

**Village of Pelham**  
**Board of Trustees**

**Resolution**

The Board of Trustees, having given due consideration to the evidence received with respect to the application of ExteNet Systems, Inc. for a permit pursuant to Chapter 87 of the Code of the Village of Pelham and to the substantive standards for its determination with respect to that permit, as established by Chapter 87, makes the following findings and determinations.

*Procedural History*

1. On or about April 11, 2013, ExteNet Systems, Inc. (ExteNet) submitted an application for a permit to install an antenna, along with associated control equipment at each of three locations on Village right-of-way in the Village of Pelham: (i) on an existing utility pole at 145 Harmon Avenue; (ii) on an existing utility pole at Colonial Avenue at Pelhamdale Avenue; and (iii) on a new utility pole to be erected at 156 East Second Street.

2. ExteNet describes each installation as a “node” of its Distributed Antenna System (DAS) in Westchester County.

3. The “nodes” are intended to be used by T-Mobile US, Inc. to provide wireless telecommunications services.

4. The Board of Trustees considered the application at its meetings on June 18, 2013 September 3, 2013 and September 17, 2013.

5. On September 17, 2013, the Board of Trustees unanimously adopted a resolution granting the application and authorizing the Village Administrator to execute an agreement on behalf of the Village for ExteNet’s use of the right-of-way.

6. On September 19, 2013, Village Administrator Yamuder executed the right-of-way agreement.

7. ExteNet obtained the requisite approvals from the Building Department and completed the installation of the new utility pole and three “nodes” on or about October 31, 2013.

8. By notice of petition dated November 4, 2013, Matthew Kaplan and Aimee Linn, who reside at 203 Cliff Avenue, commenced a proceeding pursuant to CPLR article 78 in the Supreme Court of the State of New York, County of Westchester, against the Village of Pelham and ExteNet for an order annulling the resolution of the Board of Trustees, as well as the building permits and the right-of-way agreement.

9. By order dated November 26, 2013, the Supreme Court, Westchester County (Barbara G. Zambelli, J.), denied the petitioners' application for a preliminary injunction requiring that the nodes be removed pending the determination of the proceeding.

10. By order dated June 20, 2014, the Supreme Court, Westchester County (Barbara G. Zambelli, J.), granted the petition and remitted the matter to the Board of Trustees, holding in abeyance that part of the petition which requested an order directing that the nodes be removed, and directing that the Board of Trustees act on the application within 150 days.

11. By order dated November 17, 2014, the Supreme Court, Westchester County (Barbara G. Zambelli, J.), upon the stipulation of the parties, extended the deadline for the Board of Trustees to act to December 20, 2014.

***Proceedings Before the Board of Trustees***

12. Since the June 20, 2014 order remitting the matter to the Board of Trustees, the Board of Trustees has considered the ExteNet application at its meetings on September 2, 2014, September 16, 2014, September 30, 2014, November 6, 2014, November 18, 2014, December 2, 2014 and December 16, 2014.

13. The Board of Trustees has received the documents with respect to the ExteNet application that are identified on the attached statement of the documents received.

14. On September 30, 2014, the Board of Trustees determined that the public hearing required by Village Code § 87-6(F) with respect to the application would commence on November 6, 2014.

15. ExteNet gave notice of the public hearing as required by the Village Code.

16. The Board of Trustees opened the public hearing with respect to the application on November 6, 2014.

17. The Board of Trustees continued the public hearing on November 18, 2014 and December 2, 2014.

18. During the course of the public hearing, the Board of Trustees heard presentations by numerous concerned residents, as well as the attorneys and engineers for ExteNet; the attorney and consultant for Mr. Kaplan and Ms. Linn; the attorney for Dr. Morel, who resides at 111 Cliff Avenue; and Lee Afflerbach, P.C. of CTC Technology & Energy, the consultants for the Village.

19. The Board of Trustees closed the public hearing with respect to the application on December 16, 2014.

20. On December 16, 2014, after the public hearing had been concluded, the Board of Trustees approved by a unanimous vote a resolution under the New York State Environmental Quality Review Act (SEQRA) which, among other things, adopted a negative declaration with respect to the application.

21. Also on December 16, 2014, the Board of Trustees, by a vote of six members in favor and one opposed, directed counsel to prepare for its consideration a resolution approving the application and authorized the Village Administrator to execute on behalf of the Village a right-of-way agreement in a form acceptable to the Village Attorney and substantially similar to the prior right-of-way agreement with ExteNet, subject to the adoption of a formal resolution granting the permit.

22. The Board of Trustees adjourned its consideration of this application to December 22, 2014.

#### *Applicable Law*

23. On April 10, 2014, the Board of Trustees adopted Local Law No. 2 of 2014, amending Chapter 87 of the Village Code.

24. This application is to be determined in accordance with the provisions of Chapter 87 as amended by Local Law No. 2 of 2014.

25. The equipment that ExteNet proposes to install is a wireless telecommunications facility as defined in Village Code §87-3.

26. Village Code §87-4 provides that no person may install a wireless telecommunication facility without a permit from the Board of Trustees.

27. Village Code §87-5(A) provides that the Board of Trustees may grant a permit to install a new wireless telecommunication facility in accordance with the standards set forth in Village Code §87-8.

28. Village Code §87-9(A) prohibits the installation of a wireless telecommunication facility in the public right-of-way in the Village of Pelham except upon (1) the consent of the Board of Trustees, as expressed in a license or franchise agreement, and (2) a permit pursuant to Chapter 87.

29. Village Code §87-8 establishes the following standards for wireless telecommunications facilities in the Village of Pelham:

- a. The proposed wireless telecommunications facility must fill a significant gap in current wireless telecommunications services in the Village of Pelham. Village Code §87-8(A).
- b. The proposed wireless telecommunications facility must be the least intrusive means of filling the significant gap in current wireless telecommunications services in the Village of Pelham. Village Code §87-8(B).
- c. The proposed wireless telecommunications facility must be designed, constructed, maintained and operated in such a manner as to minimize noise and traffic, ensure the security of the facility and be protected against unauthorized access. Village Code §87-8(C).
- d. The proposed telecommunications facility must comply with applicable standards for environmental effects of radiofrequency emissions. Village Code §87-8(D).
- e. Co-location is required and the use of a new support structure is permissible only if an existing structure is not feasible and a new support structure is the least intrusive means to fill the significant gap in wireless telecommunications services. Village Code §87-8(E), (F).

- f. The total height of the support structure must be the least necessary to fill the significant gap in current wireless telecommunications services and may not be greater than the maximum height permitted for a building in the zoning district in which the facility is proposed to be located. Village Code §87-8(G).
- g. The proposed telecommunications facility is an attached wireless telecommunications facility which may not extend more than five feet from the utility pole on which it is mounted. Village Code §87-8(H).
- h. The proposed telecommunications facility must have minimum adverse visual impact on surrounding areas. Village Code §87-8(I).
- i. If the proposed wireless telecommunications facility is freestanding, landscaping must be provided sufficient to minimize the visual impact. Village Code §87-8(J).
- j. If there is an accessway for the proposed wireless telecommunications facility, it must provide an adequate turning radius for service vehicles. Village Code §87-8(K).
- k. No lighting or signage is permitted unless required by law or necessary, in the judgment of the Board of Trustees, for public safety. Village Code §87-8(L), (M).
- l. The wireless telecommunications facility must be comparable in size to or smaller than other wireless telecommunications facilities in the area. Village Code §87-9(D)(1).
- m. If not co-located, the proposed antenna array must be located at least 1200 feet from the nearest antenna array or, if less, 1200 feet minus a distance required to avoid placement of the proposed antenna array in the front of a residential unit on the same side of the street as the existing array. Village Code §87-9(D)(2).
- n. The proposed wireless telecommunications facility must be located at least eight feet above ground level and must be designed to prevent interference with vehicular traffic and pedestrians and to minimize the visual impact of the facility to adjoining properties. Village Code §87-9(D)(3).

- o. A proposed wireless telecommunication facility on an attachment structure must be flush-mounted and may not intrude on any sidewalk or roadway. Village Code §87-9(D)(4).
- p. A new support structure must be designed in a manner consistent with existing utility poles in the area. Village Code §87-9(D)(5).

### ***Factual Determinations***

30. The proposed facilities are part of a Distributed Antenna System (DAS) that ExteNet is constructing for the use of T-Mobile cellular service in southern Westchester County.

31. The proposed facilities were installed pursuant to the September 27, 2013 approval and are currently operational.

32. The proposed facilities are located on (i) an existing utility pole at 145 Harmon Avenue; (ii) an existing utility pole at Colonial Avenue and Pelhamdale Avenue; and (iii) a new utility pole that was erected at 156 East Second Street.

33. These sites are located in the Residence A-1 and Residence A-2 zoning districts.

34. ExteNet has entered into a pole location agreement with Con Edison by which Con Edison allows ExteNet to install its facilities on their utility poles, subject to placement criteria that must be addressed on a pole-by-pole basis.

35. The existing utility poles are each 32 feet in height.

36. The newly-installed utility pole is 37 feet high and is consistent in appearance with existing utility poles in the Village.

37. Each node is approximately 24 inches in height and 10 inches in diameter.

### ***Radiofrequency Emissions***

38. The report of Pinnacle Telecom Group dated October 22, 2014 demonstrates that the proposed facilities comply with the regulations established by the Federal Communications Commission for maximum permissible exposure to radiofrequency emissions. There is no evidence in the record to controvert the Pinnacle report.

### *Significant Gap*

39. The report of Joseph Menio, dated October 22, 2014, demonstrates through computer propagation modeling, using Asset software produced by Aircom International, and by actual drive test data that there is a significant gap in wireless telecommunication service in the area surrounding the proposed facilities.

40. The exhibits accompanying the Menio report depict those areas in which, according to the author of the study, T-Mobile wireless service without the proposed facilities fails to satisfy T-Mobile's design criteria for reliable wireless service of -90dbm for in-building service and -98dbm for reliable in-vehicle service and those areas that would have reliable service with the proposed facilities.

41. ExteNet has submitted an explanation of the basis on which T-Mobile has established its standards for reliable wireless service.

42. The Village's consultant has confirmed that T-Mobile's standards are reasonable and consistent with industry practice.

43. The computer propagation model submitted in the Menio report demonstrates a significant gap in T-Mobile wireless service without the proposed facilities.

44. The actual drive test data confirms the existence of a significant gap in T-Mobile in-vehicle wireless service without the proposed facilities.

45. ExteNet did not provide actual in-building signal test data, but otherwise established that there is a significant gap in in-building wireless service.

46. T-Mobile calculates that the level of in-building wireless service without the proposed facilities does not meet its signal standards by extrapolating from the actual drive test data based upon the known signal-attenuation characteristics of residential buildings.

47. The Village's consultant has advised the Board of Trustees that T-Mobile's calculation reasonably supports the conclusion that there is a significant gap in T-Mobile in-building wireless service without the proposed facilities.

48. The gap in wireless coverage is significant because there is substantial vehicle traffic and there are a substantial number of residents in the area in which the gap in coverage would

exist without the proposed facilities.

49. Where an applicant demonstrates a significant gap in wireless coverage through computer propagation modeling performed in a manner consistent with industry standards and the accuracy of that model is confirmed by actual drive test data and the methodology that the applicant uses to extrapolate from that data to confirm a gap in in-building wireless service is reasonable and supported by scientific evidence, the applicant has established a significant gap in wireless service under Chapter 87 of the Village Code.

50. The Village's consultant confirms that ExteNet has demonstrated a significant gap in wireless service.

51. There is no evidence in the record that controverts the conclusion that there is a significant gap in wireless service which will be filled by the proposed facilities.

52. There is a significant gap in wireless service in the Village which will be filled by the proposed facilities.

#### ***Adverse Visual Impact***

53. The proposed facilities consist of three "nodes" on top of two existing 32-foot high utility poles and one newly-constructed 37-foot utility pole, with attendant mechanical and electrical equipment mounted on the poles.

54. The "nodes" are grey in color.

55. Each "node" is 24 inches in height and 10 inches in diameter.

56. The "nodes" are not inconsistent in appearance with the other utility installations on the existing utility poles and other nearby utility poles.

57. There are hundreds of utility poles in the Village of Pelham.

58. The adverse visual impact of the proposed facilities is minimal.

#### ***Least Intrusive Means***

59. There is no location in a commercial district from which wireless service can be provided to the area that the proposed facilities are intended to serve.

60. Existing utility poles in the vicinity of the new utility pole at 156 East Second Street are not feasible alternatives to the new utility pole because regulatory, proprietary and practical limitations on their use prohibit the placement of a “node” on any of those utility poles.

61. The Board of Trustees has considered three potential sites as alternatives to either the proposed facility at 156 East Second Street or all of the proposed facilities: a location 650 feet north of that proposed site, a location at Cliff Avenue and First Street and a location at Corlies Avenue and First Street.

62. The proposed facility is at maximum ground elevation within the proposed service area.

63. Each of the proposed alternative sites is at a lower ground elevation than the proposed sites.

64. Siting the facility 650 feet north of the proposed location at 156 East Second Street would compromise service to the south of the proposed location.

65. Siting the facility at Corlies Avenue and First Street would compromise service to the east of the proposed location unless the wireless facility were installed on an 80-foot pole and, if it were, would cause interference to other wireless telecommunications facilities outside the proposed service area.

66. A wireless telecommunication facility on an 80-foot utility pole is not less intrusive than a similar facility on a 37-foot utility pole.

67. Eliminating the proposed facility at 156 East Second Street would compromise wireless service in the area.

68. The Village’s consultant has confirmed that the site of the proposed wireless facility at 156 East Second Street is in close proximity to the targeted area and is elevated above average terrain to enhance coverage.

69. The Village’s consultant has further confirmed that there appear to be no existing utility poles within 350 feet of that location which would be available to support a “node.”

70. There is no feasible, less intrusive alternative to the proposed facilities.

### *Co-Location*

71. Two of the proposed facilities satisfy the co-location requirements because they are mounted, to the extent reasonably feasible, on existing utility poles.

72. Limitations on the permissible use the existing utility poles in the area of 156 East Second Street make it infeasible to co-locate the proposed facility at 156 East Second Street.

### *Other Issues*

73. A pole analysis dated September 17, 2014, prepared by CEG Engineering and submitted by ExteNet demonstrates that the proposed facilities satisfy the applicable requirements for structural safety. There is no evidence to the contrary in the record.

74. Because the proposed “nodes” consist only of antennas and attendant mechanical and electrical equipment mounted on utility poles, and generates no traffic themselves other than the occasional need to service the facilities, (a) they present no traffic, noise or security concerns, and (b) no landscaping is necessary.

75. No lighting or signage is necessary or desirable.

76. There is no accessway.

77. The proposed facility satisfies the location and dimensional requirements established by Chapter 87.

**NOW, THEREFORE, BE IT RESOLVED** by the Board of Trustees of the Village of Pelham, that the permit is GRANTED, subject to the following terms and conditions:

1. The permit is granted to ExteNet Systems, Inc. It may not be assigned or otherwise transferred except upon the approval of the Board of Trustees, unless the assignment or other transfer is to a corporate affiliate or successor of the permit holder, in which case the permit holder must notify the Board of Trustees of the assignment as soon as practical, but not more than 30 days after the assignment or other transfer. The Board of Trustees will approve an assignment or other transfer upon proof that the assignee or transferee is capable of complying with the obligations imposed by the permit.

2. ExteNet will enter into a right-of-way agreement with the Village of Pelham within 30 days.

3. ExteNet will deposit with the Village within 30 days, and maintain on deposit throughout the term of the permit, funds in the amount of \$3,000, which is the amount the Board of Trustees deems sufficient to reimburse the Village for the reasonable costs of a regular review by an appropriate expert of the facility's compliance with these standards.

4. The facility must at all times comply with the applicable individual facility and cumulative standards for environmental effects of radiofrequency emissions based on general population limits (and not occupational limits) as such terms are defined by the Federal Communications Commission and must demonstrate compliance with those standards upon request.

5. ExteNet may not modify the facility or its location in any way, but ExteNet may make subsequent immaterial modifications to the wireless telecommunications facility upon notice to the Village but without further application to the Board of Trustees. This provision does not relieve ExteNet of its obligation to apply for and obtain permits, authorizations or inspections required from other Village departments in connection with the modifications.

6. If the applicable rules, regulations, standards, and provisions of any state or federal agency, including but not limited to, the Federal Aviation Administration and the Federal Communications Commission, and specifically including any rules and regulations regarding height, lighting, and security are changed and/or are modified during the duration of this permit, ExteNet will conform the facility to the applicable changed and/or modified rule, regulation, standard, or provision within a maximum of 24 months of the effective date of the applicable changed and/or modified rule, regulation, standard, or provision, or sooner as may be required by the issuing entity.

7. ExteNet will secure and maintain throughout the duration of the permit public liability insurance for personal injuries, death and property damage, and umbrella insurance coverage in accordance with the following provisions: (a) The policy will provide coverage in the following amounts: (i) commercial general liability insurance covering personal injuries, death and property damage in the amount of \$1,000,000 per occurrence and \$2,000,000 in the aggregate; (ii) automobile liability insurance in the amounts of \$1,000,000 per occurrence and \$2,000,000 in the aggregate; and (iii) workers compensation liability and disability insurance in

the amounts required by statute. (b) The commercial general liability insurance policy shall specifically include in an endorsement the Village and its officers, boards, employees, committee members, attorneys, agents and consultants as additional named insureds. (c) The insurance policies shall be issued by an agent or representative of an insurance company licensed to do business in the State of New York and with a Best's rating of at least A. The insurance policies shall contain an endorsement obligating the insurer to furnish the Village with at least 30 days' prior written notice in advance of the cancellation of the insurance. (d) Within 15 days, ExteNet will deliver to the Village a copy of each of the policies or certificates representing the insurance in the required amounts. (e) Renewal or replacement policies or certificates shall be delivered to the Village at least 15 days before the expiration of the insurance that such policies are to renew or replace.

8. The applicant, to the greatest extent permitted by the law, will at all times defend, indemnify, protect, save, hold harmless, and exempt the Village, and its officers, boards, employees, committee members, attorneys, agents, and consultants from any and all penalties, damages, costs, or charges arising out of any and all claims, suits, demands, causes of action, or award of damages, whether compensatory or punitive, or expenses arising therefrom, either at law or in equity, which might arise out of, or are caused by, the placement, construction, erection, modification, location, products performance, use, operation, maintenance, repair, installation, replacement, removal, or restoration of said facility, excepting, however, any portion of such claims, suits, demands, causes of action or award of damages as may be attributable to the negligent or intentional acts or omissions of the Village, or its servants or agents. With respect to the penalties, damages or charges referenced herein, reasonable attorneys' fees, consultants' fees, and expert witness fees are included in those costs that are recoverable by the Village.

9. ExteNet will provide and maintain throughout the term of the permit a bond in an amount at least \$75,000, in a form acceptable to the Village Attorney. The bond will be in an amount sufficient to ensure the safe and timely removal of the wireless telecommunications facility in case of abandonment, and/or to restore the site to a condition comparable to that which existed prior to the issuance of the permit. The bond will remain in effect throughout the term of the permit and must be renewed annually.

10. If the facility is not used for the provision of personal wireless services for a continuous period of 12 months it will be deemed to be abandoned. Upon receipt of notice of a determination of abandonment from the Village, ExteNet will remove the facility within 90 days.

11. If ExteNet files with the Federal Communications Commission a notice of intent to cease operations, it must provide the Village with a copy of the notice within 30 days and must remove the facility within 90 days. If ExteNet fails to remove the abandoned facility within the time prescribed, the Village may remove the facility and obtain reimbursement for the costs it incurs from the bond.

12. This permit is valid for five years from the date on which it is issued.

13. The Board of Trustees may revoke or suspend a permit granted under this chapter if ExteNet violates any condition of this permit or any requirement of Chapter 87 of the Code of the Village of Pelham and fails to abate that violation within 10 days after written notice, and

**BE IT FURTHER RESOLVED** that the Village Administrator is authorized and directed to execute on behalf of the Village a right-of-way agreement in a form acceptable to the Village Attorney and substantially similar to the prior right-of-way agreement with ExteNet.

**ExteNet Application Documents Received June 20, 2014 through December 16, 2014**

<u>Date</u>	<u>From</u>	<u>Description</u>
06/20/14	Justice Zambelli	Decision on Proceeding
07/02/14	Sive Paget	Joint Request Proposal on Pole Removal
08/19/14	Cuddy/Feder	Supplemental Documentation Transmittal re: RF Emissions
08/26/14	Cuddy/Feder	Supplemental Document Transmittal re: SEQRA, ROW
09/05/14	CTC	Response to Village's Request for Proposal
09/10/14	AKRF	Response to Village's Request for Proposal
09/16/14	Cuddy/Feder	Response re: Village Hiring CTC and AKRF Consultants
09/22/14	Cuddy/Feder	Signed Escrow Agreement, Appl. Fee and Pole Analysis
09/23/14	AKRF	EAF Review re: SEQRA
09/29/14	CMS	Report and Resume
09/29/14	Sive Paget	Clients Retained Richard Comi of CMS
09/30/14	Cuddy/Feder	Response to Barshov and Comi Comments
10/21/14	Cuddy/Feder	Notice of Public Hearing for 11/06/14
10/21/14	Cuddy/Feder	Transmittal of Revised Full EAF re: SEQRA, ROW
10/24/14	Cuddy/Feder	Response to Village incl. Menio & Pinnacle Reports
10/30/14	CTC	Review of ExteNet Application Submittals
11/03/14	Cuddy/Feder	Response to Village's Request for Information
11/11/14	AKRF	Updated EAF Review
11/13/14	Cuddy/Feder	Response to Village's Request for Information
11/17/14	Cuddy/Feder	Response to Village's Request for Information
11/25/14	Silverberg/Zalantis	Response to Proposal to Move Pole to 111 Cliff Avenue
11/24/14	Silverberg/Zalantis	FOIL Request re: 11/18/14 Board Public Hearing
11/26/14	CMS	Letter Report from Kaplan's Consultant CMS
11/26/14	Sive Paget	Transmittal Letter re: Report from CMS
12/02/14	Sive Paget	Reply Evaluating Application
12/02/14	Cuddy/Feder	Letter Confirming Public Hearing Extension
12/02/14	CTC	Review of ExteNet Application Submittals
12/02/14	Residents	Petition (19 names)
12/02/14	Residents	Petition (4 names)

12/04/14	CTC	Review of ExteNet Application Submittals
12/08/14	Cuddy/Feder	Response to Various Public Comments
12/10/14	CMS	Letter Report
12/10/14	Sive Paget	Response to Public Comments
12/12/14	Cuddy/Feder	Reply to Comments Made by Mr. Kaplan & Ms. Linn
12/12/14	CTC	Review of ExteNet Application Submittals
12/12/14	Cuddy/Feder	ExteNet Information in Response to CTC
12/12/14	Mr. Murdock	Letter to Village Board
12/15/14	CMS	Reply to ExteNet's 1/12/14 Submission
12/15/14	Sive Paget	Reply to ExteNet's 1/12/14 Submission
12/15/14	CTC	Review of ExteNet Application Submittals
12/16/14	Residents	Statement from Concerned Residents
12/16/14	Pelham Village	Resolution Adopting Neg. Dec. re SEQRA