

Note.—This resolution is final but subject to formal revision before publication in the Bulletin. Please notify the General Counsel of any typographical or other formal errors so that corrections may be made before the Bulletin is published.

CORRECTION: This resolution adopted on December 5, 2022, under Calendar No. 2022-8-BZ, is hereby corrected to read as follows:

BOARD OF STANDARDS AND APPEALS

MEETING OF: December 5, 2022
CALENDAR NO.: 2022-8-BZ
PREMISES: 183-01 Horace Harding Expressway, Queens
Block 7067, Lot 11

ACTION OF BOARD — Application granted on condition.

THE VOTE —

Affirmative: Vice-Chair Chanda, Commissioner Ottley-Brown,
Commissioner Sheta, Commissioner Scibetta, and Commissioner
Yoon.....5
Negative:.....0

THE RESOLUTION —

The decision of the Department of Buildings (“DOB”), dated May 19, 2021, acting on Alteration Type 1 Application No. 44064507, reads in pertinent part: “Requesting denial for Z.R. §§ 73-03,73-30, 32-31 and 22-21, previously approved under 348-02-BZ”.

This is an application for a variance, pursuant to Z.R. § 72-21, to permit, within an C1-2 (R3-1) zoning district, the enlargement of an existing cellular monopole in excess of permitted height requirements, contrary to Z.R. § 33-431.

A public hearing was held on this application on September 13, 2022, after due notice by publication in *The City Record*, with a continued hearing on October 18, 2022, and then to decision on December 5, 2022. Community Board 11,

Queens, recommends approval of this application, on condition:

- That the site be secured properly with proper fencing and locks, including security in regards to access from the roof of the neighboring establishment
- That the site be beautified and maintained with planters and be kept free of litter on an ongoing and regular basis.
- That the graffiti on site be removed and monitored for removal on an ongoing and regular basis.

Vice-Chair Chanda and Commissioner Scibetta performed inspections of the Premises and surrounding neighborhood. The Board received six letters of

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objection, citing concerns over the proposed pole enlargement's proximity to residences; the graffiti and litter present at the site; and the lack of landscaping.

I.

The Premises are located at the southeast intersection of Horace Harding Expressway and 183rd Street, within a C1-2 (R3-1) zoning district, in Queens. With approximately 50 feet of frontage along Horace Harding Expressway, 80 feet of depth, and 3,999 square feet of lot area, the Premises are currently occupied by a two-story, mixed-use commercial and residential building with an existing 70-foot monopole structure.

The Board has exercised jurisdiction over the Premises since March 18, 2003, when, under BSA Cal. No. 348-02-BZ, the Board granted a special permit, pursuant to Z.R. §§ 73-03, 73-30, 32-31 and 22-21, to permit, in a C2-2 (R3-2) zoning district, the proposed construction of a 70-foot monopole communications tower, on condition that all work substantially conform to drawings as they apply to the objection filed with the application; the special permit be limited to a term of 10 years, expiring on March 18, 2013; substantial construction be completed in accordance with Z.R. § 73-70; the approval be limited to the relief granted by the Board in response to specifically cited and filed DOB/other jurisdiction objection(s) only; the approved plans be considered approved only for the portions related to the specific relief granted; the Department of Buildings ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code, and any other relevant laws under its jurisdiction irrespective of plan(s) and/or configuration(s) not related to the relief granted.

II.

The applicant proposes to modify the existing 70-foot monopole structure at the Premises by increasing its height 36 feet to an overall height of 106 feet. The applicant notes that the structure would remain in the same location adjacent to the existing two-story, mixed-use commercial and residential building and within an existing fenced compound. The applicant states that the requested enlargement would allow it to continue to provide cellular service to its customers in the area and to permit for the collocation of the monopole structure for multiple cellular companies. The applicant notes that an enlargement of this nature is necessary because the recent development of a six-story hotel immediately adjacent to the subject Premises has blocked and significantly impaired the transmission of its cellular frequencies to the northeast and that the monopole structure at its current height does not permit for collocation with other cellular companies.

The applicant contends and has submitted a DOB Zoning Resolution Determination ("ZRD-1") attesting that as per Z.R. § 32-15(d), the subject monopole is classified as a Use Group ("UG") 6D "other communications equipment" structure and permitted as-of-right in the subject C1-2 commercial overlay district. At issue in this instant application is the applicable height and setback regulation provision under Z.R. § 33-431. The existing 70-foot monopole penetrates the sky exposure plane proscribed by the regulation in Z.R. § 33-431, and any further height increase would also penetrate the sky exposure plane contrary to Z.R. §33-431.

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Moreover, the applicant claims that a 20-foot extension to the monopole is as of right under DOB Bulletin 2021-011, which states:

Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 (“Spectrum Act”), as interpreted by the Federal Communications Commission’s (“FCC”) Acceleration of Broadband Deployment Report & Order, requires a state or local government to approve any Eligible Facilities Request for a modification of an existing tower or base station that does not result in a substantial change to the physical dimensions of such tower or base station, provided Code requirements are satisfied including but not limited to Fire Code.

- i. The Department will accept professional certification applications by Registered Design Professionals (“RDP”) for Eligible Facilities covered by the Act, identified by the RDP as not constituting a substantial change per the Spectrum Act.
- ii. Modifications to an existing lawful antenna equipment structure that constitutes a substantial change will not be accepted through professional certification as an Eligible Facility covered by the Act, and must comply with the requirements of Use Group 6 (UG 6) “communication equipment structures,” and may be erected as-of-right in Commercial and Manufacturing Districts, subject to the zoning bulk regulations, or may be permitted pursuant to a special permit issued by the Board of Standards and Appeals.

Here, the applicant contends that only the additional 16-foot increase, past the 20 feet enlargement that is as of right, is at issue before the Board. In the subject C1-2 (R3-1) zoning district, the Zoning Resolution permits a building of a maximum height of 30 feet or two stories, whichever is less, *see* Z.R. § 33-431. Accordingly, the applicant seeks the relief requested herein.

III.

The Zoning Resolution vests the Board with wide discretion to “vary or modify [its] provision[s] so that the spirit of the law shall be observed, public safety secured and substantial justice done,” Z.R. § 72-21. In *Cellular Tel. Co. v. Rosenberg*, 82 N.Y.2d 364, 371, 624 N.E.2d 990, 993 (1993), the Court noted that “the construction of an antenna tower in a residential district to facilitate the supply of cellular telephone service is a ‘public utility building’ within the meaning of a zoning ordinance. the meaning of a zoning ordinance (see, *Matter of Payne v. Taylor*, 178 A.D.2d 979, 578 N.Y.S.2d 327).” As such, even where a use variance might be required under a municipal code for a cellular tower, a balancing test on the need for the facility to serve the public with any related environmental effects associated with the structure is applicable to a zoning board’s review of the application. Typically, to grant a variance the Board must make five findings pursuant to Z.R. § 72-21 that: (a) there are unique physical conditions associated with the lot; (b) that zoning compliant alternatives do not offer a reasonable return to the lot owner; (c) that the essential character of the neighborhood, development of adjacent property and public welfare will not be adversely impacted by issuance of a variance; (d) that the practical difficulties or unnecessary hardship claimed as a ground for a variance were not created by

the owner; and (e) that the minimum variance necessary is granted to afford relief. The applicant contends that the Z.R. § 72-21(a), (b), (d) and (e) language relating to hardship or practical difficulties for applications by non-utility applicants is not applicable in the instant request.

As a public utility, the standard of “public necessity” as set forth by the New York State Court of Appeals, the public necessity standard requires that:

[A] balance must be maintained between those interests of the locality which can be expressed by Zoning Ordinances and the needs of the community which must be served by the utility ... not only is it within the power of the Respondent [the Town] to grant a Variance but the fact the applicant is a utility calls for the balancing of interest. “...the utility must show that modification is a public necessity in that it is required to render safe and adequate service, and that there are compelling reasons, economic or otherwise, which make it more feasible to modify the plant than to use alternate sources of power such as may be provided by other facilities...[And,] where the intrusion or burden on the community is minimal, the showing required by the utility should be correspondingly reduced.

See Matter of Cellular One v. Rosenberg, 153 Misc.2d 302, 581 N.Y.S.2d 554 (Westchester Co. 1992), affirmed, 188 A.D.2d 648, 591 N.Y.S.2d 526 (2d Dept. 1992), affirmed, 82 N.Y.2d 364, 624 N.E.2d 990, 604 N.Y.S.2d 895 (1993). In short, the “public necessity” standard requires zoning boards to balance the need for wireless infrastructure to serve the public with the community effects of any particular facility when considering a zoning variance.

A.

First, the applicant submits that the significant wireless needs of the subject Queens neighborhood necessitate an extended height of the existing monopole facility. In support of this contention, the applicant submitted a report by a radiofrequency engineer and mapping of the area which shows large areas to the northeast which have experienced a loss of in-building and in-vehicle network services for customers serviced by this particular monopole. Additionally, the report quantifies the in-building and in-vehicle coverage losses to the northeast of the site at 11% to 38% of the geography, depending on the specific FCC frequencies in the network. Additionally, the report concludes that there are over 3,500 residents and approximately 14,000 average daily vehicle trips in these areas blocked by the new adjacent building. Furthermore, the report states that extending the monopole 36 feet in height would allow the facility to overcome the blockage brought on by the adjacent building; remedy the service degradation to the northeast and continue to serve the coverage requirements for the site; and readily accommodate collocation.

Moreover, the applicant represents that it made repeated attempts to try and secure a rooftop lease on the new adjacent hotel site for possible replacement of the site and an as-of-right configuration, and the property owner declined to enter into a lease which makes that site not feasible as an alternative. Additionally, the applicant states that there are no as-of-right alternatives to extension of the monopole to the northeast in the area of degraded service, as the applicant’s research concluded that a 20-foot extension is not feasible to overcome the lost services to the north and that any other alternative would

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necessarily involve a facility at 80 feet to 100 feet in height to the northeast towards Kissena Corridor Park. The applicant states that it evaluated that northeastern area, noting that it is within an R2A zoning district, and buildings consist of lower density residential properties, a school, and a church, none of which are tall enough to accommodate an as-of-right wireless facility at the height required. Additionally, the applicant did not consider construction of a new monopole in these residential areas along Kissena Corridor Park a reasonable alternative, stating that parkland is not available for such purposes and the overwhelming majority of lots in the area are more typical of single and two-family residences.

From the submitted reports and data, the applicant concludes that the proposed monopole extension from 70 feet to 106 feet Above Ground Level (“AGL”) would achieve the following need and corresponding community benefits: 1) restored wireless services to an area covering up to 193 acres of land northeast of the facility and in-building services to an area with over 3,500 residents; 2) deployment of national public safety spectrum to serve first responders in the vicinity of the tower site and its coverage in a mixed-use area of commercial, residential, and transportation corridors; 3) restored wireless services to an area supporting thousands of weekly calls and hundreds of Gigabytes of wireless data usage by residents northeast of the facility; and 4) collocation with new wireless services introduced into this area of Queens. As such, the applicant concludes that there is a public necessity for extension of the existing monopole to 106 feet AGL, which it states, is the minimum necessary to restore services and permit effective collocation at the facility site with the required 10 feet separations of antenna centerlines.

Accordingly, the Board finds the proposed modification is a public necessity that it is required to render safe and adequate service, and that there are compelling reasons, which make it more feasible to modify the existing structure than to use alternate sources of power such as may be provided by other facilities and supplant the findings under the typical criteria set out in Z.R. § 72-21(a), (b), (d), and (e).

B.

The applicant further represents that the requested variance would not alter the essential character of the neighborhood, impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare. Specifically, the applicant points out that the purpose of the sky exposure plane rule is to provide for light and air at street level in higher density zoning districts, (*see* Z. R. § 12-10) however, this existing monopole is located towards the front of a corner lot and adjacent to other commercial uses with frontage on Horace Harding Expressway including hotels, medical facilities, and nearby gas stations in a C1-2 (R3-1) zoning district. The applicant points out that other land uses in the area include the Long Island Expressway to the south, Francis Lewis High School located further to the west, and the predominantly residential community to the north, including the Kissena Corridor Park. The applicant also states that the proposed enlargement represents an approximately 34% increase in the height of the structure itself, a height which is the minimum technically required to restore services associated with signal blocking and the adjacent hotel, and an approximately 15% increase in the height over that permitted as

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of right. The applicant declares that this proposed change in height would only modestly increase visibility of the structure without an overall change in community character or impact in relation to existing conditions and submitted photographs, photosimulations, and existing and proposed plans of the subject site and surrounding streetscape in support of this contention.

Accordingly, the Board finds that the proposed variance will not alter the essential character of the neighborhood or district in which the Premises are located; will not substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare.

IV.

Over the course of hearings and in response to community concerns, the Board raised concerns regarding the site conditions and requested the applicant add additional site screening for aesthetic and safety purposes at the facility site's frontage along Horace Harding expressway and the adjacent sidewalk area; evaluate the monopole and antenna platform screening for the upper reaches of the monopole; and update the submitted photosimulations to include all collocation antenna platforms.

In response to the concerns about site conditions, the applicant provided a written site maintenance protocol along with additional information regarding site security, committing to the following:

- I. Enhanced site maintenance, monitoring and inspections by Crown as the monopole/compound owner:
 - a. Crown personnel to conduct site visits monthly:
 - i. Clear any debris from the site compound and area adjacent to the sidewalk
 - ii. Clear/clean/remove any graffiti from the site compound, fencing and related cellular improvements
 - iii. Identify any conditions that require additional site maintenance or repair and coordinate completion by Crown contractors
 - iv. Carrier tenants to continue to monitor site equipment and alarms remotely 24/7 through their respective National Operations Centers. Carrier Site IDs and NOC #s are:
 - 1. AT&T Site # NYNYNY0081
 - 2. T-Mobile Site # BQ04950A
 - 3. Dish Site # NYNYC01322A
 - b. Crown to continue to perform annual ground based inspections of the site improvements and facilities
- II. Streetscape improvements at facility frontage on Horace Harding Expressway [The Board notes that the BSA-approved plans titled "ANT 112.00" and "ANT 113.00" illustrate these proposed improvements.]
 - a. Attached plan incorporates streetscape improvements to address site security and aesthetics to be installed and maintained as a BSA condition
 - b. A decorative wrought iron fence shall be installed with hedges along with a new concrete apron adjacent to the sidewalk

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- c. Plantings and other improvements will be installed that are scaled and sited to deter trespassing, screen the facility and improve the area adjacent to the sidewalk
- d. Contact information for community members requesting a maintenance site visit:
 - i. If warranted, a member of the community may call to log a ticket with the Crown Castle National Operations Center at 800-788-7011, referencing site ID#843090, and stating any conditions such as vandalism or excessive litter in the compound area.

Additionally, the applicant submitted revised plans which demonstrated proposed improvements that include security fencing with hedge slats, landscaping, decorative fencing, proposed collocation, and sidewalk improvements that address site security and the streetscape as well as updated photographs which show a site free of debris and graffiti.

Lastly, the applicant submitted a report by licensed professional engineers evaluating: 1) adding faux evergreen or other antenna screening materials to the extended monopole and antenna platforms; or 2) construction of a new concealment superstructure. The report concluded that the tower site compound and existing monopole cannot be feasibly modified to support the additional loading associated with evergreen or other forms of antenna screening or replaced altogether.

V.

The project is classified as an Unlisted action pursuant to Section 617.2 of 6 NYCRR. The Board has conducted an environmental review of the proposed action and has documented relevant information about the project in the Final EAS CEQR No. 22BSA020Q, dated December 5, 2022. The EAS documents that the project as proposed would not have significant adverse impacts on land use, zoning, and public policy; socioeconomic conditions; community facilities and services; open space; shadows; historic resources; urban design and visual resources; neighborhood character; natural resources; waterfront revitalization program; infrastructure; hazardous materials; solid waste and sanitation services; energy; traffic and parking; transit and pedestrians; air quality; noise; or public health.

No other significant effects upon the environment that would require an Environmental Impact Statement are foreseeable. Based on the foregoing, the Board has determined that the proposed action will not have a significant adverse impact on the environment.

VI.

Based on the foregoing, the Board finds that the evidence in the record supports the findings required to be made under Z.R. § 72-21 and that the applicant has substantiated a basis to warrant exercise of discretion.

Therefore, it is Resolved, that the Board of Standards and Appeals does hereby *issue* a Negative Declaration prepared in accordance with Article 8 of the New York State Environmental Conservation Law and 6 NYCRR Part 617, the

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Rules of Procedure for City Environmental Quality Review and Executive Order No. 91 of 1997, as amended and makes each and every one of the required findings under Z.R. § 72-21 to *permit*, the enlargement of an existing cellular monopole in excess of height requirements, contrary to Z.R § 33-431, *on condition* that all work and site conditions shall conform to drawings filed with this application marked “Board Approved: December 5, 2022” — Twenty (20) sheets; and *on further condition*:

THAT the bulk parameters of the building shall be as follows: a UG 6D monopole structure with a maximum height of 106 feet;

THAT the site shall be secured and maintained free of debris and graffiti;

THAT landscaping shall be maintained as per BSA-approved plans;

THAT a certificate of occupancy, also indicating this approval and calendar number (“BSA Cal. No. 2022-8-BZ”), shall be obtained within four years, by December 5, 2026;

THAT this approval is limited to the relief granted by the Board in response to objections cited and filed by the Department of Buildings;

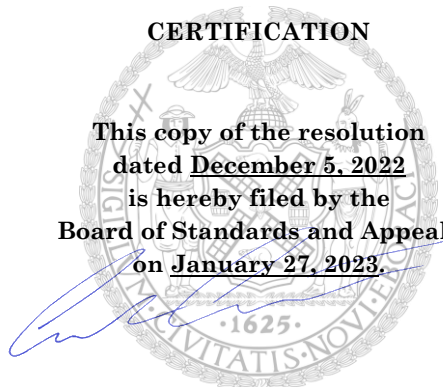
THAT the approved plans shall be considered approved only for the portions related to the specific relief granted; and

THAT the Department of Buildings must ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code and any other relevant laws under its jurisdiction irrespective of plans or configurations not related to the relief granted.

Adopted by the Board of Standards and Appeals, December 5, 2022.

CERTIFICATION

**This copy of the resolution
dated December 5, 2022
is hereby filed by the
Board of Standards and Appeals
on January 27, 2023.**



**Carlo Costanza
Executive Director**