

**Town Board  
Town of Olive Ulster County, New York**

**FINDINGS AND DETERMINATION REGARDING IMMUNITY FROM ZONING**

In the Matter of the Application:

**ULSTER COUNTY PUBLIC SAFETY RADIO TOWER**

Lands n/f of Tonche Mountain Association  
Pitcairn Estates/Mtn. Road  
Town of Olive, Ulster County, New York  
Section 37.1, Block 5, Lot 12.412

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**I. SUMMARY of PROPOSED ACTION**

The County of Ulster has submitted a proposal to construct a public safety radio tower (PSRT) and associated improvements on an approximately 35.3 acre property of which it will lease approximately 1.8 acres located on Pitcairn Estates/Mtn. Road in the Town of Olive. The project, as revised during review of the initial application, will include a 135 foot-high guyed tower located approximately 250 ft from the existing tower at the site. Access to the site will be via an existing road and electrical service will utilize existing service at the site. A fenced enclosure of approximately 75 x 50 feet will protect the equipment and include the tower, equipment shelters and a generator. The project will disturb an area of less than one acre. The existing tower will be dismantled upon activation of the facilities on the new tower.

The County has projected that the facility is needed to provide critical service gaps and to support the additional equipment as part of the modernization of the County's emergency response system as communications transform from analog to simulcast technology. The tower is being designed to accommodate emergency responders in the Olive area, The tower will be constructed to have the ability to support two (2) cellular carriers. The County is not proposing any cellular service.

The property is located within the Conservation Residential (CR) zoning district. However, the Town of Olive Zoning Law does not allow a facility, such as that proposed by the County, in any zoning district as the telecommunication provisions in the code refer to "commercial" facilities of which this is not. Importantly, the CR District does allow commercial telecommunication facilities. To allow the County facility would likely require a use variance to be granted by the town of Olive Zoning Board of Appeals and review by the Town Planning Board. Therefore, Ulster County is seeking immunity from requirements of the Town of Olive Zoning Law utilizing a "balancing of public interests" test established by the New York State Court of Appeals.

## **II. STANDARDS AND PROCEDURES**

### **1. County of Monroe Balancing Test**

In 1988, the New York State Court of Appeals issued a decision in the case, “*Matter of Monroe v. City of Rochester*”, 72 N.Y. 2d 338, in which the Court established a new “balancing of interests” test to allow local municipalities to determine whether a specific project qualified for immunity from local zoning requirements.

The “balancing of interests” test identifies nine (9) separate factors to be considered to determine whether a specific project qualifies for immunity from zoning. Each of the nine (9) factors identified by the *Monroe* Court are discussed in Part III below as they relate to the Ulster County PSRT proposal.

### **2. Town of Olive Zoning Law**

The balancing issue is not addressed in the Town of Olive Zoning Law as the statute is silent on the matter of the of who shall decide any question as to the proper application of this chapter to public and quasi-public projects and improvements under the ‘balancing of interests’ test (*Monroe*) referenced above.

## **III. EVALUATION OF BALANCING OF INTEREST FACTORS**

Each of the nine factors established by the Court of Appeals is listed below and evaluated to determine whether it is in the public interest to require Ulster County to comply with the Town’s Zoning Law.

### **1. *The Nature and Scope of the Instrumentality Seeking Immunity.***

The County of Ulster is a governmental entity that provides a variety of essential public services to the more than 180,000 residents of the County, including those in the Town of Olive. Such services include providing communication and dispatch to first responders to emergencies such as weather disasters, fires, and traffic accidents. Due to its geographic coverage and broad governmental powers, Ulster County is in position to coordinate emergency services among the many local response agencies. The PSRT will provide interconnections to other County towers and the system interconnects with neighboring Counties of Dutchess, Greene, Delaware, Sullivan, and Orange County as well. The tower will also contain the necessary interoperability antennas that allow communications between all first responders.

The project involves installation of a new tower on property owned by the Tonche Mountain Association. The County currently leases a portion of the site for an existing tower. The project site will involve a new lease area with the construction of a new 135-foot guyed tower. The proposed facility will provide a significant public benefit to local emergency services and the public they serve. The County is the appropriate entity to coordinate these services.

### **2. *The Encroaching Government’s Legislative Grant of Authority.***

As discussed in 1. above, Ulster County (the “encroaching government”) has extensive legislative authority. However, it is not automatically exempt from the provisions of a Town’s Zoning Law. As cited previously, the NYS Court of Appeals has established a “balancing of interests test” to determine if such exemption, or immunity, is warranted.

The Town of Olive Town Board (TOTB) has the power and is the appropriate agency to consider the factors set forth in *County of Monroe* and to make the determination that this application is exempt from local zoning regulations. This is especially so since under §146-4 of the Town Zoning Law telecommunications system is defined as to provide “service of a commercial nature” and §146-7 allows these providers to seek relief from the provisions of Chapter 146 from the town board. Of note §155 -16 \_allows telecommunication systems within the CR District however given the definitions and limitations is Chapter 146 it is unclear that the County’s facility would be permitted. Ulster County would likely require a use variance from the Zoning Board of Appeals and further review by the Planning Board Such a variance involves a stringent test that would be difficult to satisfy. Importantly, the Town Board as the adopting body for the zoning code and with a presumption of legislative validity with regard to zoning and the ability to waive requirements under Chapter 146 is the appropriate body to decide the Monroe tests.

### **3. The Kind of Function or Land Use Involved.**

The proposed land use is not an intensive use with a ground footprint of approximately 50’ x 75’ and will utilize an existing access road. The County has asserted it will not require any municipal services as part of its operation. It will not generate any additional traffic or solid waste or public assembly. The site currently houses a public safety radio tower that no longer is capable of meeting the county’s needs even with structural modifications. The proposed facility meets a critical public safety need that is utilized by first responders in the Town.

The construction of the proposed tower does provide for collocation opportunities for cellular facilities. It is important to note that the overall height of the tower is driven by the need for the County’s communication needs and not the need to provide space to accommodate the cellular facilities. The Project will enhance communications for responding to accidents and natural disasters and for reporting medical emergencies and other dangers such as potential criminal activity as well as incorporate critical links to meet regional public safety needs .

### **4. The Effect Local Land Use Regulation Would Have Upon the Enterprise Concerned.**

Town zoning regulations, if strictly applied, would prevent development of the PSRT facility. However, such regulations would not be more protective of Town land use policies or the environment. It is noted that the Conservation Residential (CR) District allows construction of commercial telecommunication facilities. The PSRT shares all the attributes of a commercial telecommunication facility. The project has been designed by qualified engineers and consultants that have confirmed that a new facility is necessary to improve service gaps and allow for the interconnections of the County’s simulcast system between existing towers thereby providing safe and adequate service to the surrounding area and beyond. In addition, the County has extensive experience in the construction and operation of these facilities.

### **5. Alternative Locations for the Facility in Less Restrictive Zoning Areas.**

There are no locations for the PSRT in less restrictive zoning districts as the use is not permitted in any district under the Zoning Law. In determining the proposed location of the PSRT the County concluded that the proposed site uniquely meets the County's emergency response requirements for service in this portion of the County with an existing tower at the site. The County originally considered increasing the height of the existing tower to meet the requirements of the simulcast system and determined that, even with structural improvements, the existing tower is unable to support the County's all the needed communication facilities. Finally, the County examined other locations in the vicinity of the project site to determine if a these would meet the County's purpose concluding that additional site disturbance would be needed for these locations. The County made it clear from the onset of its application that it preferred this location with an existing PSRT rather than seek an alternate site. This, as well, as the ability to interconnect with its other towers was a driving factor in choosing this site.

#### **6. The Impact Upon Legitimate Local Interests.**

The Applicant has demonstrated a need for this facility to (a) fill gaps in service; and (b) provide interconnection to other County towers in the area. The facility has been designed in accordance with the applicable structural requirements of the Building Code of New York State (to the extent applicable), and all other applicable local, state, and federal codes and regulations. It is a legitimate local interest that safe and reliable emergency communication service be maintained within all areas of the Town. The proposed facility will assist with achieving such goal.

Another local interest is the preservation of the historic, scenic visual environment of the Town which is valued by both residents and visitors. The County has identified the viewshed from which the PSRT may be visible and evaluated the visual impact of the proposed tower on recognized, sensitive scenic and aesthetic resources. Such resources may include designated historic sites, parks, natural landmarks, scenic roads and waterways, viewsheds, and similar places. Balloons were flown at the site, at the proposed tower height, and photographs were taken from locations where the tower might be visible. Photo simulations of the tower, where it would be visible, were prepared and submitted to the town.

The County also concluded that the use of a guyed tower would be less visually intrusive than standalone tower. Tower height was set at 135 feet the minimum needed to meet the County's communication needs. The Tower will be partially visible from several areas of the Town including NYS Rt. 28, and the Ashokan Reservoir. Importantly these views are at a distance and are similar to the current views of the existing tower that will be removed upon activation of the equipment on the new tower. As lead agency under the State Environmental Quality Review (SEQR) Act, the County will be responsible for rendering a determination of significance and deciding whether any mitigation measures are appropriate to avoid adverse effects.

#### **7. Alternative Methods of Providing the Proposed Improvement.**

The proposed location of the project is the most feasible of available alternatives. The site is adjacent to the existing tower site leased by the County, has relatively flat topography, favorable conditions to anchor the tower and existing road access and electric service. There are no

sensitive development constraints on the site such as wetlands, endangered plant or animal species or archaeological resources and the County has provided these documents to the Town Board. There are no known more viable alternative methods of providing the necessary improvement in emergency communications for this area. A new tower structure is, therefore, necessary.

#### **8. The Extent of the Public Interest to be Served by the Improvements**

As demonstrated in the Application, there are significant issues associated with the existing emergency communication tower on Tonche Mountain the primary being that existing tower cannot structurally meet the County's need associated with its new simulcast radio system. The County has established that it will need to place a microwave dish at a minimum height of 110 ft and that its coverage associated with portable in and out bound radio signals is improved by placing its VHF antenna at 130 ft. The improved coverage includes the areas in the surrounding towns. The new tower provides a critical link in the upgrade of the County-wide emergency response system. The County has also predicted that construction of the tower on the Tonche Mountain site, as proposed, will remedy or improve deficiencies and enhance safe and adequate radio coverage in the Town of Olive. While not part of this application for relief from zoning requirements it is note that the facility will be able to accommodate two (2) cell carriers in the future and this is a permitted use under zoning.

The need for improved emergency service communications is recognized and it is noted that over meetings in which the public hearing was held open, no specific objections from neighboring homeowners was received. Statements attesting to the need for improved emergency service communications were received from the Town's fire departments and emergency service responders at these hearings.

The site is also located in an area of that is under conservation easement by the New York City Department of Environmental Protection (NYCDEP) whereby telecommunication facilities require approval by NYCDEP. That approval has been forthcoming with conditions related to environmental protection during construction and operation of the PSRT. Accordingly, the public interest is served by the project, and it is noted that commercial telecommunication facilities are permitted at the site as discussed above.

#### **9. Intergovernmental Participation in the Project Development Process and an Opportunity to be Heard.**

The Town of Olive Town Board has held several public meeting and discussions with representatives of the Applicant in an effort to ensure the proper design and location of the proposed facility. A public hearing was convened by the Town Board and help open for several months to receive comments on the proposal. The County has initiated coordinated review under SEQR and will serve as lead agency. The County will consider all comments by involved agencies and the public prior to making its determination of significance under SEQR.

### **IV. FINDINGS AND DETERMINATION**

1. For the foregoing reasons, the Town of Olive Town Board (TOTB) finds and determines that this application by the County of Ulster that the *County of Monroe* “balancing of interests test” is applicable to this application.

2. The TOTB further finds that its evaluation of the nine factors established under the balancing of interests’ test, set forth in Section III above, favors Ulster County’s proposal to enhance emergency communications by providing a new radio tower. Therefore, the TOTB determines that the County’s application is immune from the provisions of the Town of Olive Zoning Law and no variances from the provisions of the Zoning Law are necessary nor any additional Town approvals.

3. The TOTB further finds and determines that it is in the public interest and relevant to the balancing of interests that the above determinations are based on the following mutual understandings and agreement by Ulster County and the Town of Olive :

a. Immunity from the Town’s Zoning Law on this site shall apply only to the tower proposed by Ulster County as presented and considered which is the subject of this determination. Such immunity shall not apply to any other public safety towers or commercial telecommunications service facilities.

b. The County shall keep the Town advised of its progress on the project by providing copies of submissions and periodic status updates.

c. The County shall advise the Town of modifications elsewhere in its County simulcast system (physical facilities, equipment and technology), that would affect coverage in the Town of Olive or lead to modification of the proposed tower or facilities in the Town of Olive

d. The County shall notify the TOTB should it propose to modify the project, as currently proposed, and provide the TOTB an opportunity to review and comment on such revised plans.

e. The County is solely responsible for the coverage and enhanced communications deliverables detailed in its application.

f. The County will provide free access for and placement of the Town of Olive fire, police, and other first responders equipment on the tower to help such agencies improve their existing communications networks in the area to the extent that such space is available on the tower.

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g. The County shall notify the TOTB prior to commencement of any construction.