower or base station;

(b) the modification involves collocation of new transmission equipment, removal of transmission equipment, or replacement of transmission equipment; and

(c) the modification does not substantially change the physical dimensions of the tower or base station.

A modification substantially changes the physical dimensions of an eligible support structure if it increases the height of the tower by more than 10% or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater. As such, a jurisdiction may not limit an Applicant's request under Section 6409(a) to increase the height of the tower if the request does not increase the tower height by more than 10% or 20 feet, whichever is greater.

Coverage Gaps and Required Evidence

Under the Telecommunications Act of 1996, local governments "shall not prohibit or have the effect of prohibiting the provision of wireless services."[4] To establish an effective prohibition, the First Circuit Courts generally require a finding that there is a significant coverage gap and that the Applicant has put forth the only feasible plan. Omnipoint Holdings, Inc. v. City of Cranston, 586 F.3d 38, 50 (1st Cir. 2009). Members of the public continue to question whether a significant gap exists and whether the resulting coverage from the proposed site is sufficient.

Both Verizon Wireless and T-Mobile have submitted propagation studies and drive test data to support the existence of their respective coverage gaps. Computer modeling, propagation studies and drive tests are common and accepted methods of determining wireless service gaps. See Nextel Communications of the Mid-Atlantic, Inc. v. Town of Sudbury, Mass., No. Civ. A. 01-11754-DPW, 2003 WL 543383 at *12 (D.Mass. Feb. 26, 2003). ("coverage maps are commonly relied upon by wireless carriers, zoning boards, and courts to determine the extent of coverage in a given locality"); Omnipoint Holdings, Inc. v. Town of Westford, 206 F.Supp.2d 166, 168 (D.Mass.2002) (noting applicant's use of drive tests and computer modeling to identify coverage gap); City of Cranston, 586 F.3d at 49 (data showing dropped or unsuccessful calls can be indicative of a coverage gap).

The evidence in the record, consisting of written statements by two qualified radio frequency engineers, propagation maps, drive test data and testimony, all peer-reviewed by the

[3] 158 Cong. Rec. E237 (daily ed. Feb. 24, 2012) (statement of Rep. Upton).
[4] 47 U.S.C. §332(c)(7)(B)(i)(II).

Cape Cod Commission's wireless consultant, confirm the existence of a significant gap for both carriers.

Anecdotal testimony of individual residents is not sufficient to raise a genuine issue as to the existence of a coverage gap. A desire to see MORE coverage at the beach areas in Popponessett, while certainly understandable, does not negate the large area of insufficient coverage which will be addressed by the proposed site. See Industrial Tower and Wireless, LLC v. Haddad, 2015 WL 2365560 at *26 (D. Mass. 2015); T-Mobile Ne. LLC v. City of Lawrence, 755 F.Supp.2d 286, 292 (D. Mass. 2010) (allowing summary judgment for the applicant holding that "[u]nscientific, anecdotal evidence will not suffice to controvert the plaintiff's evidence of a coverage gap.") Anecdotal evidence submitted by non-experts does not refute the concrete scientific evidence submitted by highly qualified experts, reviewed by an independent consultant who confirmed the data. The Applicant has utilized experts in the field of radio frequency delivering quantifiable propagation modeling and drive test data which shows a significant gap in Verizon Wireless and T-Mobile's networks.

As aptly stated in City of Cranston, 586 F.3d 38, federal law does not require any specific signal level. Like its competitors, Verizon Wireless and T-Mobile must build out its network and close gaps in service which it finds inadequate according to its own network design and its own standard of service for its customer base in the context of what locations are available to close that gap.

As explained by the radio frequency engineers and as documented with supplemental submissions on this topic, alternative technology is not a feasible solution for the coverage and capacity problem in South Mashpee. The radio frequency experts have both concluded that there is no alternative technology (small cell, ODAS, etc.) to close these coverage gaps. The Cape Cod Commission, in conjunction with their retained expert, also reached the conclusion that alternative technology is not a viable solution for this site.

Local municipalities must not take it upon themselves to design a wireless carrier's network. Verizon Wireless and T-Mobile are solely responsible for determining the required signal strength to satisfy its network demands, determine the search area and also to determine what technology is available to effectively close its significant gap in wireless coverage so long as it is based on reasonable and scientific methodology as has been presented to the Board.

Alternative Site Analysis

The Applicant has the burden to show that it has thoroughly investigated all feasible alternatives to the proposed location. The Applicant submitted a thorough alternative site list in its original submission. Based upon comments and questions from the Board and the public, the Applicant revisited and further investigated a site on its alternative site analysis in New Seabury.

The Applicant initially ruled out a potential alternative on Rock Landing Road because this was the location of a previous agreement for a site between New Seabury and Verizon Wireless which was terminated at the request of New Seabury. Also, the impact on residences in this area would be similar if not more burdensome than the present location. Based upon requests from residents, the Applicant again reviewed the potential on Rock Landing Road and

determined that it is not a feasible alternative. The Rock Landing Road property is encumbered by an Agreement for Judgment between New Seabury Properties LLC and the Cape Cod Commission dated May 12, 2005. The Agreement for Judgment placed conservation restrictions and recreational use restrictions over portions of New Seabury, including the property on Rock Landing Road. Even if it was possible, albeit financially prohibitive, to bring access to a potential site around the conservation area, the tower itself would need to be placed in the area encumbered by a recreational use restriction. Clearly, a wireless facility is not a recreational use and as such, the location of a tower on this property is prohibited. The Applicant communicated with Chris Card, President and Executive Director of the Club at New Seabury and shared this analysis. Mr. Card replied that there was nothing more to discuss on this issue at this time. As such, there is no viable alternative in New Seabury and the Applicant has performed the necessary due diligence to rule this site out.

Members of the public have pointed to the Cape Cod Commission's expert's initial report that questions whether there is another alternative that is more centrally located in the coverage gap. The expert's initial report only points to the location which is more central to the gap and does not identify an actual alternative. Certainly, the most optimal location for a new tower is in the middle of the search ring, but this does not mean that a site in the middle of the search is available. The report does not assess the viability of placing a site in the optimal location, only states the obvious which is that a centrally located site is best. The Applicant, in its alternative site analysis, did assess every parcel in the search ring for location, size, frontage, view shed, access, topography, setbacks, wetlands, restrictive covenants, availability (willing landlord) among other criteria. Only after this thorough analysis did it rule that the proposed location is the only feasible location. Providing vague details on the feasibility of alternatives, without reconciling those proposals with the feasibility of the technology that the carriers are proposing, and the specifics of the parcel being evaluated are NOT considered viable alternatives. City of Cranston, 586 F.3d at 44.

The First Circuit has held that the TCA's goal of "promoting competition in the wireless communications market and of relatively speedily effectuating the purpose of the Act, including the elimination of significant gaps, underlie the determination of feasibility and impose their own constraints." Id. at 51-52. **"Just as carriers must present evidence of their efforts to locate alternative sites, once they have done so there are limits on town zoning boards' ability to insist that carriers keep searching regardless of prior efforts to find locations or costs or resources spent."** Id. Where an Applicant has "systematically searched for solutions to the gap problem using technologically reliable criteria and methodologies" and reached a well-supported conclusion that a property is the only feasible site, the Board cannot simply claim it is not convinced. As the court in National Tower LLC v. Frey, 164 F.Supp.2d 185, 190 (D. Mass. 2001) held, once presented with information that no alternative exists, "the Board's obligation was either to show that evidence was factually insufficient, or to come forward with evidence of its own."

The Applicant has provided a cogent reason as to why every individual alternative site reviewed by the Applicant or raised by the Board or the public does not work. The Board may not now selectively ignore the Applicant's explanations regarding the non-feasibility of other sites.

The Applicant has clearly met its burden in showing that the proposed location is the only feasible location to remedy a significant coverage gap for not one, but two wireless service providers. Anecdotal statements to the contrary from the Board or the public are insufficient to refute this hard data and the Board cannot insist that the Applicant continue to expend time and resources on this issue where significant time and resources have already been spent to show that such efforts are fruitless.

Aesthetic Impacts of Proposed Tower

The Applicant retained an expert appraiser to analyze the impacts, if any, the proposed tower would have on property values. The Applicant's expert, Mark Correnti, has testified before the Board and submitted an initial report and follow-up report based upon anecdotal news articles and studies submitted by the public. Mr. Correnti's findings concluded, based upon on-the-ground analysis of comparable sales in Mashpee and in like communities, that the proposed facility will have no measurable impact on property values. Aesthetic judgments against the location of a wireless facility must be grounded in the specifics of the case. See Nextel Communications Inc. v. Manchester-by-the-Sea, 115 F. Supp.2d 65, 71-72 (D.Mass. 2000) (generalized concerns about aesthetics not deemed substantial evidence where residents and Board opposing facility did not offer evidence with regard to aesthetics or possible injury to property values). The generalized objections of abutters that the tower would constitute a nuisance is not evidence on which this Board should base a denial. See Town of Sudbury, 2003 WL 543383 at *12. In the present case before the Board there is NO evidence, abject the generalized complaints of a few nearby residents, that the proposed tower will have any negative impact on their homes' values.

The opponents' objections to the proposed site are nothing short of the "not in my backyard" ("NIMBY") mentality. Nearby property owners are resisting the facility because they find it unsightly and worry about its effect on their property values yet as consumers these same people want quality service. Getting quality service requires local infrastructure and, in this case, NIMBYism is influencing the Board's review of this critical site. The facts have been established and the facts are clear. The proposed facility will remedy the existing coverage gap for two federally licensed service providers and is the only feasible alternative to do so. As such, the Applicant requests the Board grant its application for a special permit.