

Kensington Planning Board and Zoning Board Joint Meeting
Minutes
February 15, 2023

Place: Kensington Town Hall 95 Amesbury Road

Planning Board Members Present: Vanessa Rozier- Chair, Marty Silvia, Bob Solomon- Ex-officio, Glenn Greenwood- Town Planner; Mary Smith- Vice Chair, Justin McLane.

Zoning Board Members Present: Michael Schwotzer, Chair, Bill Ford, Joan Skewes, Therese Wallaga, Mark Craig-enter the meeting at 6:55pm

Public Attendance- 23

Opening:

Mrs. Rozier called meeting to order at 6:31 p.m. and explained the process of the joint meeting.

General Presentation:

Applicant M. Dinicola for permit to approve Vertex towers at 70 Moulton Ridge Rd. Map 10 Lot 1 Francis Parisi representing Vertex gave an in-depth presentation on the project. See addendum A.

V. Rozier- Opened up the meeting to the Board of Adjustment and noted there would be an option for public input during the public hearings.

M. Schwotzer- Introduced board; B. Ford, J. Skewes, T. Wallaga, Alternate 4 permanent members and an alternate.

MOTION:

M. Schwotzer made a motion to approve T. Wallaga to sit as a full board member to replace J. Bunnell for the evening. Second by J. Skewes and all in favor.

Vertex Towers representing Marybeth Dinicola of 75 Moulton Ridge Road. The applicant is requesting that the ZBA grant a variance to Article V Section 5.1.5.2 to allow for construction of a Telecommunications Facility in the Residential/Agricultural zone.

MOTION

Mr. Schwotzer made a motion to open public hearing.

M. Schwotzer brought the application packet provided by the applicant to the attention of the zoning board members, and explained to the public that they would review the variance criteria to see if the proposed use could be allowed in the residential/agricultural district.

The board started with the variance criteria.

- 1) The application would not be contrary to the public interest, due to the increased cell coverage in the area.
- 2) Would the spirit of the ordinance be observed.
 - a) J. Skewes questioned if the tower could be viewed from abutters land.
 - b) The representative was unsure where it will be visible from due to the topography and tree height, as well as the foliage of the trees. The board accepted questions from the public.
 - c) Lynne Monroe- 5 Hobbs Rd.- walked the site in the morning. She showed the representative a picture of the tree line and they stated that the tower would not be above that. (The picture was not shown to the board)
 - d) Mary Rezendes Brown-66 Moulton Ridge Rd- she is concerned about the environment and that land is in conservation surrounding the project location. She would like to work with the company so that less of the tower is seen from her property.
 - e) M. Schwotzer asked if the land would be leased, and it was explained that it is and that the lease is a private agreement and not viewable by the public.
 - f) c. Karen Martell- North Haverhill Road- she is an abutter and asked for a balloon test so that everyone can see how high the tower will be.
- 3) The board continued the checklist and agreed that the spirit of the ordinance would be observed. - no objections from the board members.
- 4) Substantial Justice- The proposed location is designed to mitigate the visual impact of abutters. So substantial justice would be done if approved.
 - a) J. Skewes stated that they are trying to minimize the impact to the abutters. B. Ford stated that they are trying to keep the tower as low as possible.
- 5) Value of surrounding properties - no evidence from the public to support that it would diminish the surrounding properties values.
 - a) Not granting the variance would result in Unnecessary Hardship because-
 - b) This is a restrictive ordinance and due to the lack of other locations in the town, this location was selected. The representative explained that they chose this location for the need of service in the area.
 - i) Sarah Horn-268 North Haverhill Road- questions related to service and other issues that would be something that the planning board will deal with.
 - (1) She asked if the commercial zone had been exhausted for areas to put the tower. M. Schwotzer explained that the commercial zone is very limited in Kensington. She asked about the coverage and if the tower that has been approved for Rosencrantz could extend the coverage so that it will work with Exeter instead of putting in another tower. F. Parisi explained that you cannot turn up the coverage on one tower because it is regulated. She stated that the regulations are there for a reason. She was concerned that this would set a precedence but it was explained that each application is taken individually.
 - ii) Patricia DeCaprio-31 Osgood Road- Brought the board some information on the safety issues surrounding towers. The board looked through the information provided. J. Skewes stated that all phone users would be exposed

- 91 according to the information provided. M. Schwotzer stated that the board
92 will share with the planning board. No comments.
- 93 iii) Ami Delgado- 5 Hoosac Road-explained that she believes that the board
94 should take into consideration the health issues and environmental impact.
- 95 iv) K. Martel- 285 North Haverhill Road- believes that there are other spots that
96 the tower can be constructed.
- 97 v) A. Delgado- 5 Hoosac Road- she believes that Moulton Ridge already has
98 good service. M. Schwotzer stated that the question is should this be
99 constructed in a residential zone.
- 100 vi) Peter Sawyer- 50 Moulton Ridge Road-asked the size of the lot, and it was
101 explained that it was a approximately a 60x60 area.
- 102 vii) Peter Merrill- 275 North Haverhill Road- asked if the size of the leased area is
103 a small section or a large one does that matter with this application? M.
104 Schwotzer stated that the applicant has presented specific aspects of the
105 application and they are meeting the criteria.
- 106 viii) M. Craig asked about generators and the space, they are not planning to
107 use a generator.
- 108 ix) L. Monroe stated that the visual analysis will be part of the later information
109 to be supplied by the applicant.
- 110 x) A. Smith- 63 Moulton Ridge Road- was concerned with being able to sell her
111 property with a tower located on that lot.
- 112 xi) K. Martel- stated that she had an appraisal done because of another tower in
113 East Kingston that was put in and her value would go down with the tower in
114 the area. M. Schwotzer explained that for that criteria to fail there needs to be
115 specific evidence provided to the board on this particular application and the
116 reduction of value due to the tower.
- 117 xii) S. Horn- indicated that due to the fact that they only had 3 weeks to know
118 about this application would the board allow them to do their research about
119 values. J. Skewes stated that it is an issue that has been raised and the board
120 should consider it and continued that the board would need the information to
121 be from an appraiser. M. Schwotzer explained that the information would
122 need to be back to the board before the next planning board meeting in March.
123
- 124 J. Skewes stated that the public is asking for the opportunity to provide information and
125 they need to consider allowing that. B. Ford would like to determine the criteria that they
126 will be looking for. The board discussed that a qualified appraiser needs to review the
127 information and give written comments to the board. J. McLane, from the planning
128 board, asked if the other side of the situation is being evaluated and how might this
129 increase the values of the surrounding homes. How does the board determine what the
130 matrix is for how this will affect the community negatively or positively. (ex. If five
131 people are negatively affected would that negate the 100 people that are positively
132 affected.) M. Schwotzer explained that the applicant will probably provide the board
133 with the positives of the application as well.
- 134 a) P. DeCaprio- wanted to be sure that the board looked into the health effects.
- 135 b) P. Merrill- stated that he is in a deadzone but he has cable and the cell phone
136 works off of his WIFI.

c) Paul Bonani- 75 Moulton Ridge Road- he agrees that there is a benefit that is not being discussed. He would caution the board about reviewing health data that has not been researched and to make sure that they know the source of the data. The WIFI is great but the cellular is not and he works from home and that would give him another avenue for his teaching from home.

F. Parisi stated that the Fire Chief has given them a letter stating that the cellular service in that area is a safety concern. He cautioned the board before reviewing health issues that the board may want to consult their legal counsel. He stated that the law is very clear that they cannot make their decision on health-related issues.

M. Schwotzer asked if the board wanted to continue the hearing until March 15, 2023, at 6:30pm. J. Skewes stated it would be a qualified appraiser to evaluate the application and specific properties to see if the values would be diminished.

MOTION:

B. Ford made a motion to continue the public hearing for Vertex until March 15, 2023, at 6:30pm, J. Skewes seconded, all in favor.

The board asked the public to turn any real estate values to Kathleen before the meeting. B. Ford asked if there was anything else that this board would be dealing with at the next meeting. The board agreed that they are not dealing with anything health related, they are only dealing with the values. All other criteria has been discussed.

M. Schwotzer reiterated that the Zoning Board of Adjustment hearing will be continued until March 15, 2023, at 6:30pm.

The Planning Board Chair V. Rozier stated that since the zoning board has not made a motion, they will not be hearing the application tonight. F. Parisi stated that his application is complete and would like the board to hear his presentation tonight.

G. Greenwood stated that they cannot hear an application that is not in compliance with the zoning ordinance. The variance is needed before the planning board can state that the application is complete.

V. Rozier explained that the board has decided that the board will not be holding the hearing tonight.

The applicant stated that he would like to do the balloon test and the date and times below would be what works best for the representative and the planning board.

Saturday March 4, 2023 or Sunday March 5th, 2023 from 9:00am to 12:00pm.

The second weekend if the first two dates do not work will be on

Saturday March 11, 2023 or Sunday March 12, 2023 from 9:00am to 12:00pm.

MOTION:

B. Ford made a motion to adjourn at 8:29pm, seconded by J. Skewes, all in favor.

V. Rozier explained that they would continue with the remaining planning board business.

MOTION:

J. McLane made a motion to continue the application for Vertex Tower LLC to March 15, 2023 at 6:30pm, seconded by M. Smith, all in favor.

V. Rozier explained that their next workshop is March 1, 2023 and wanted to know what the board wanted to do about the workshop. The board decided to cancel the workshop on the 1st of March.

Next regular meeting will be March 15, 2023. J. McLane will miss that meeting. Kathleen and V. Rozier will make sure of a quorum before the meeting.

No updates on prior business or the Master Plan.

Minutes from January 18, 2023, were reviewed.

MOTION:

J. McLane motioned to approve the meeting minutes from January 18, 2023, seconded by M. Smith, all in favor.

Kathleen informed the board that the zoning board just approved an application for Stacey Tree Service LLC on 149 South Road, she just wanted to let them know about the upcoming application. She will post the Unitil notice of the public hearing in the paper and send out post cards to the residents on the roads. There will also be a lot merger for Map 4 Lot 7-1 and Map 4 Lot 5 both with the same ownership at the March meeting.

The board decided to start the meeting early at 6:00pm on March 15, 2023, in order to incorporate the two applications waiting to be heard by the board. The Vertex application will be heard at 6:30pm.

M. Smith asked if there were any updates on the 152 Drinkwater Road project and there was not anything outstanding on that project for the board to discuss.

V. Rozier motioned to adjourn the meeting at 8:43pm, seconded by M. Silvia, all in favor.

Respectfully Submitted,

Kathleen T Felch, Town Administrator



**APPLICATION FOR VARIANCE
(Zoning Board of Adjustment)
AND
APPLICATION SITE PLAN REVIEW
and CONDITIONAL USE PERMIT
(Planning Board)
FOR
TELECOMMUNICATIONS FACILITY**

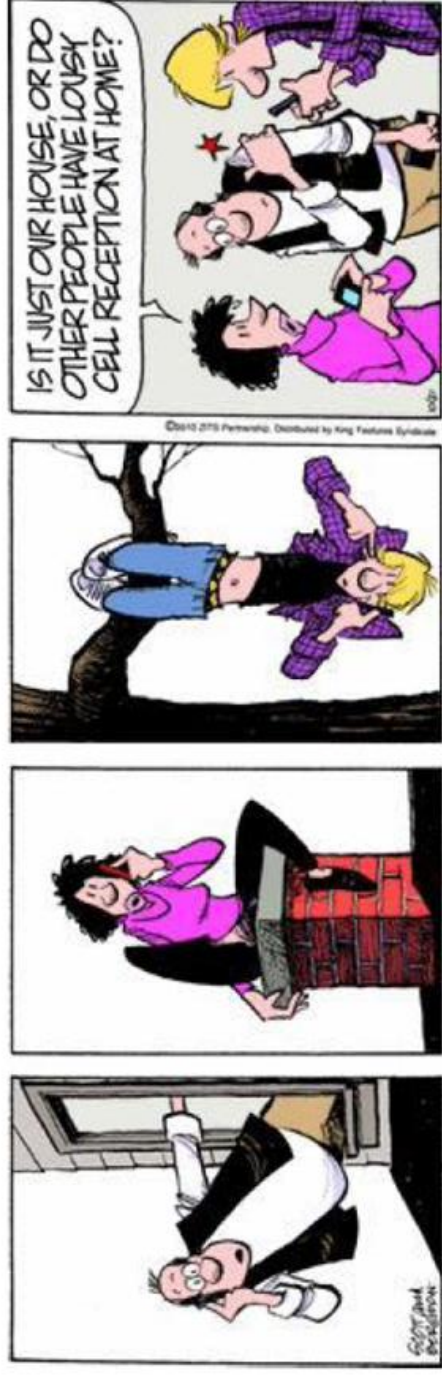
SUPPLEMENT No. 2

Applicant: Vertex Towers LLC
Site Id: VT-NH-0298A
Property Address: 70 Moulton Ridge Road, Kensington, NH 03833
Tax Assessors: Map 10 Lot 1
Property Owner: Maribeth Dinicola
Date: February 21, 2023

1. Powerpoint Presentation

Respectfully submitted,

Vertex Towers, LLC
c/o Francis D. Parisi
225 Dyer Street
Providence, RI 02903
(401) 447-8500 cell
fparisi@plapc.com



TOWN OF KENSINGTON
PLANNING BOARD / ZONING BOARD OF ADJUSTMENT
FEBRUARY 15, 2023

FRANCIS D. PARISI
FPARISI@PLAPC.COM

MEETING PURPOSE

2

APPLICATION FOR VARIANCE (Zoning Board of Adjustment)

AND

APPLICATION SITE PLAN REVIEW and CONDITIONAL USE PERMIT (Planning Board) FOR

TELECOMMUNICATIONS FACILITY

Applicant:

Vertex Towers LLC

Property Address:

70 Moulton Ridge Road, Kensington, NH 03833

Tax Assessors:

Map 10 Lot 1

Property Owner:

Maribeth Dinicola

PROCEDURAL HISTORY

Planning Board (Site Plan Review and Conditional Use Permit)

05/25/22 Application filed

02/15/23 Public Hearing

Zoning Board of Adjustment (Variance)

05/25/22 Application filed

02/15/23 Public Hearing

Vertex Towers is a telecommunications infrastructure developer. We develop, manage and own telecommunications facilities in strategic locations across the country. The Vertex team has been working in the industry for almost 25 years and has the experience and expertise to navigate the challenges of the most complex markets.

Vertex's on the ground experience and expertise allows us to identify the opportunities and locations where there is a need for new telecommunications facilities. Identifying where a new facility is needed is only half of the equation. Strict zoning ordinances and environmental regulations require that new telecommunications facilities take into consideration not only the needs of the wireless provider but also potential permitting obstacles and construction costs. The Vertex team has the experience necessary to identify, permit and construct the best site for the property owner, the wireless provider and the municipality.

WHY WE ARE HERE

4

The Property is a large, approximately 75 acre parcel located in the Residential/Agricultural Zoning District. The Applicant has submitted the accompanying Site Plans and additional material to the Town of Kensington PLANNING BOARD for SITE PLAN APPROVAL and a CONDITIONAL USE PERMIT, and respectfully requests that the PLANNING BOARD APPROVE the SITE PLANS as proposed and GRANT a CONDITIONAL USE PERMIT.

In addition, although the proposed Facility has been designed in accordance with the Town's Zoning Ordinance as much as possible, the proposed Facility will be in the Residential Agricultural Zoning District. Section 5.1.5.2 provides that in R/A Zoning District, new tower construction is not a permitted use. Given the terrain and topography of the Property, the lack of existing wireless telecommunications infrastructure as well as the technical requirements and limitations of wireless carriers and telecommunications tower construction, the location of the Facility represents the only viable alternative to achieve the coverage objectives and satisfy all of the other requirements of the Ordinance, including co-location. Because the Facility will be located in the R/A Zoning District, the Applicant respectfully requests a VARIANCE from the ZONING BOARD OF ADJUSTMENT.

WAIVERS REQUESTED

5

In addition, although the proposed Facility has been designed in accordance with the Town's Zoning Ordinance as much as possible, the Applicant respectfully requests that the PLANNING BOARD grant WAIVERS pursuant to Section 5.1.9 as appropriate to permit construction and operation of the Facility as proposed:

Section 5.1.8.C.2 requires that the applicant submit written proof that an evaluation has taken place, as well as the results of such evaluation, satisfying the requirements of the National Environmental Policy Act (NEPA). Upon approval of Site Plans and issuance of the Conditional Use Permit, the Applicant agrees to provide the Town with a copy of a final NEPA checklist concurrent with is application for a building permit. The Applicant does not anticipate that an environmental impact statement and FCC approval will be required. Although the Applicant agrees to provide the Town with its NEPA checklist prior to construction, because a NEPA review is very specific with respect to site, location, design, height and many other criteria, the Applicant believes that conducting a NEPA analysis prior on the proposed Facility prior to Planning Board approval is premature and constitutes an hardship, and respectfully requests that the Planning Board grant a WAIVER of this Application requirement pursuant to Section 5.1.9.

COMMENTS OF TOWN ENGINEER

6

BEALS · ASSOCIATES

PLLC

Waivers:

1. Section 5.1.8.C.2 – Conditional Use Permits: We concur with the NEPA review at the time of application filing as premature due to the propensity that design features could change through the Planning Board review/hearing process. The proposal to provide the Board with the review/checklist prior to construction seems reasonable.
2. Section 5.1.9.A.3.c. - Waivers: We take no exception to the waivers from certain application requirements as detailed in the application narrative.

Application Materials & Plans:

1. The applicant has submitted a very thorough and comprehensive application package & upon review, we have no issues with the application materials nor plan set specific to engineering matters. If the Zoning Board of Adjustment approves the requested variance, we would support Planning Board approval of the proposed site plan application.

(original) Application Package

7

- 1. Application for Variance (Zoning Board of Adjustment)**
- 2. Application for Site Plan Review and Conditional Use Permit**
- 3. Filing Fees**
- 4. Abutters List**
- 5. Letter of Authorization**
- 6. Project Narrative**
- 7. TOWAIR (FAA Analysis re No Hazard to Air Navigation)**
- 8. Report of Site Acquisition Specialist**
- 9. Report of RF Engineer and RF Coverage Maps**
- 10. MPE Report**
- 11. Structural Assessment from Civil Engineer**
- 12. Removal Cost Estimate and draft Removal Bond**
- 13. Site Plans**

WHY DO WE NEED ANOTHER CELL SITE?

8

Wireless communications is not just a public convenience; it is a public safety necessity.

- There are now more wireless subscriptions than landline telephone subscriptions in the United States.
- More than 50% of American homes are “wireless only”
- More than 80% of 911 calls are made from mobile phones
- More and more workers are “telecommuting”

Kensington has a verifiable “gap” in wireless coverage that limits its access to rapidly evolving wireless services.

“[W]ithout a cell site located at or very near the proposed site, this area of Kensington would not meet the typical coverage requirements for multiple wireless carriers, resulting in a substantial gap in wireless coverage.”

RF Report of Radio Frequency Engineer

SPOTTY CELL SERVICE “A PUBLIC HAZARD”

9

The Taconia Daily Sun

January 8, 2019

“Poor quality or non-existent telecommunications services are **jeopardizing the health and safety** of our residents and are **constraining economic development** in New Hampshire’s Lakes Region,” stated the letter signed by Executive Director Jeffrey Hayes of the Lakes Region Planning Commission and numerous municipal officials.

“Just as telecommunications providers were required to supply landline service decades ago, wireless service has become the ‘life line’ replacement for wired services. The requirements of outdated technologies must be carried forward to the more modern replacement technologies. Failing to do so has **serious and well-established safety and economic concerns.**”

“It’s a big-time problem for our community.”

WHY HERE?

10


Given the location (and lack) of existing wireless infrastructure, the topography and terrain, the lack of existing tall structures in and around Kensington, zoning and other land use restrictions (i.e. wetlands and conservation land), **“the proposed [facility] to be located at 70 Moulton Ridge Road is the least intrusive and only available and viable alternative to provide adequate coverage to this significant gap in coverage.”**

Report of Site Acquisition Specialist

Town of Kensington, NH

Zoning Map

Adopted March, 2013

 Commercial District (Adopted 2013)

 Residential and Agricultural Zone

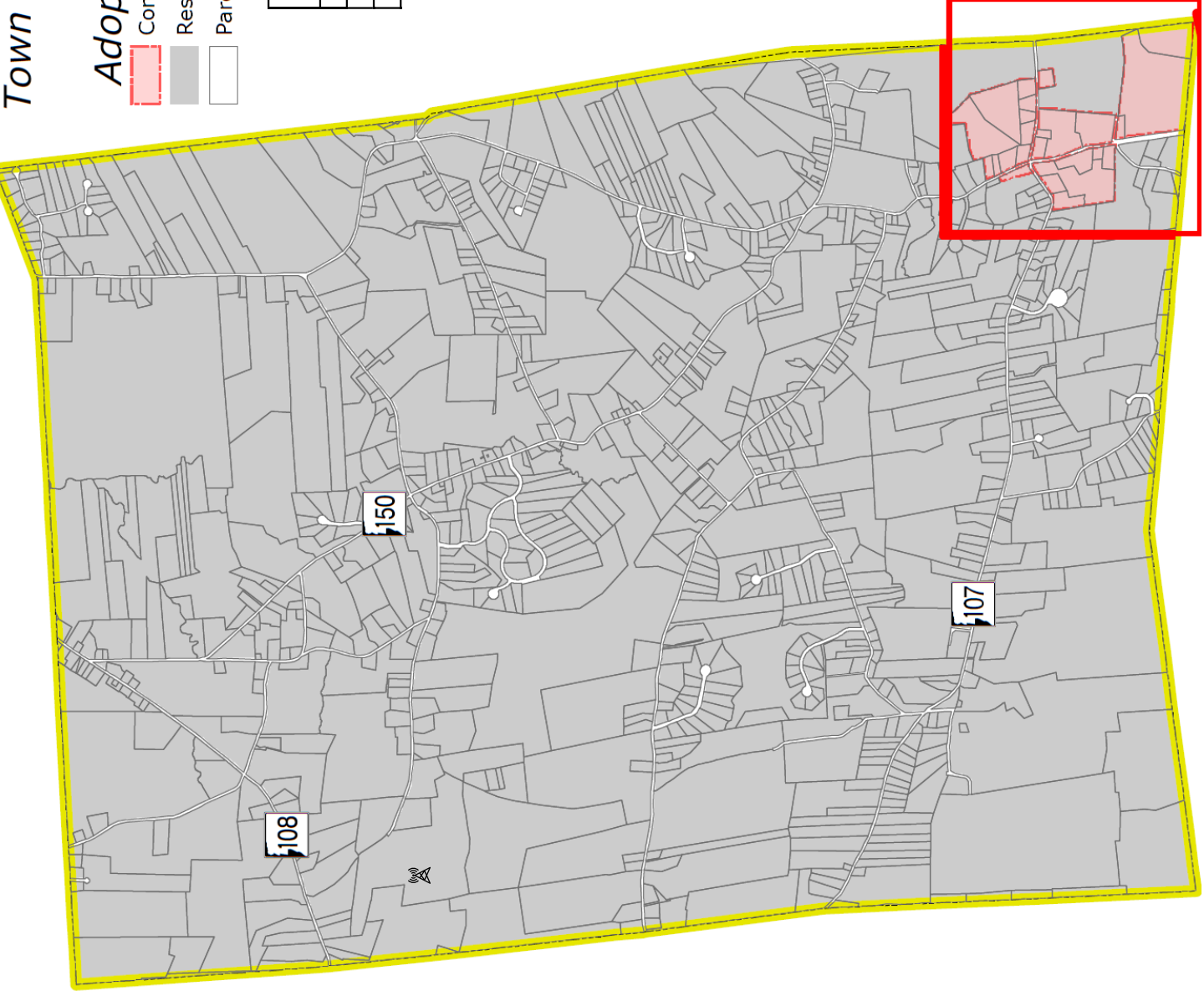
 Parcel Boundaries (2007)

	New Tower Construction ¹
Commercial District	PCU
Wetland District	X
Residential/Agricultural District	X

P = Permitted Use without Conditional Use Permit

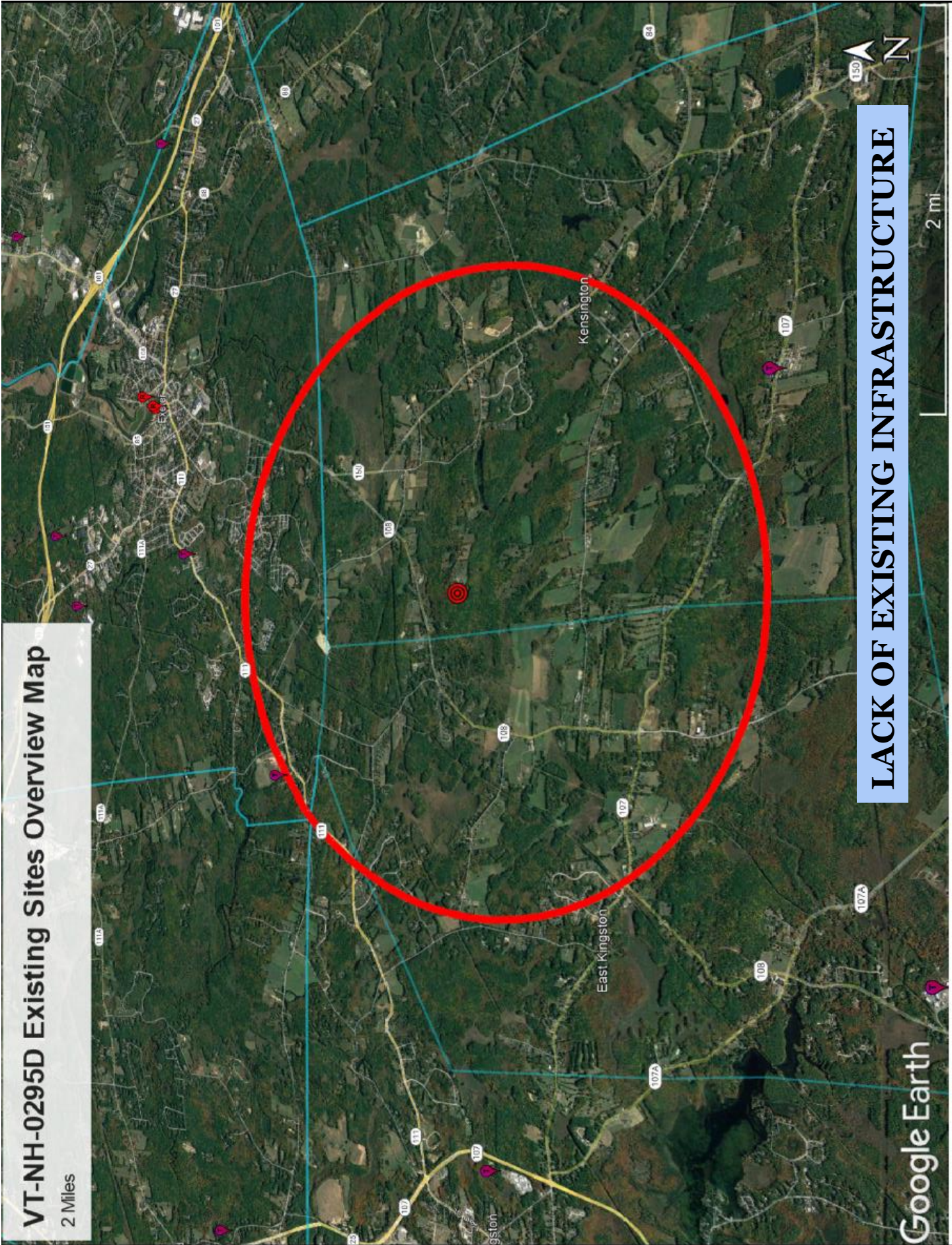
PCU = Permitted Use with Conditional Use Permit

X = Prohibited



VT-NH-0295D Existing Sites Overview Map

2 Miles

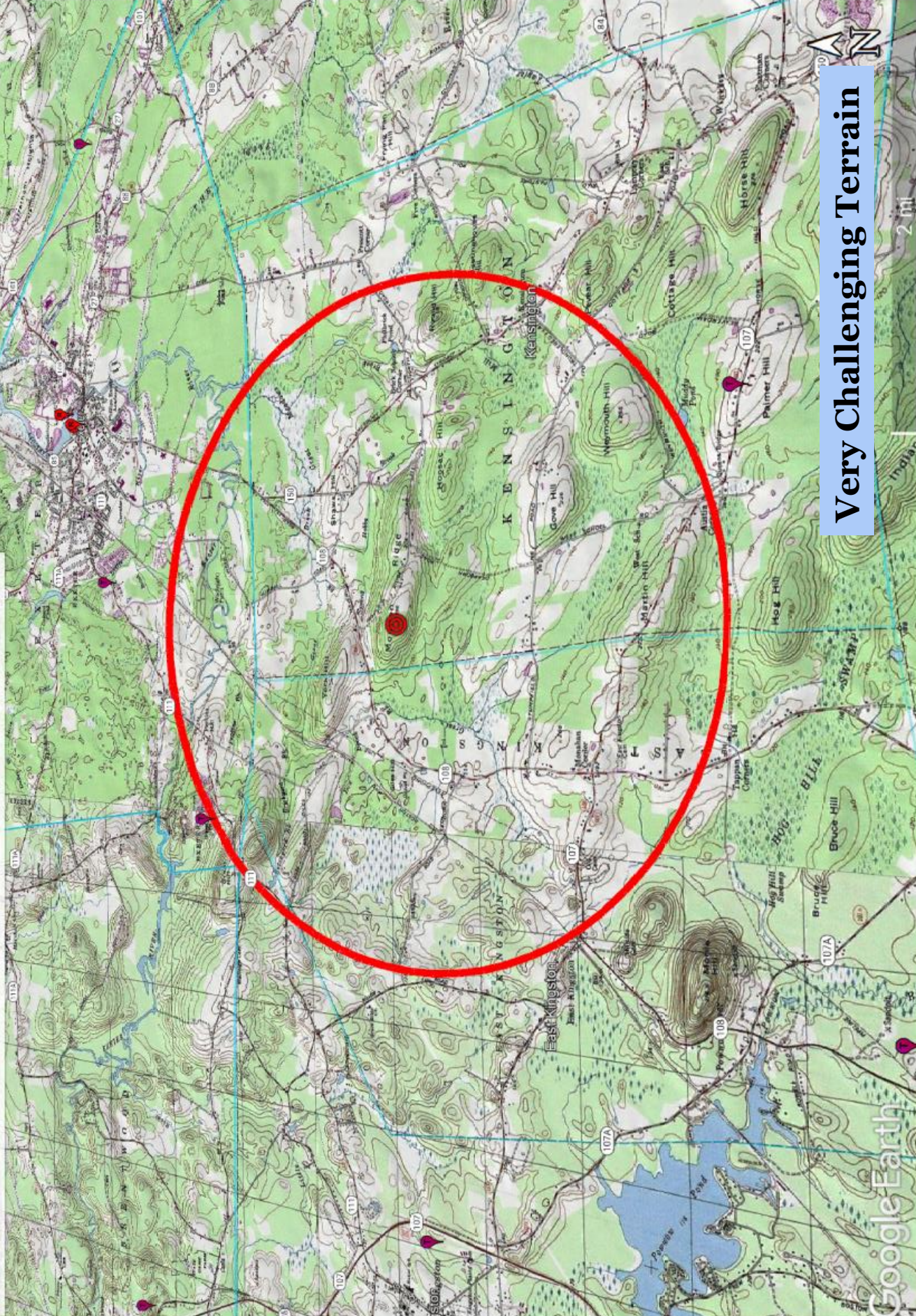


LACK OF EXISTING INFRASTRUCTURE

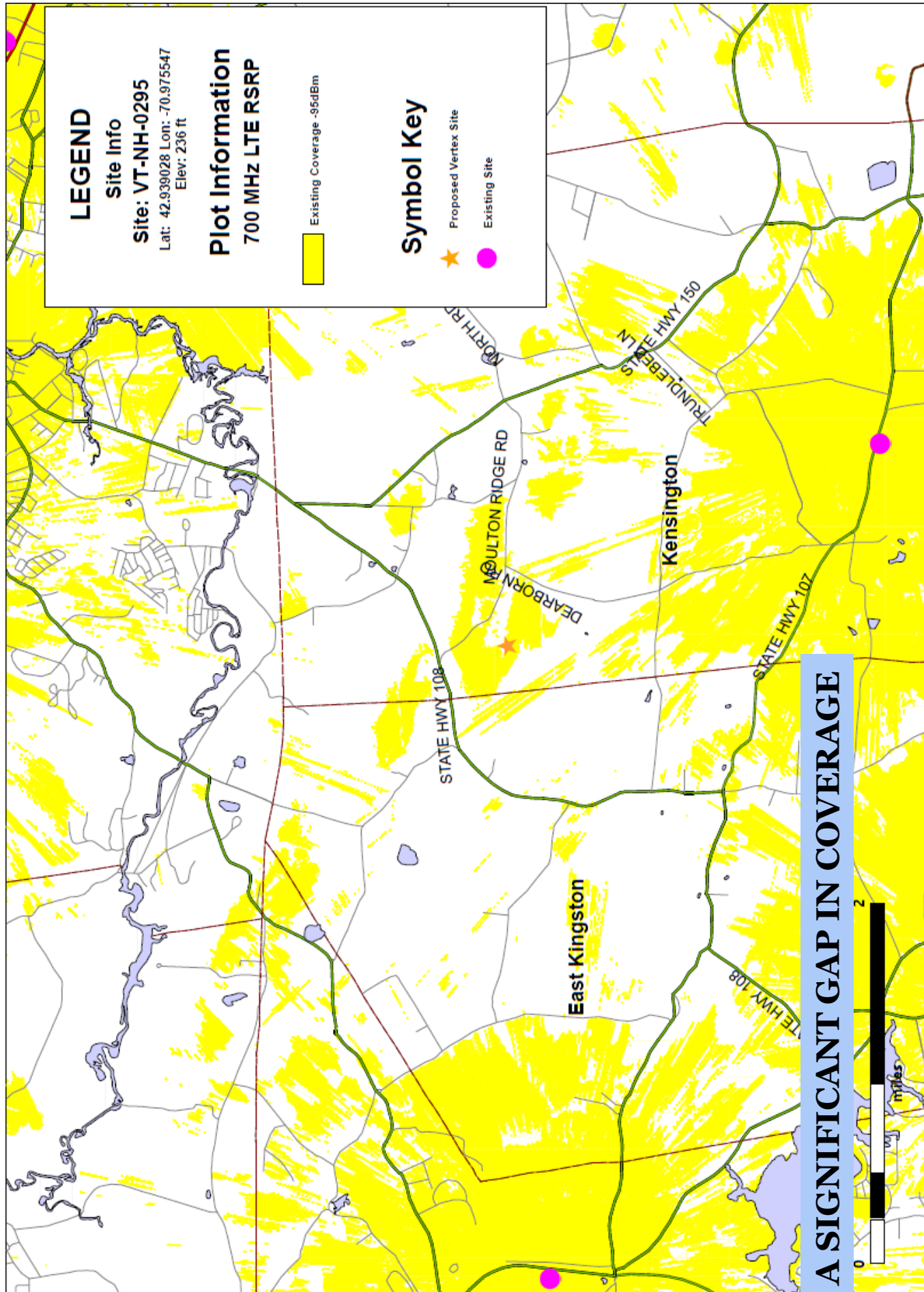
Google Earth

VT-NH-0295D Existing Sites Overview Map - Topo

2 Miles



Very Challenging Terrain



A SIGNIFICANT GAP IN COVERAGE

70 MOULTON RIDGE ROAD

15

70 Moulton Ridge Road Parcel Value Subscription is active.

70 Moulton Ridge Road

Legend

100

Bucovina Quispes

Kentledge Farm

Moulton Ridge

Moulton Ridge Town Forest

Moulton Ridge Rd

Moulton Ridge Rd

Hilliard Rd

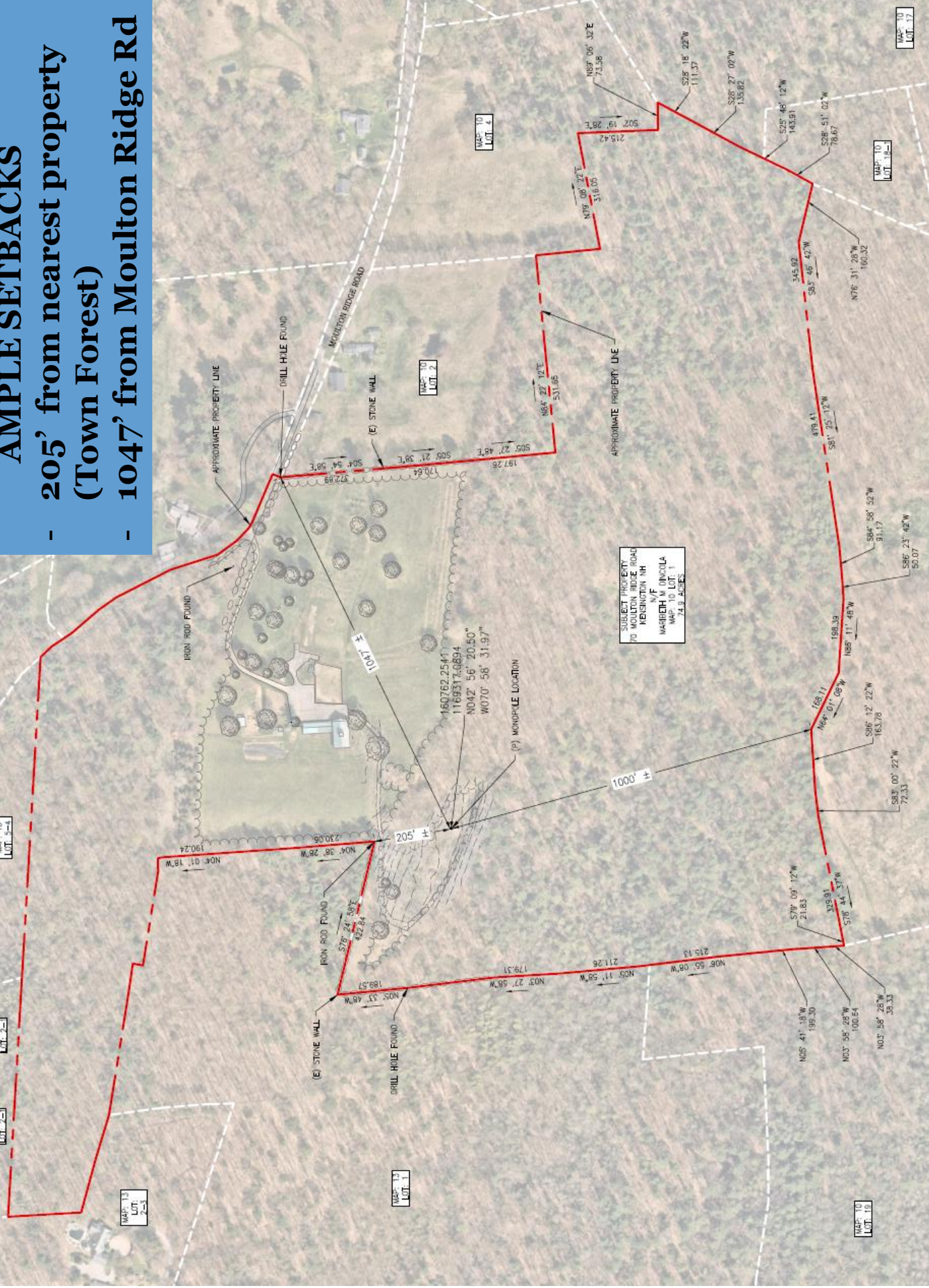
Leano

Hobbs Brook

N

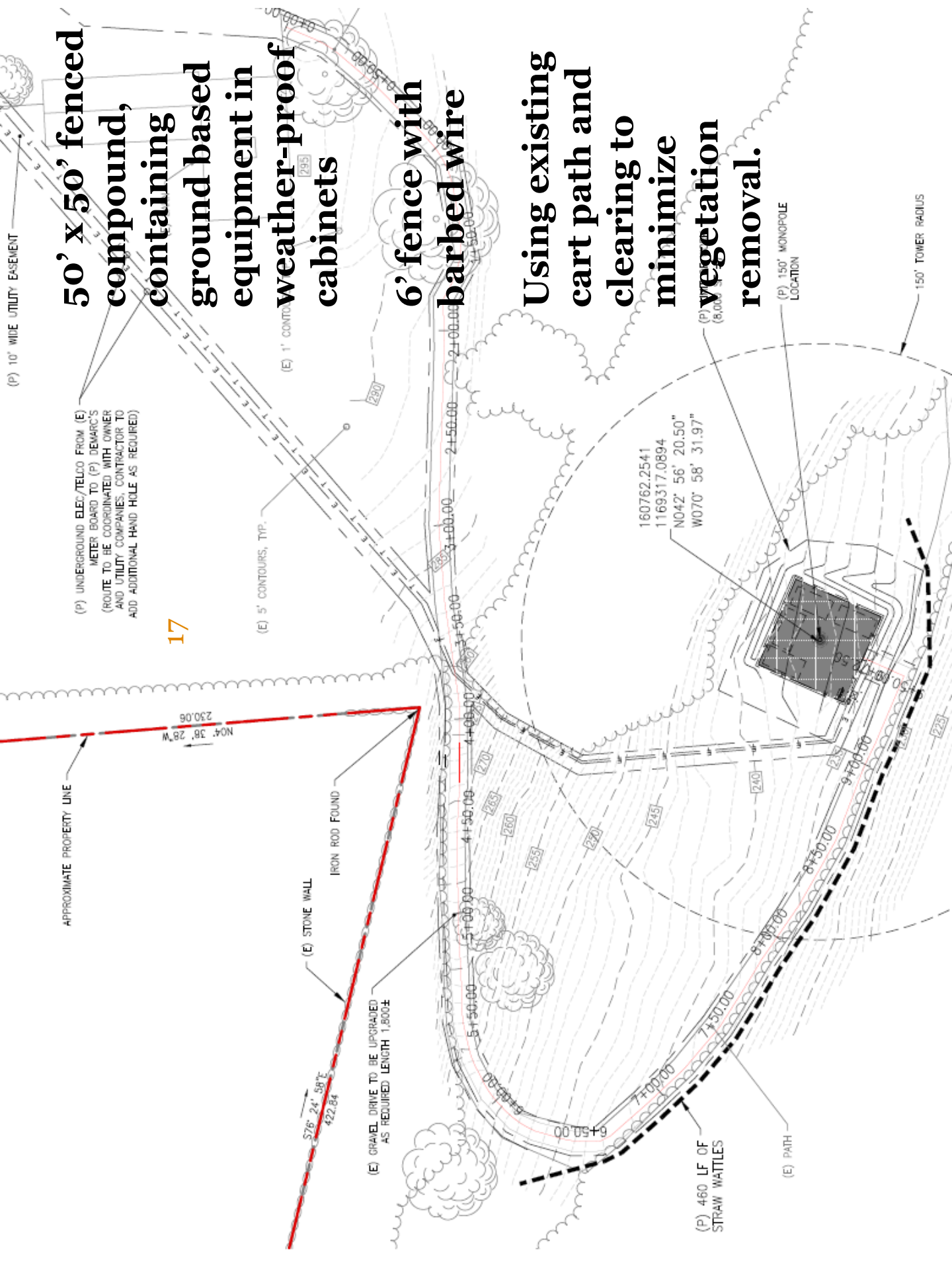
1000 ft

- 1047' from Moulton Ridge Rd



17

**Using existing
cart path and
clearing to
minimize
vegetation
removal.**



Tower Type: Monopole Height: 150'

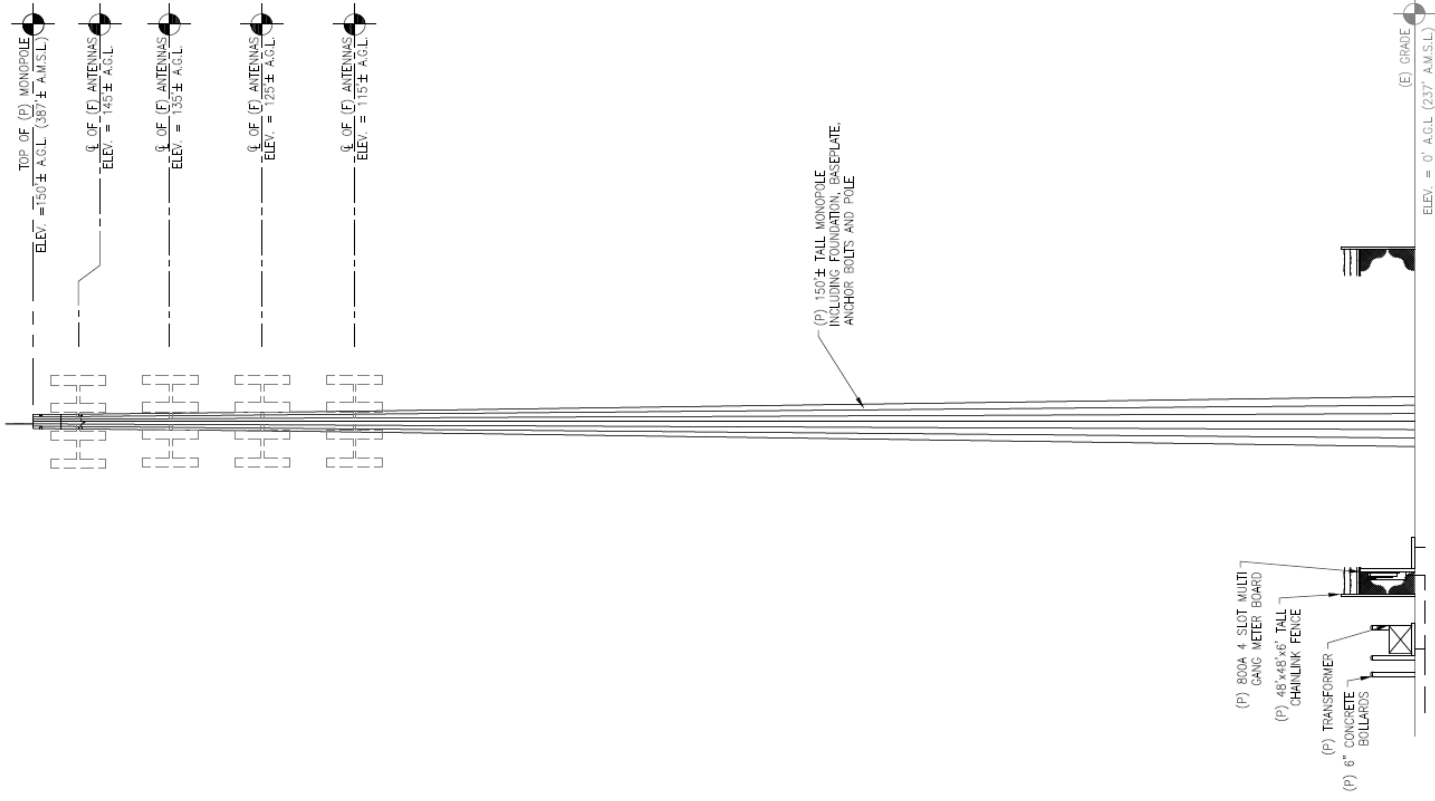
Designed to support multiple wireless telecommunications carriers, including

- T-Mobile
- AT&T / FirstNET
- Verizon Wireless
- DISH Networks

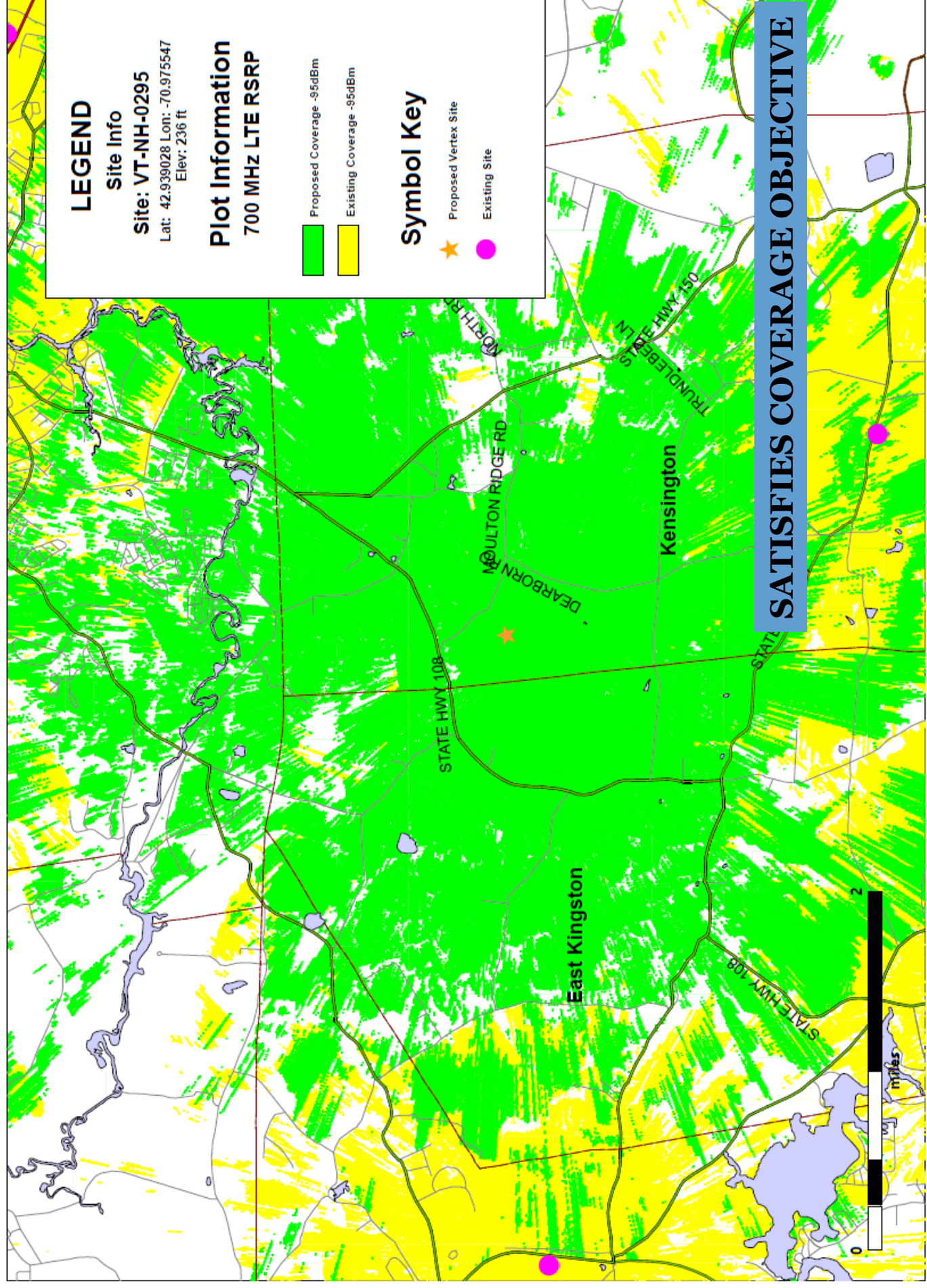
Construction & Design Standards:
Telecommunications Industry Assn. (TIA)
American Society of Safety Eng's (ASSE)
American National Standards Ins. (ANSI)

Design Criteria:

Will satisfy county specific wind and ice loading standards



RF Existing Coverage With VT-NH-0295@145'



LEGEND

Site Info

Site: VT-NH-0295
Lat: 42.939028 Lon: -70.975547
Elev: 236 ft

Plot Information

700 MHz LTE RSRP

- Proposed Coverage -95dBm
- Existing Coverage -95dBm

Symbol Key

- Proposed Vertex Site
- Existing Site

SATISFIES COVERAGE OBJECTIVE

EXCEEDS ALL SAFETY REQUIREMENTS UNDER FCC REGULATIONS

20

The maximum permissible RF exposure limits adopted by the FCC for both general population/uncontrolled exposure and for occupational/controlled exposure incorporate a substantial margin of safety and have been established to be well below levels generally accepted as having the potential to cause adverse health effects.

Even at the lowest heights on the tower, and especially given the height of the tower and ample setbacks, the RF emissions from the tower will be well below of the applicable FCC limits for general public exposure.

MEETS PURPOSE AND INTENT AND SITING CRITERIA FOR TELECOMMUNICATIONS FACILITY

21

The proposed Facility has been designed to satisfy the Town's Bylaw as much as possible.

Meets all the general siting standards and policies and additional requirements for wireless telecommunications facilities.

The location of the proposed Facility is on a large, substantially undeveloped lot amply set back from abutting properties and public rights of way.

The Facility has been designed to minimize visibility as much as possible. No FAA lighting or marking required. No signs on tower.

There are no other structures of sufficient height and structural integrity anywhere near the Property which would provide the requisite telecommunications coverage.

As a wireless infrastructure developer, Vertex encourages co-location and has relationships with all of the existing wireless telecommunications carriers licensed in this market and intends to provide space on the proposed Facility at commercially reasonable rates, which will minimize the total number of towers in the community.

MEETS ALL OF THE CRITERIA FOR A VARIANCE

22

674:33 Powers of Zoning Board of Adjustment. –

I. (a) The zoning board of adjustment shall have the power to:

(2) Authorize, upon appeal in specific cases, a variance from the terms of the zoning ordinance if:

(A) The variance will not be contrary to the public interest;

(B) The spirit of the ordinance is observed;

(C) Substantial justice is done;

(D) The values of surrounding properties are not diminished; and

(E) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

(b)(1) For purposes of subparagraph I(a)(2)(E), "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:

(A) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and

(B) The proposed use is a reasonable one.

(2) If the criteria in subparagraph (1) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

(3) The definition of "unnecessary hardship" set forth in subparagraphs (1) and (2) shall apply whether the provision of the ordinance from which a variance is sought is a restriction on use, a dimensional or other limitation on a permitted use, or any other requirement of the ordinance.

IN the public interest

23

The proposed Facility:

- will enhance wireless telecommunications service coverage in the Town;
- is desirable to the public convenience for personal use of wireless services and for community safety in times of public crisis and natural disasters;
- will be an attractive feature to area businesses; and
- will facilitate the adequate provision of transportation by improving mobile telecommunications for business, personal and emergency uses.

Spirit of the Ordinance is observed

24

The proposed Facility has been designed to satisfy the Town's Zoning Ordinance regulating personal wireless service facilities as much as possible.

- large substantially undeveloped parcel with an ample vegetative buffer
- set back amply from abutting property lines
- no FAA lighting required
- designed to facilitate co-location, to minimize the total number of towers in the community

Substantial INJUSTICE if denied

25

There are already other similar towers located in the surrounding communities all comparative in height to the proposed Facility. The proposed location meets all of the other requirements for a wireless communications facility. Moreover, the proposed Facility has been designed to mitigate all impacts of the facility as much as possible. Given the great public benefit and the minimal if any impact on the surrounding area, it would be a substantial injustice if the requested variances are denied.

NO EFFECT ON ABUTTING PROPERTY VALUES

26

In Daniels v. Londonderry, 953 A.2d 406 (N.H. 2008), the New Hampshire Supreme Court considered a proposal involving a 170 foot telecommunications tower. The record appendix includes numerous reports that analyze the question whether wireless towers (such as the proposed Facility) diminish the value of surrounding residential properties as to other towers in similar settings. The conclusions in the case and of the five reports in the record appendix underscore that wireless towers do not diminish the value of surrounding residential properties.

Denying the Variance(s) an UNNECESSARY HARDSHIP

27

Given:

- the location of the tower relative to the surrounding neighborhoods and other existing telecommunication sites in and around the Town;
- the topography of the surrounding area;
- the lack of viable alternatives in the area;
- the Town's, the federal government's and the public's desire to accommodate multiple wireless communications companies;
- the demand for robust and reliable telecommunications coverage; and
- the requirement to accommodate rapidly evolving technologies;

literal enforcement of the Ordinance will exact unnecessary hardship.

MEETS ALL OF THE CRITERIA FOR SITE PLAN APPROVAL

28

The proposed Facility has been designed to fulfill the purpose and intent of the Town's Site Plan Review Regulations as much as possible. The location of the proposed Facility is on a large substantially undeveloped, amply set back from abutting properties and public right of ways. There are no other structures of sufficient height anywhere near the Property which would provide the requisite telecommunications coverage. The use is passive in nature and will not generate any traffic, smoke, dust, heat, glare, discharge of noxious substances, nor will it pollute waterways or groundwater. Once constructed, the proposed Facility will have no adverse impact on the Town's scenic and historic assets, safety, health, environment, general welfare, values and quality of life, and will facilitate the provision of telecommunications services throughout the municipality and enhance the ability of wireless carriers to provide telecommunications services to the community quickly, effectively and efficiently.

MEETS ALL OF THE CRITERIA FOR A WAIVER

29

5.1.9 WAIVERS

A. General

Where the Board finds that extraordinary hardships, practical difficulties, or unnecessary and unreasonable expense would result from strict compliance with the foregoing regulations or the purposes of these regulations may be served to a greater extent by an alternative proposal, it may approve waivers to these regulations. The purpose of granting waivers under provisions of these regulations shall be to insure that an applicant is not unduly burdened as opposed to merely inconvenienced by said regulations. The Board shall not approve any waiver(s) unless a majority of those present and voting shall find that all of the following apply:

1. The granting of the waiver will not be detrimental to the public safety, health or welfare or injurious to other property and will promote the public interest.
2. The waiver will not, in any manner, vary the provisions of the Kensington Zoning Ordinance, Kensington Master Plan, or Official Maps.
3. Such waiver(s) will substantially secure the objectives, standards and requirements of these regulations.
4. A particular and identifiable hardship exists or a specific circumstance warrants the granting of a waiver. Factors to be considered in determining the existence of a hardship shall include, but not be limited to:
 - Topography and other Site features;
 - a. Availability of alternative site locations;
 - b. Geographic location of property;
 - c. Size/magnitude of project being evaluated and availability of co-location.

THE TELECOMMUNICATIONS ACT OF 1996

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In 1996, the U.S. Congress enacted the Telecommunications Act of 1996, Pub. L. No. 104-104, § 704; 110 Stat. 56 (1996) (the “TCA” or the “Telecommunications Act”).

The intent of the TCA as enacted by Congress was to institute a framework to promote competition and innovation within the telecommunications industry.

Law specifically preserves local zoning authority with respect to the siting of wireless service facilities, but it clarifies when the exercise of local zoning authority may be preempted by federal law.

○ SECTION 704 (7) PRESERVATION OF LOCAL ZONING AUTHORITY-

- ✦ (A) GENERAL AUTHORITY- Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.
- ✦ (B) LIMITATIONS- (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--
 - (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
 - (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

THE TELECOMMUNICATIONS ACT OF 1996

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The Applicant's application is governed by the TCA which "imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of such facilities...47 U.S.C. § 332(c)(7)." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115-116 (U.S. 2005).

Under this provision, local governments shall not take actions that "prohibit or have the effect of prohibiting the provision of personal wireless services," § 332(c)(7)(B)(i)(II), and any decision denying such a request must "be in writing and supported by substantial evidence contained in a written record," § 332(c)(7)(B)(iii). *Id.*

The TCA overrides boards that do not decide matters based upon the merits of local ordinances and, instead, yield inappropriately to ill-founded opposition. *Brehmer v. Planning Board of Town of Wellfleet*, 238 F.3d 117, 122 (1st Cir. 2001), citing *Roberts v. Southwestern Bell Mobile Sys., Inc.*, 429 Mass. 478, 709 N.E.2d 798, 806 (1999) ("Congress certainly intended to protect providers of [personal wireless] services from irrational or substanceless decisions by local authorities who might bend to community opposition to these facilities."). See also *Southwestern Bell Mobile Systems, Inc., d/b/a Cellular One v. Todd*, 244 F.3d 51, 57-58 (1st Cir. 2001) (TCA protects against overzealous or parochial regulation at the local level); *Town of Amherst v. Omnipoint Communications Enterprises, Inc.*, 173 F.3d 9 (1st Cir. 1999).

Moreover, the TCA specifically states that "[n]o State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions" 47 U.S.C. § 332(c)(7)(B)(iv).

The Board cannot rely upon generalities about visual impacts that are not "grounded in the specifics of the case." *New Cingular Wireless PCS LLC v. Town of Stow*, 2009 WL 2018450 (D. Mass. 2009) at *8 ("bare conclusory assertions" are not substantial evidence), citing *Todd*, 244 F.3d at 61. The Board cannot rely on generalized concerns that "refer to negative comments that are applicable to any tower regardless of location." *Todd*, 244 F.3d at 61 (visual impact). See also *SBA Towers*, *supra*; *Nextel Communications of the Mid-Atlantic, Inc. v. Town of Sudbury*, 2003 WL 543383 (D. Mass. 2003) (same) and cases cited.

SUMMARY

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THE APPLICANT requests a VARIANCE and SITE PLAN APPROVAL and CONDITIONAL USE PERMIT to construct a Telecommunications Facility:

The proposed Facility meets all of the siting criteria for a wireless telecommunications facility under the Town's Zoning Ordinance, other than those provisions for which a VARIANCE has been requested.

The proposed Facility meets all of the requirements for a VARIANCE.

The Applicant has provided all of the documentation required for a CONDITIONAL USE PERMIT other than those requirements for which a WAIVER has been requested.

The proposed Facility meets all of the requirements for SITE PLAN APPROVAL other than those provisions for which WAIVERS have been requested.

The proposed Facility is required to close a substantial COVERAGE GAP and represents the ONLY VIABLE ALTERNATIVE.

Pursuant to §704(a) of the Federal Telecommunications Act of 1996 which provides, among other things, that wireless facilities may not be prohibited in any particular area and that any denial of zoning relief must be based upon substantial evidence.

Accordingly, the APPLICANT respectfully requests that the ZONING BOARD OF ADJUSTMENT GRANT a VARIANCE, the PLANNING BOARD APPROVE the SITE PLANS and GRANT A CONDITIONAL USE PERMIT, and that both boards grant such other relief deemed necessary so that the Applicant may construct and operate the proposed Facility.