

**BOROUGH OF WESTWOOD  
ZONING BOARD OF ADJUSTMENT  
SPECIAL MEETING  
MINUTES**

**September 25, 2012**

**APPROVED 10/1/12**

**1. OPENING OF THE MEETING**

The meeting was called to order at approximately 8:05 p.m.

Open Public Meetings Law Statement:

This meeting, which conforms with the Open Public Meetings Law, Chapter 231, Public Laws of 1975, is a Special Meeting of the Westwood Zoning Board.

Notices have been filed with our local official newspapers and posted on the municipal bulletin board.

**2. PLEDGE OF ALLEGIANCE**

**3. ROLL CALL:**

**PRESENT:** William Martin, Chairman  
Raymond Arroyo, Vice-Chairman  
Robert Bicocchi  
Eric Oakes  
Matthew Ceplo (Alt #1)

**ALSO PRESENT:** David Rutherford, Esq., Board Attorney  
Steve Lydon, Burgis Associates,  
Board Planner

**ABSENT:** Michael Bieri (Excused absence)  
Vernon McCoy (excused absence)  
Guy Hartman, (Alt. #2)(excused absence)  
Christopher Owens (excused absence/  
recused)  
Louis Raimondi, Brooker Engineering,  
Board Engineer (not required)

**4. MINUTES - None**

**5. CORRESPONDENCE: None**

**6. VOUCHERS: None**

7. **RESOLUTIONS:** None
8. **PENDING NEW BUSINESS:** None
9. **VARIANCES, SUBDIVISIONS AND/OR SITE PLANS, APPEALS, INTERPRETATIONS:**

SWEARING IN OF BOARD PROFESSIONALS FOR PUBLIC HEARINGS  
The Board Professionals were sworn in.

1. **Metro PCS New York, 182 Center Avenue - Variance & Site Plan Approval** - (Christopher Owens recused) There were only five members present. Mr. Raimondi was not needed and was excused from being present. Russell Huntington, Esq. was present and wished to be heard.

Mr. Rutherford reviewed that the meeting was adjourned with an extension of time granted until this evening for the Board to deliberate and deliver a vote. It was his opinion that the Board has the right to reopen the hearing, and it is important, since Mr. Huntington is the Borough Attorney. Mr. Meese has the right to address this. The matter would not be grossly impaired for Mr. Huntington to be heard.

Gregory Meese, Esq. entered his objection on the record, stating that the record is closed and should not be reopened. Mr. Huntington is here to advocate on behalf of a property owner, but not on behalf of the Borough. That is improper and there is a case on this. It is improper to open it up and for the purpose. It is improper to persuade the Board for an individual to utilize a piece of property.

Mr. Rutherford advised that in the manner that the Board has proceeded, the Board always has the right to reopen. He also does not know exactly what Mr. Huntington is going to state. Also one of the cases is that there is an issue of applicant using Borough owned facilities. It does make the Borough an interested party in the application. He would caution the Board that case law does indicate that there are occasions when the Board attorney can appear before the Zoning Board, and he would tell the Board that the Board maintain its independent autonomy to make findings of fact and conclusions of law, and the Board would hear Mr. Huntington's testimony and take it under advisement as it deems appropriate. Under the scheme of the ordinance as it is set up, and the role the Borough plays in these applications for the moment, the Board is

not able to ignore it. We will have to make findings of fact when the case is decided. It is not the procedure the Board would ordinarily follow.

Mr. Martin stated Mr. Huntington is the Borough attorney and does have information on the Borough side. It is not additional testimony. Mr. Rutherford said Mr. Huntington's statements would be part of the record. He is not appearing with his client, but it would be the same as any comments or arguments even though not sworn testimony. Mr. Martin said we technically closed the matter, but we are not taking additional witnesses when hearing from Mr. Huntington. We have had their attorneys come in and we have allowed them to make statements, so we are not deviating from the way we have addressed these matters. We heard Mr. Meese's objections, Mr. Martin said, and asked if any Board Members had comments.

Mr. Arroyo asked if there was a notice issue. Mr. Rutherford advised there is no notice issue, and the matter was carried to this evening for additional argument and deliberation.

Mr. Martin commented, in the interest of fairness, that Mr. Meese consented to the extension of time until tonight, due to the lateness of the hour for us to deliberate, and he did not have to do that. He would not want this to become a problem in extending the time that we are taking additional witnesses.

There was a consensus of the Board in hearing from Mr. Huntington. Russell R. Huntington, Esq. came upon specific authorization of the Mayor and Council for commenting on this particular matter. His coming here should not be viewed as any implied criticism on the Zoning Board. He wanted to be extremely clear on that. It is very unusual but perfectly normal that the municipal attorney can come to the meeting and give the municipality's view on the matter. He would tailor his remarks as to not taint the proceedings in any way and cause a problem for Mr. Rutherford to deal with. He also wants to say in addition for it to be lawful to be here, that we have in our ordinance a lawful condition that the applicant Metro PCS has to address. It is not his idea to antagonize Mr. Meese, who is a very competent lawyer. There were some things that should have been proven but were not proven. An applicant seeking to erect a cell tower in Westwood is

required to demonstrate that there is no other suitable site. Mr. Meese indicated he is speaking out for a property owner, but that is not the case. To say we have to accommodate cell services is not to proliferate cell towers. They are potentially dangerous, tall structures that are unattractive nuisances. There is a policy that favors collocation, and the applicant has the burden of proving there is no other location. They have not met that burden. The testimony as to the suitability of the firehouse has been non-existent here. To be said that we did not respond is only hearsay. Handing in a package at the last meeting is not proof ether. They have to provide competent evidence.

The question is if the Borough can accommodate Metro PCS on their tower. In Mr. Meese's 8/29/12 letter it states Metro PCS has reviewed the latest draft of the bid, and while acceptable, there are technical issues that render it unacceptable. Then there are four other items Metro PCS would like in the bid. This was in the summer, only seconds ago in municipal time. They could have tried harder to get the bid specs. It is less than a month for the municipality to redraft its specs and go back to bid. They owe the municipality that. Those are the facts before you. You need only read it. It is a suitable site, it needs four more things. I do not think they are entitled to it, Mr. Huntington stated. It is a lawful, smart policy to eliminate the proliferation of cell towers in town, so why erect a smoke stack on top of the movie theatre when there is a cell tower up the block already, only if there was no shot to get on the other tower, but they did not reach that point. Therefore, he concluded to the Board, you must deny their application, or if there is a way to do so, craft it in a way that prompts them to negotiate with the Borough in a reasonable time frame and let it resolve itself. Otherwise, it is not correct or fair when there is a suitable site directly up the street.

Questions and comments of the Board followed. Mr. Oakes commented it was said there was no room for the boxes. Mr. Huntington said they found a place for the boxes on the roof of the firehouse. Then they were informed they would need more space. Mr. Meese was asked when this first began. They were in contact with them and went out to bid a long time ago, which was rejected. The Borough managed to collocate a spot with Verizon and were in discussion, but there were gaps. Mr. Martin asked how many

bids went back and forth between the applicant and the Borough. Three or four times Mr. Huntington responded. Then he was told about the boxes, so they would go on the roof. Verizon was given room in the basement. Mr. Martin commented if we are considering the roof, structural accommodations would have to be made. Mr. Huntington said they consulted with Mr. Boswell, and it is not a big deal. Mr. Martin said the Board was told that it was not Metro PCS rejecting the bid of the Borough but the Borough rejecting their bid. Mr. Huntington said they are required to follow the local public contracts law. It was failure of PCS to say yes and then they had other changes. The 400 sf box on the roof was rejected by the Borough by letter. If PCS asked for more space, they would have been unable to do that.

Mr. Martin asked if the firehouse was full. Mr. Huntington said that if it is, they are welcome to go to the movie theatre. They need to exhaust their efforts. Mr. Martin asked if there was anything that prohibits the applicant from making an application to the Zoning Board for this. His response was no. Once that occurs there is a 120 day period for them to act, where the Borough is not limited at all. What is to stop them from filing an application and continue to negotiate with the Borough, Mr. Martin noted. Mr. Rutherford said the law provides the proofs the applicant must provide. It puts the burden on the Board of Adjustment with a time limit.

Mr. Martin asked why would the applicant not pursue that with speed if they desperately want the antennae. Mr. Huntington said maybe they like it better. Mr. Martin stated the applicant put in a full case and now you come in to us at the very end. Mr. Huntington said they did not put in a full case with respect to this part.

Mr. Oakes asked if one last provider came in would there be any room. Mr. Huntington responded maybe but he would have to ask, depending on the boxes and radio. Mr. Oakes commented adding another tower might give us room for growth too. That site is very close to full if not full. Mr. Martin asked how any attempts do they need to make. Mr. Huntington said it is fair and practical to put this off one month. Mr. Martin stated the applicant would have to consent. Mr. Huntington added, unless you fashion it in a certain way. Mr. Meese said he had waited patiently and wanted to comment.

Mr. Ceplo had a question about the Borough owned tower. Mr. Huntington advised the users approach the Borough. People regard cell towers as a negative, but if they are coming into the Borough, it would proceed accordingly. Mr. Martin is there any way the applicant could be barred from making an application to the Zoning Board until it completes its due diligence with the Borough. Mr. Huntington advised that is part of the proofs. Mr. Bicocchi commented the applicant has been in contact with the Borough since 2008. Mr. Martin commented the Borough was aware these hearings have been going on for 120 days.

Mr. Meese commented he appreciated the questions from the Board. In Mr. Huntington's view, this application started in 8/29/12, but Metro PCS work started 12/2008. They do not reject bids, but rather set forth specs they could not meet. In 4/2012, the Borough did not give Metro PCS the courtesy of a letter. We informed the Board that it is under a time line. Notwithstanding, it took another few months until 8/21/12 when Mr. Huntington sent a revised bid package. Metro PCS sent a detailed letter as to why it could not comply with that bid package. They haven't received a response from the Borough as to their letter. They do not reject bids; that is not how it works. They are willing to increase the poles, but need to find a spot for the equipment. The 8/29/12 letter very clearly spells out the concerns, and to this date there has been no response from the Borough. The Borough site is just not available. Metro has tried to get there over a series of several years. This is more than tolerated, and the law says they must comply with collation within 150 days. If they cannot get anywhere with them, they have to make an application for an alternate site, which they did.

Mr. Meese continued. As of this evening and this vote, that site is not available. There is absolutely nothing that shows that site is more favorable. In fact, Mr. Karlbach said that tower would have to be raised. Metro PCS is a stealth facility. All the equipment is hidden. Nearest single family home to the firehouse is 8'; from the proposed Metro PCS site is 300'. Under the criteria set forth in the ordinance, there is nothing that commends that tower over this one except that the Borough owns it. One of the dangers is when Boroughs force applicants to go on their properties with delays when the FCC says the procedure should be rapidly processed. Since 12/2008, Metro PCS has been trying to get a facility and has been

frustrated along the way. This facility, looking at both simulations, is a nice looking facility, not intrusive in the downtown, less so that the firehouse. Options to make it a flag pole or chimney are even better. This facility is a better one from a planning point of view, and Metro PCS has done everything it can to get on the firehouse tower. To say this just started 8/29/12 is not credible. Mr. Meese asked that the Board act favorably on their application and suggested that there are other carriers that perhaps the Borough would work with.

Mr. Martin deferred to Mr. Rutherford on the law. Mr. Rutherford said basically we have two sets of laws, the MLUL and Telecommunications Act. We have a D1 variance, and applicant presented its proofs and provided special reasons and no substantial detriment to the public good and zone ordinances and zone plan. Wireless facilities are not inherently beneficial uses. Also there was a balancing test which requires proof of suitability. Mr. Rutherford gave the law and overview. The Board is to consider the proofs and evidence, and argument of counsel would be considered. He gave an extensive overview of the case.

Mr. Martin asked if we needed to open to the public again. Mr. Rutherford said we could, but Mr. Huntington comments were not testimony. Comments by Board Members followed. Mr. Oakes commented if the Board were to act favorably, he liked the square bricks illusion vs. the flagpoles. They would be less visible and more practical. Mr. Arroyo commented we need to get to point of what the exact proof is and whether all options were exhausted. The Board analyzed this. Mr. Rutherford read from the ordinance which basically states make an inquiry and get a response. That is all it says. It requires the collation inquiry and response as well as the general standard proofs that no other structure can accommodate the applicant. Mr. Meese's case says it has to be available. Discussion continued. Mr. Oakes commented they did try for three years. Mr. Martin commented and asked if there were any other questions or comments before calling for a motion. Mr. Rutherford Board agreed in a commercial zone, like stealth facilities, the benefits outweigh any detriments. Chairman Martin called for a motion.

Mr. Oakes made a motion for approval, with the condition of the design. On discussion it was agreed it would be A14, Design "C", a brick square enclosure, approx.

30" square as a condition. The motion was seconded by Mr. Bicocchi. On roll call vote, all members voted yes. Mr. Arroyo commented the Borough's attempt to curtail the proliferation of cell towers was valid, and if it were in a residential neighborhood, there would have been more interest and testimony would have been rebutted. He would prefer it go on the firehouse tower, but his understanding of the law compels him to vote yes. Mr. Martin agreed with Mr. Arroyo and it compels him to also vote yes.

**10. DISCUSSION:** None

**11. ADJOURNMENT** - On motions, made seconded and carried, the meeting was adjourned at approx. 9:20 p.m.

**Respectfully submitted,**

---

**MARY R. VERDUCCI, Paralegal**  
**Zoning Board Secretary**