516 Fowler Avenue
Pelham, New York 10803
December 12, 2014

Hon. Timothy Cassidy
Mayor, Village of Pelham
Village Hall
195 Sparks Avenue
Pelham, New York 10803

Re: Pending Extenet Application

Dear Mayor Cassidy,

At the last public hearing on the Extenet Application, you posed to the participating lawyers, as I recall it, the following hypothetical: if the Village’s Board were to deny the application on the basis of the record before it and Extenet sued to seek to have the Board’s decision overturned, would the reviewing court be limited to determining whether the Board’s action was “arbitrary and capricious”, or could it properly consider anew whether granting the application would have been the appropriate action for the Board to have reached. I believe the answer is, with a minor qualification noted below, that the court would be limited to a review under the “arbitrary and capricious” standard.

I am not a resident of the Village of Pelham, I do not represent any person or entity with any personal interest in the Extenet proceedings, and, prior to these proceedings, I knew practically nothing about wireless telecommunications facilities. I have, however, attended some of the hearings on the Extenet Application, and have reviewed on line what I have been able to locate relating to it. I am a New York attorney with more than 50 years of experience in federal and state litigation, and I offer this letter in the nature of a submission by an amicus curiae in the hope that your Board will find it of some value and receive it as part of the record on the Extenet Application.

As you know, the pending proceedings before Westchester County Judge Barbara Zambelli were brought by Matthew Kaplan and Aimee Linn under Article 78 of the Civil Practice Law and Rules of the State of New York (“CPLR”), which is the State’s device for challenging the activities of an administrative agency in court. CPLR 7803 prescribes the scope of Article 78 review, and, with respect to Board action on the Extenet Application, it provides that the only questions that may be raised in an Article 78 proceeding relating to such Board action are: whether a
determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion. In her Decision and Order of June 20, 2014, Judge Zambelli ruled that the Village, in entering into the ROW Agreement with Extenet without a full evaluation of Extenet’s application under Chapter 78 of the Village Code and SEQRA, was an error of law and she annulled and vacated “the ROW Agreement itself and the construction permits which were issued thereunder, as all were issued in error of law.” However, if the Board were now to deny Extenet’s application, which Judge Zambelli found would be a discretionary act of the Board, the scope of court review of such action would be the “arbitrary and capricious” standard or a similar, narrowly-drawn formulation. Another subdivision of CPLR 7803 governing a slightly different kind of action provides for a “substantial evidence” test. In his treatise on *New York Practice*, Professor David Siegel writes:

[W]e submit that the tests are indistinguishable. A decision found to be ‘arbitrary and capricious’ cannot be said to be supported by ‘substantial evidence’. And a decision found unsupported by ‘substantial evidence’ is necessarily arbitrary and capricious. The [New York] Court of Appeals appears to have acknowledged that there is no difference. It has held that ‘rationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard’. [Footnote citation to *Pell v. Board of Education, 343 N.Y. 2d 222 (1974)*] A decision failing either test is irrational, in other words, must necessarily fail the other test as well.

The decision by the United States Court of Appeals for the Second Judicial Circuit in *Omnipoint Communications, Inc. v. City of White Plains, 430 F.3d 529 (2005)*, is a good example of a court’s review of a municipality’s denial of a permit for a wireless telecommunications facility. (The appellate court reversed a district court decision to the contrary.) The plaintiff Omnipoint was a cellular telephone provider which sought a special permit from the Planning Board for the City of White Plains to erect a telecommunications tower to close a gap in Omnipoint’s coverage within the City. Following monthly public hearings from July 2000 through March 2001, the Board denied the permit application in a 25-page resolution adopted at the March 2001 meeting. Thereafter, Omnipoint brought suit in federal court under CPLR Article 78 and the Federal Telecommunications Act (“TCA”), alleging violations of the TCA.

The *Omnipoint* appellate court ruled that its review obligation was not to see whether or not it agreed with the White Plains Board’s decision, or even whether or not the weight of the submissions to the Board favored the applicant. Rather, the court held that the scope of its review was, by statute, more narrowly drawn; it simply had to determine whether there was substantial evidence before the Board to support its decision. In so holding, the court relied on a section of the TCA, 47 U.S.C. sec. 332(c)(7)(B)(iii), which provides: “Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.” *Omnipoint* at 533. Thus, the court wrote: “the latter is a deferential standard, and courts ‘may neither engage in [their] own fact-finding nor supplant
the [] Board's reasonable determinations.... Substantial evidence, in the usual context, has been construed to mean less than a preponderance, but more than a scintilla of evidence.’ Cellular Tel. Co. v. Town of Oyster Bay, 166 F3d 490, 494 (2d Cir. 1999) (internal citation omitted). Substantial evidence is ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’ Id.” Based upon the record before the Pelham Village Board as I understand it, I believe there is more than substantial evidence to support a denial of Extenet’s pending application, and, on the case law I have seen, a court should have no difficulty sustaining such Board action if challenged.

In Omnipoint, the appellate court upheld the White Plains Board’s denial of a permit even though there was little question but that there was a gap in Omnipoint’s coverage as claimed by its expert. Rather, the controversy was over the proposed solution for such gap. As the court pointed out, the White Plains Board’s decision rejecting the proposed solution was focused on three considerations: adverse visual impact, diminution of property values, and lack of “public necessity”. In the matter before the Village Board, by contrast, both the issue of whether there is any substantial gap, and, if there is one, the issue of whether the three installations should be permitted to remain as unlawfully installed are hotly contested.

Under section 87-8. A. of Chapter 87 of the Village of Pelham Code, the clearly annunciated standard is that a “proposed wireless telecommunications facility must fill a significant gap in current wireless telecommunications services in the Village of Pelham. A significant gap may be demonstrated only by actual in-kind survey data in the area of the proposed installation. For example, if the significant gap is within a building or buildings, then the survey data must be measured inside the building or buildings in the survey area. Aggregated data purchased from a third party is not sufficient to establish a gap in service.” (Emphasis added.) In Omnipoint, the court ruled that the White Plains Board “was not bound to accept Omnipoint’s expert testimony simply because (as Omnipoint contends) it was insufficiently contested by properly credentialed expert testimony....[T]he residents were not required to offer any expert testimony at all.” Omnipoint at 533. As to the Extenet application, the Kaplans, at their own expense, have provided the Board with what appears to be persuasive expert proof that the significant gap claimed by Extenet has not been shown to exist — a “must” according to the code. As to the other code “must”, there does not appear to be anything more than Extenet’s self-serving statements that the proposed facilities would “fill” the claimed gap.

Moreover, in light of the code language quoted above, an applicant seeking to install wireless telecommunications facilities in three separate locations in residential areas in the Village is required in so many words to present data measured inside at least some of the residences within the alleged gap areas. Extenet, as I understand, has conceded it has no such data, and, indeed, has not even sought it. Extenet speculates that the residents probably would not let them in, but if a number of homes actually have a significant gap in service, and Extenet could present itself to them as an entity committed to curing the gap, Extenet’s speculation seems counter-intuitive. In addition, as cellular phone companies regularly warn telephoning
customers that their calls may be recorded, it seems surprising that Extenet has no T-Mobile records of service complaints from residents within the alleged Pelham gaps to put before the Board.

Under very similar circumstances to those in Pelham, the court in Omnipoint ruled that the “[White Plains] Board was free to discount Omnipoint’s [visual impact] study because it was conducted in a defective manner.” Id. As the court observed: “The [Omnipoint] study concluded that the tower ‘would be visible from only one property outside the Golf Course.’ However, because the study was conducted without notice to the Board or community, the observation points upon which its conclusion was based were limited to locations accessible to the public – mostly public roads – and no observations were made from the residents’ backyards, much less from their second story windows.” Id. The court also rejected Omnipoint’s argument that the Board gave improper deference to community opposition, saying: “we conclude that the Board had discretion to rely (as it did) on aesthetic objections raised by neighbors who know the local terrain and the sightlines of their own homes.” So far as I am aware the drive-thru studies upon which Extenet relies were conducted without notice to the Village Board or the community, and, as already noted, there have been no observation points within homes in the gap areas.

Still another point of commonality between the Omnipoint decision and the matter presently before the Village Board has to do with property values. The court wrote: “The Board credited expert testimony that the tower’s adverse visual impact (combined with public perception that cell towers may pose health hazards) would result in a decline in the marketability of homes in the neighborhood. We need not decide whether such testimony by itself would constitute substantial evidence. The Board’s ruling on property values is closely related to its determination on aesthetics, and stands on much the same footing.” Id. at 534-35. A number of Pelham residents have expressed similar concerns and I believe have submitted articles supporting the claimed diminution of property values, and so far as I am aware Extenet has offered nothing to rebut it. The Second Circuit has refused to create a requirement that “all zoning boards in this Circuit use expert testimony or written studies to support their decisions.” Harlen Assocs. v. Vill. of Mineola, 273 F.3d 494, 501 n.3 (2d Cir. 2001). Consistent with that, it would seem that the Village Board should be entitled to acknowledge and give weight to expert testimony on property value impacts in a similar proceeding in a neighboring municipality without requiring its replication here, at least in the absence of compelling evidence to the contrary.

Finally, it should be noted that, in addition to the many similarities between the Extenet application record and the one on the Omnipoint application the denial of which was upheld in court, there are undoubtedly other independent reasons supportive of denial of the Extenet application that a reviewing court would find persuasive. For example, Extenet pressed arguments before the County Court, all found meritless, to avoid a public hearing and Board ruling on its application in accordance with the TCA and SEQRA, and thereby placed a
substantial financial burden on the two residents challenging the unlawful agreement between Extenet and the Village in order to get the Extenet application on its proper statutory path. The court also found that Extenet’s representation to the Village that under Federal law it could still install the nodes at issue even if the Village denied its application “was, at best, a gross misstatement of the law” to the very Board that would evaluate its application. In addition, so far as I am aware, Extenet has made no real attempt to comply with subsection 87-8.B. of the Village Code relating to the showing that “must” be made by the applicant that the proposed locations for the nodes are the “least obtrusive means” for filling any substantial gap in service. Nor has it even acknowledged the court’s finding that Chapter 87 of the Village code “evinces the Village’s preference to have such facilities be constructed on Village property located in commercial areas.”

Respectfully submitted,

Daniel R. Murdock

Service by e-mail to:
timothy.cassidy@pelhamgov.com,

michael.volpe@pelhamgov.com,

christopher.reim@pelhamgov.com,

adam.kagan@pelhamgov.com,

joseph.senerchia@pelhamgov.com,

joseph.marty@pelhamgov.com,
susan.mutti@pelhamgov.com