

**TO:** Village Board of Trustees – Pelham New York

**FROM:** Christopher B. Fisher, Esq.

**DATE:** December 12, 2014

**RE:** ExteNet Chapter 87 Special Permit Application

Reply to Comments Made on Behalf of Mr. Kaplan & Ms. Linn

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This Memorandum has been prepared on behalf of the Applicant ExteNet in reply to public comments made in the December 10, 2014 letter submissions from counsel and consultants for Matthew Kaplan and Aimee Linn regarding the Village Board's consideration of an application for a special permit for a three node distributed antenna system ("DAS") in the Village of Pelham.<sup>1</sup>

1. The CMS' "Reports" Lack Substance or Credibility

The CMS Reports lack any technical substance and the purported criticisms of industry standards are patently self serving. Our client need not spend more time in this administrative proceeding explaining why these same approaches by these same consultants in numerous other zoning matters have been resoundingly rejected by the courts. See citations to federal court decisions in the Southern and Eastern Districts of New York previously supplied to the Village Board. Simply put, these so called "reports" amount to nothing more than unqualified layman opinions that are not supported by the facts, law or even CMS' past practice. In this regard, enclosed is a copy of the ExteNet original DAS node network in neighboring Mt. Vernon where Mr. Comi actually served as a municipal consultant and helped the City approve a 56 node network using the same technologies and provision of various in-building signal strengths stronger than those relied on by T-Mobile in this matter (-88 dBm in a 2G/3G environment comparable to Pelham).

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<sup>1</sup> As with our prior memorandum we do not address here various federal and state legal considerations related to municipal legislative authority over projects in public rights-of-way or ExteNet's status as a New York State utility certified by the New York State Public Service Commission. ExteNet is further supplementing the record of this application to address recent amendments to Chapter 87 and public comments regarding same without prejudice to its legal claims and rights. ExteNet nonetheless continues to support processing of its application in accordance with federal, state and applicable local laws without prejudice and has provided substantial information to the Village Board in support thereof.

## 2. This is Not a Federal Case as Argued by Counsel

Counsel for Mr. Kaplan and Ms. Linn have various theories of law all of which rest on mistaken understandings of statutes and jurisprudence relating to the regulatory authority of and different roles for federal, New York State and local government agencies in reviewing wireless facility applications. Having reviewed their most recent filing of December 10, 2014 purporting to rebut the information contained in our December 8, 2014 memorandum, it is clear that counsel would have the Village Board believe that applicants for permits associated with wireless infrastructure should be subjected to trials as if municipal zoning agencies were in fact federal court judges reviewing federal causes of action under the Telecommunications Act. Not only is this theory of law outrageously wrong, even as applied to the Village's Code and Chapter 87 as revised, we note that the same court that decided Willoth has already seen fit to reject the kinds of positions counsel for Mr. Kaplan and Ms. Linn has asked the Village Board to take in this administrative proceeding.

In Crown Castle NG E. Inc. v. Town of Greenburgh, N.Y., 552 F. App'x 47, 50 (2d Cir. 2014), NextG (now Crown), a certified company like ExteNet, sought permits for DAS nodes including one new utility pole and twenty attachments in the Town's rights-of-ways. The Town delayed action on the application and ultimately denied it, a decision overturned by the Southern District of New York as a violation of federal law. On appeal by the municipality, the Second Circuit addressed its prior decision in Willoth and actually held that the Town of Greenburgh erroneously interpreted the Court's 1999 decision. In so doing, the Court ruled that Greenburgh's denial based on an improper analysis of the holding in Willoth was in and of itself an error of law such that the action of the Town's zoning agency was arbitrary, capricious and unsupported by substantial evidence. Thus, irrespective of whether the Town's zoning denial also constituted an effective prohibition of service in violation of federal law, the Court ruled the denial had to be overturned and the permits in fact granted by order of the Court.

Clearly, Mr. Kaplan and Ms. Linn through their counsel believe that local regulation of wireless infrastructure should be prohibitory and only allowed on a case by case basis when judged locally by what is "least intrusive" to an individual resident as opposed to legitimate community zoning and planning standards. It is not surprising then that counsel has fashioned unsupported interpretations of Chapter 87 of the Village Code, advocates that the Village should ignore case law in its proper context and would even dismiss federal interests regarding the provision of reliable service to consumers. Ultimately, the Village Board need not be drawn into these self-serving efforts to create debate where none realistically exists factually or legally. We submit that when the Village Board deliberates, it simply has to ask itself questions bounded in fact and reason coupled with legally appropriate standards of review and interpretations of Chapter 87. Upon doing so in furtherance of Judge Zambelli's remand, the record before the Village really only supports one conclusion - that there are gaps in reliable service in Pelham and that the ExteNet DAS as a whole and individually remedies those gaps in a manner that is not intrusive as compared with any other alternative, real or imagined, given the dense residential environment in this specific area of the community.

## After/Proposed Conditions Mt Vernon DAS system



The individual points are data points collected using a scanner, with an antenna on the roof of a vehicle. The data represents real measured data transmitted from the existing DAS system. -84dBm is the required threshold for Mt Vernon.

The footprint in the proposed, is a prediction of the proposed location. This prediction has been calibrated using real measured drive data from this area.

Locations were chosen due to lack of coverage in a urban/dense urban environment.

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