SAHN WARD COSCHIGNANO & BAKER, PLLC
ATTORNEYS AT LAW
THE OMNI
333 EARLE OVINGTON BOULEVARD
SUITE 601
UNIONDALE, NEW YORK 11553

TELEPHONE: (516) 228-1300
TELECOPIER: (516) 228-0038
E-MAIL: INFO@SWCBLAW.COM
WWW.SWCBLAW.COM

MICHAEL H. SAHN
JON A. WARD
CHRIS J. COSCHIGNANO, P.C.
DANIEL J. BAKER
MIRIAM E. VILLANI
WAYNE G. EDWARDS
BRIAN S. STOLAR
ANDREW M. ROTH
DANIEL H. BRAFF
MICHELE A. PINCUS****
CHRISTIAN BROWNE
ADAM H. KOBLENZ***
JOHN C. FARRELL

JOSEPH R. BJARNSON
RALPH BRANCIFORTE
NICHOLAS CAPPADORA
JOHN P. CHRISTOPHER
ELAINE M. COLAVITO
JENNA GALLAGHER
JASON HOROWITZ
ERIK ZARATIN**

SPECIAL COUNSEL
HON. EDWARD G. McCABE
THOMAS McKEVITT*

COUNSEL
DANIEL S. COHAN

OF COUNSEL
JOSEPH B. ROSENBERG

*Admitted in New York, New Jersey, District of Columbia
**Admitted in New York, Connecticut
***Admitted in New York, New Jersey
****Admitted in New York, District of Columbia

May 10, 2014

VIA EMAIL and FIRST CLASS MAIL

Peter P. MacKinnon, Esq.
Humes and Wagner, LLP
147 Forest Avenue
Locust Valley, NY 11560

Re: Application of Crown Castle Application for DAS in Village of Matinecock

Dear Mr. MacKinnon:

As you are aware, this firm represents [redacted] regarding the above-referenced matter. I presented some comments to the Village Board at the hearing of April 8, 2014. At that time, the Board adjourned the public hearing until May 20, 2014, and asked for any submission we have to be sent ten (10) days before the public hearing date. Our submission is as follows.

Crown Castle has proposed a Right-of-Way Use Agreement with the Village of Matinecock for a Distributed Antenna System (DAS), which is annexed hereto. At this time, only four (4) nodes are proposed, but the Agreement contemplates an unlimited number of additions in the future.

Use Agreement

There are several areas of this license agreement which we have concerns:

Section 4.2 Right of Way Use Fee: the Village shall be paid a use fee on an annual basis an amount equal to five percent (5%) of Adjusted Gross Revenues. Although this seems to be common among these types of agreements, we would like a justification as to how this figure was arrived at. Also, a draft agreement was attached to correspondence addressed to the Village dated July 16, 2012, which also has the additional one-time compensation payment:

$5,000 first node
$2,500 second node
$1,000 third and subsequent nodes
$20,000 maximum.

We would like an explanation as to why these additional compensations were eliminated in the current agreement being contemplated by the Board.

Section 5.2.1 Approval of Additional Locations: this provides that Crown will submit requests for additional locations for installation of equipment within the Village's Public Way to the "Village Board for approval of location only." It also requires the Village to use reasonable efforts to review and approve Crown's applications within sixty (60) days of submission, and if no comment is received within sixty (60) days of submission, the application is presumed to be acceptable.

On November 18, 2009 the Federal Communications Commission (FCC) issued a ruling regarding "In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance." In this ruling, the FCC determined that municipalities must make a determination on applications to add equipment to an existing facility with ninety (90) days, and applications for a new facilities or towers with one hundred fifty (150) days. This ruling was upheld by the United State Supreme Court in *City of Arlington, Texas v. FCC*, 133 S.Ct. 1863(2013)

Since the FCC allows ninety (90) days for a co-location and 150 days for a new facility, we see no reason why the Village of Matinecock should be limited to just a sixty (60) day period. This provision of the agreement should be changed to allow the Village of Matinecock the maximum amount of time under federal regulation to review additional sites.

We have obtained a copy of an agreement between the Village of Freeport and NextG Networks of NY, Inc. (upon information and belief, the predecessor in interest of Crown Castle) dated July 14, 2009, which is attached hereto. The following is stated under Section 3.2 Attachment to Third Party Property Not Within FE Jurisdiction:

> Locations for attachments to third party property shall be identified in Exhibit B and shall be subject to approval by the Site Plan Review Board which may consider the size, quantity, shape, color, weight, configuration, or other physical properties of NextG's Equipment.

Section 3.3 of the Freeport agreement requires a Site Plan Review for additional facilities.

We urge that the Village of Matinecock incorporate language that would require additional nodes to be reviewed by a board in the Village, and for there to be discretion of this board to deny the application if it is merited.

Section 3 Scope of Use Agreement: the third sentence of this section states:

> Any work performed pursuant to the rights granted under this Use Agreement shall be subject to the reasonable prior review and approval of the Village except that it is agreed that no zoning or planning board permit, variance, conditional use permit or site plan permit, or their equivalent under the Village's ordinances, codes or laws, shall be required for the installation of Crown's Equipment installed in the Public Way and/or on Municipal Facilities, unless such a process has been required for the placement of all communications facilities and equipment in the Public Way by all other telecommunications providers, including but not limited to the ILEC and local cable provider(s).

As will be discussed below, we believe it would be prudent for the Village to adopt a local law to regulate all types of wireless telecommunication facilities. The language of Section 3 of the Use Agreement appears to say that Crown Castle cannot be subject to a permitting process if other providers have not been required to in the past. It is our position that all such facilities should undergo such a review, and this provision should be stricken.

Section 4.4 Most-Favored Municipality: this section states that if Crown at a later date enters into an agreement with another municipality of the same size or smaller than the Village in the same County, and in the Village's opinion contains financial benefits which are superior to those in the Agreement, then the Village shall have the right to require Crown to modify the Agreement to include those superior benefits.

It is unclear as to what is meant by a municipality of the "same size or smaller than the Village." Does this mean a municipality smaller by area or population? It is also questionable as to why it should matter if another municipality is "smaller," whatever that means. This section should be amended to state that if another municipality in the same County is given more favorable terms by Crown, then this Agreement should be amended to include that benefit.

Section 5.5 Relocations at Crown's Request: this states that if Crown desires to relocate equipment from one municipal facility to another, it shall advise the Village and the Village will use its best efforts to accommodate Crown. This provision does not hold Crown to any standard whatsoever as to the rationality of the reason to move the equipment, nor does it

balance it against any burden or detriment to the Village or its residents. This provision should either be significantly revised or stricken.

Section 9 Termination: this allows the Agreement to be terminated by either party upon forty five (45) days' prior written notice to the other party upon a default of any material covenant by the other party. Nowhere is the term "material" defined. Such a definition should be added to this section

SEQRA

The New York State Environmental Quality Review Act (SEQRA) requires a local government on discretionary approvals to require an environmental impact assessment as prescribed by 6 N.Y.C.R.R. Part 17. SEQRA requires the approving governmental body to identify and mitigate the significant environmental impacts of the activity it is proposing permitting.

In the Draft Agreement, the following provision exists:

> 11.1 Environmental Review: Crown's facilities are "unlisted" but functionally equivalent to Type II actions under 6 N.Y.C.R.R. 617.5(c)(11), Crown agrees to comply with any rules pertaining to State Environmental Quality Review and to submit any required environmental forms for the Village's review and approval, so long as the review that the Village requires is the same that the Village requires of all other telecommunication providers, including but not limited to the ILEC and the cable provider(s), for their installation of any facilities or equipment in the Public Way.

Crown Castle has given confusing and conflicting statements regarding compliance with SEQRA in this matter. As part of the application to the Village requesting a Right-of-Way Agreement on March 15, 2012, Crown Castle submitted a Short Form Environmental Assessment Form (EAF). However, on March 31, 2014, Crown Castle submitted a letter to Mayor Goodman in response to 26 Unanswered Questions and Concerns About Potential Antennas in Matinecock Village, in which the following is stated:

> 8. Applicable state and federal law requires that local governments "Manage the public rights-of-way . . . on a competitively neutral and nondiscriminatory basis." Federal courts have upheld this statute to mean that a local government cannot impose certain requirements on new entrants (like Crown Castle) without imposing those same requirements on the incumbent local exchange carrier (the "ILEC"). TCG New York, Inc. vs. Village of White Plains, 305 F.3d 67 (2nd Cir. 2002). In conformity with how the Village treats other similarly-situated providers of telecommunication services in the Village's Public Ways, Crown Castle was not required to submit SEQRA forms.

At the Public Hearing before the Village Board on April 8, 2014, Joshua Trauner of Crown Castle stated the following:

> I think our position on SEQRA is exactly what was presented in the right-of-way agreement. We're an unlisted action. However, we are equivalent to a Type II action wherever we deploy.
>
> Every municipality has a different opinion. Sometimes they treat us as Type II action. If they say no as an unlisted action, you have to comply with SEQRA, then we will out a short form EAF. We have done that occasionally in some municipalities.
>
> And if the Village would like us to fill out a short form EAF, we can do that.

From this testimony, Mr. Trauner seemed unaware that Crown Castle had already submitted a Short Form EAF.

Very recently, Crown Castle (technically NY-CLEC LLC) submitted a Long Form Environmental Assessment Form (EAF) dated May 1, 2014. Under section C.2.b, the following question is asked:

> Is the site of the proposed action within any local or regional special planning district (for example: Greenway Brownfield Opportunity Area (BOA); designated State or Federal heritage area; watershed management plan; or other?)

Crown Castle checked this box "Yes", and then explains:

> Telecommunications equipment location RAN19 would be situated upon an existing utility pole within a right-of-way adjacent to National Register of Historic Places listed Planting Fields Arboretum.

This section of the EAF continues:

> c. Is the proposed action located wholly or partially within an area listed in an adopted municipal open space plan, or an adopted municipal farmland protection plan?

After the box is checked "Yes" Crown Castle explains:

> Planting Fields Arboretum is Designated Open Space in Nassau County. Telecommunications equipment location RAN19 would be situated upon an existing utility pole within the right-of-way adjacent to Planting Fields property. However, the installation of an antenna and associated equipment upon an existing utility pole would not have an adverse impact upon open space resources.

According to the SEQRA regulations,

> 617.4 (a) The purpose of the list of Type I actions in this section is to identify, for agencies, project sponsors and the public, those actions and projects that are more likely to require the preparation of an EIS than Unlisted actions. All agencies are subject to this Type I list.

Among the actions that are to be classified as a Type I action is:

> 617.4 (b) (9) any Unlisted action (unless the action is designed for the preservation of the facility or site) occurring wholly or partially within, or substantially contiguous to, any historic building, structure, facility, site or district or prehistoric site that is listed on the National Register of Historic Places, or that has been proposed by the New York State Board on Historic Preservation for a recommendation to the State Historic Preservation Officer for nomination for inclusion in the National Register, or that is listed on the State Register of Historic Places (The National Register of Historic Places is established by 36 Code of Federal Regulation (CFR) Parts 60 and 63, 1994 (see section 617.17 of this Part)

Due to the fact that Crown Castle now admits that one of the equipment locations is adjacent to Planting Fields Arboretum, and that Planting Fields is on the National Register of Historic Places, this is undoubtedly a Type I, and not an Unlisted action. We maintain it is incumbent for the Village Board to require Crown Castle to prepare an Environmental Impact Statement, as encouraged by the SEQRA regulations.

As the Second Department explained in *Matter of Prand Corp. v. Town of East Hampton*, 78 A.D.3d 1057 (2010):

> The basic purpose of SEQRA is to incorporate environmental considerations directly into the government's decision-making process "at the earliest possible time" (6 NYCRR 617.1[c]; *see* ECL 8–0109[4]; *Matter of Neville v. Koch,* 79 N.Y.2d 416, 426, 583 N.Y.S.2d 802, 593 N.E.2d 256). To that end, SEQRA mandates that all government agencies prepare or request an environmental impact statement (hereinafter an EIS) "on any action they propose or approve which may have a significant effect

> on the environment" (ECL 8–0109[2]; *cf.* 6 NYCRR 617.1[c]). **"Because the operative word triggering the requirement of an EIS is 'may,' there is a relatively low threshold for the preparation of an EIS"** (*Matter of Omni Partners v. County of Nassau,* 237 A.D.2d 440, 442, 654 N.Y.S.2d 824; *see Matter of UPROSE v. Power Auth. of State of N.Y.,* 285 A.D.2d 603, 608, 729 N.Y.S.2d 42; *Matter of Silvercup Studios v. Power Auth. of State of N.Y.,* 285 A.D.2d 598, 600, 729 N.Y.S.2d 47; *Matter of Farrington Close Condominium Bd. of Mgrs. v. Incorporated Vil. of Southampton,* 205 A.D.2d 623, 624, 613 N.Y.S.2d 257).(emphasis added)

The Court further noted:

> in assessing whether a lead agency has complied with statutory requirements, the court must review the record to determine **if the agency identified the relevant areas of environmental concern, took a "hard look" at them, and gave a "reasoned elaboration" for its determination** (*Matter of Riverkeeper, Inc. v. Planning Bd. of Town of Southeast,* 9 N.Y.3d 219, 232, 851 N.Y.S.2d 76, 881 N.E.2d 172 [internal quotation marks omitted]; *see Matter of Jackson v. New York State Urban Dev. Corp.,* 67 N.Y.2d 400, 417, 503 N.Y.S.2d 298, 494 N.E.2d 429; *Red Wing Props., Inc. v. Town of Milan,* 71 A.D.3d 1109, 1111, 898 N.Y.S.2d 593; *Matter of Baker v. Village of Elmsford,* 70 A.D.3d 181, 189–190, 891 N.Y.S.2d 133).(emphasis added).

An EIS would encompass numerous factors, for under 617.2(l) of the SEQRA regulations:

> Environment means the physical conditions that will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, resources of agricultural, archeological, historic or aesthetic significance, existing patterns of population concentration, distribution or growth, existing community or neighborhood character, and human health.

It should also be noted that as part of the Long Form EAF, Crown Castle did not submit a Visual EAF Addendum. Such addendum would disclose where the installations would be visible from Planting Fields Arboretum, as well as other natural resources and roadways. Therefore the Long Form EAF which was submitted is incomplete.

The Long Form EAF submitted by Crown Castle also only addresses the possibility of four (4) nodes to be erected on existing utility poles. Through a Freedom of Information Law

(FOIL) request, we obtained a document (annexed hereto) that contemplates perhaps as many as six (6) additional installations in and around the Village of Matinecock in the future. Addressing only the four (4) nodes as this time could be interpreted as an improper segmentation under SEQRA. The EAF and any review should be amended to analyze the complete build out contemplated by Crown Castle.

Additionally, the Long Form EAF that Crown Castle submitted to the Board has failed to correctly answer question number E.2.0, which asks:

> Does the project site contain any species of plant or animal that is listed by the federal government or NYS as endangered or threatened, or does it contain any areas identified as habitat for an endangered or threatened species?

Crown Castle answered "No" to this question. However, the NYSDEC's maps and records relating to the project site state that the site does in fact contain species of plant(s) and/or animal(s) that is/are listed by the federal government or NYS as endangered or threatened, or that it does contain areas identified as habitat for an endangered or threatened species. Accordingly, Crown Castle must identify what plants and animals exist in this area that are designated as threatened or endangered, so that the Board is able to consider what effect the proposed DAS may have on the same.

There is precedent to subjecting a DAS to an EIS. Annexed hereto is a Draft Initial Study and Mitigated Negative Declaration prepared for Crown Castle NG West Inc. for the San Mateo County Project in March 2014. This study appears to be very analogous to the EIS utilized in New York.

Telecommunications Applications

The Second Circuit in *Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630 (1999) ruled that a provider of wireless services must demonstrate that its application "is the least intrusive means for closing a significant gap in a remote user's ability to reach a cell site that provides access to land-lines."

Upon information and belief, the Village of Matinecock does not have a separate code provision addressing Wireless Telecommunication Facilities. We believe it is in the interest of the Village and its residents, that the Village adopt one. By adopting such a provision, the Village would be able to gather the information needed to adequately assess whether a wireless telecommunication antenna is truly "needed" under the law. This would include propagation maps which would demonstrate the current wireless service that is provided by a carrier, and a model on what coverage would be provided if a new facility was installed.

The Village could also require an applicant to perform a specific visual simulation using photographs of a current location, and a computer generated graphic on what the appearance would look like after the facility is installed.

At the public hearing on April 8, 2014, we submitted samples from the City of Glen Cove, the Village of Sea Cliff, the Town of Southampton and the Town of Greenburgh. Annexed hereto is a sample ordinance that we have designed for the Village of Matinecock, which is largely based on those from the above-mentioned municipalities.

In *Crown Castle NG East v. Town of Greenburgh*, 2013 WL 3357169 (S.D.N.Y. 2013)(attached hereto) Crown Castle sought to install a DAS in the Town of Greenburgh, New York. The initial purpose of the DAS was to establish Metro PCS service in the Town. Crown initially sought a license agreement in accordance with section 253 of the Telecommunications Act. The Town treated the application for a license agreement as an application under the Town's Antenna Law. Although Crown disputed whether that law applied to them, it eventually had its proposal reviewed by the Town's Antenna Review Board.

After several meetings and hearing dates, the Town Board denied the application. The Town determined that the proposed to install the notes on rights-of-way were subject to the Town's Antenna Law, and that Crown had not demonstrated that the facilities were "needed" under the code and that Crown had not proven that the proposed installations were of minimum height and "aesthetic intrusion" as required under the Code.

Crown then commenced an action in the United States District Court for the Southern District of New York. The causes of action were: (1) that the Town violated 47 U.S.C. 253(a) for failing to approve the antenna nodes along the Town's Right-of-Way; (2) that the Town violated the FCC's Shot Clock Order for failing to approve the application within a timely manner; and (3) for issuing a determination not based on substantial evidence since Crown claimed it had demonstrated the existence of a gap and there was no non-residential right-of-way location to close that gap,

The District Court in its decision of July 3, 2013 dismissed the claim under 47 U.S.C. 253(a), as that section only addresses violations where municipalities have an ordinance that on its face prevents the installations, and here that was not the case. The Court also dismissed the second cause of action for the Town's violating the Shot Clock Order, since it found that the only remedy for this violation would be to require the Town to issue a written determination. Since the Town had issued a determination, this cause of action was rendered moot.

The Court granted Crown's claim that the Town's decision was not based on the substantial evidence. The Court found that MetroPCS had a service gap, and that the DAS was needed to fill that gap. On January 17, 2014, the Second Circuit affirmed the District Court's decision, 2014 WL 185012 (2014)(attached hereto).

Although the Court ruled against the Town of Greenburgh, we believe the reasoning in the Court's decision is very important. The Court did not decide that an applicant for a DAS is

simply entitled to have the proposal granted in any form it desires. A DAS applicant must still prove that there is a gap in service, that there is a "need" and that the method to reduce or eliminate that gap is the least intrusive means.

Here, Crown Castle has not provided any evidence as to what specific carrier would be utilizing the DAS (although a representative may have stated at the March 25, 2014 hearing of the Village Board that T-Mobile and Verizon were possibilities). They have not provided any propagation maps or technical data on what coverage is present in the area, and if a gap in coverage exists. They have also not provided any data on how the DAS would close any gap in service.

No specific visual simulation has been provided to measure the specific aesthetic impact the nodes on the utility poles would have on the surrounding areas.

There has also not been any demonstration on what alternatives could be utilize other than installing DAS nodes on public right-of-ways. We note that there are already approvals for Sprint, Nextel and Cingular to locate antennas on the water tank owned by the Locust Valley Water District at Section 23, Block B, Lot 428. This may be an alternative site which could provide coverage for the community and may be less intrusive than erecting nodes on many poles throughout the Village.

Conclusion

Based on the foregoing, we recommend that the Village Board to continue to adjourn the public hearing for approving a Use Agreement with Crown Castle for a DAS on public right-of-ways, until the issues that we have raised in this letter have been addressed.

Very truly yours,

Thomas McKevitt

cc: Joshua Trauner, Esq.
(via email)