




Town of Ithaca

215 N Tioga St, Ithaca, NY 14850
Ph: 607-273-1747 ■ www.town.ithaca.ny.us
Susan Ritter, Director of Planning

10/06/2021

TO: Codes and Ordinances Committee:
William Goodman, Chair
Patricia Leary
Eric Levine
Eva Hoffmann
Bill King
Yvonne Fogarty

FROM: Christine Balestra, Planner 

RE: Next Codes and Ordinances Committee Meeting – October 13, 2021

The next meeting of the Codes and Ordinances Committee is scheduled for Wednesday, October 13th at 5:30pm in the Aurora Conference Room at Town Hall, 215 North Tioga Street. A quorum of the Town of Ithaca Town Board may be present at this meeting. However, no official Town Board business will be conducted.

The following items are attached:

- Meeting minutes from the August 25, 2021, COC meeting
- NY Times Article – Apple iPhone 12 Review (explains 5G Nationwide vs 5G Ultrafast)
- Selected Provisions from Town of Fishkill Draft Telecommunications Law, drafted by Andrew Campanelli

If you cannot attend this meeting, please notify Christine Balestra as soon as possible at (607) 273-1747 or cbalestra@town.ithaca.ny.us.

cc: Susan H. Brock, Attorney for the Town
Susan Ritter, Director of Planning
Marty Moseley, Director of Code Enforcement
Abby Homer, Administrative Assistant
Paulette Rosa, Town Clerk
Town Administrative staff (email)
Town Board Members (email)
Town Code Enforcement staff (email)
Town Planning staff (email)
Town Public Works staff (email)
Media

TOWN OF ITHACA CODES AND ORDINANCES COMMITTEE

215 North Tioga Street
Ithaca, New York 14850
(607) 273-1747

PLEASE NOTE: Members of the public who wish to attend the meeting via Zoom may call in on a cell phone or landline at (929) 436-2866 and enter the Meeting ID: 675 059 3272; or may view the meeting by computer at <https://zoom.us/j/6750593272>. Once on Zoom, click on “Join A Meeting” and enter the Meeting ID: 675 059 3272. The meeting will also be recorded on the Town of Ithaca YouTube Channel.

Meeting of October 13, 2021 – 5:30 P.M.

AGENDA

1. Member comments/concerns.

2. Minutes from August 25, 2021, COC meeting.

3. Discussion of Update Town of Ithaca Telecommunications Law – public comments and review of attached meeting materials.

4. Other business.

TOWN OF ITHACA CODES AND ORDINANCES COMMITTEE (COC)

Meeting of August 25, 2021 – 5:45pm – Hybrid: In-person, Zoom, and live on You Tube]

Draft Minutes

Present: Bill Goodman, Chair; Eva Hoffmann, Bill King, Yvonne Fogarty, Members; Marty Moseley, Director of Code Enforcement (via Zoom); Susan Ritter, Director of Planning (via Zoom); Chris Balestra, Planner; Susan Brock, Counsel (via Zoom).

Absent: Pat Leary, Eric Levine

1. **Member comments/concerns.** Bill G. explained the hybrid meeting setup for the participants in the room and on Zoom and You Tube. He also announced that this COC meeting was a combined meeting for August and September and that the next meeting will be on October 13th. He mentioned that he would allow members of the public to speak at the October meeting, alternating allowing comment every other month. The agenda was read, noting the end of the meeting would conclude with a closed session to seek advice of counsel.

2. **Minutes from June 9, 2021, COC meeting.** The committee approved the minutes with minor changes. Eva moved and Bill King seconded. All who were present were in favor (Pat and Eric were absent).

3. **Begin review of Draft Local Law – Town of Ithaca Wireless Telecommunications Facilities, redlined and highlighted version.** Bill G. mentioned that the City of Ithaca Administration Committee was going to discuss the city's Telecommunications Law on September 22nd. For the town, Bill expects the topic to take at least three meetings, with some sort of draft being ready to go to the Town Board after the November COC meeting.

The electronically circulated proposed document of the full Telecommunications Law with most of the recommended additions and changes that the committee has been working on (less a few of the June meeting changes due to timing of the meeting) was reviewed. The committee focused on the red lined proposed language changes as opposed to the yellow highlighted discussion areas. Bill G. read the redlined sections aloud and Susan Brock offered legal clarification where needed.

In B. **Definitions** section, under "Antenna," a question was asked to clarify "unintentional radiator". Bill G responded that a comprehensive review of definitions will be done by the staff and attorney later.

C. **General approval and permit requirements for wireless telecommunications facilities, (6),** Susan Brock explained that the redlining was related to property that the town owns and/or controls. The Town Board has no right to dictate whether something can go on a road-by-use. Committee agreed with the redlined change.

E. **Applications for small wireless facilities,** committee agreed with redlined text in E. (5), (6) and [2]. In (r), "Documentation justifying the total height of any proposed antenna and structure and the basis therefor" Susan Brock explained that this was part of the Bedford Law and that she'd need to check to see if it's legal. It's also ? Possible that the provision would be hard to apply. The committee generally agreed to strike the second sentence if the Town cannot legally require the justification in the manner written. Committee agreed to redlined text in "(" on page 14 (there's no number or letter

associated with the statement). The number and lettering system needs to be updated for the whole document.

F. Engineering, Safety and Maintenance Requirements, committee agreed to redlined text in 5 (a), (b), and (d). In 5 (c), the town still needs to determine who shall pay for the required radiofrequency emission certification test. It could be the town or the owner/operator. The City of Ithaca policy was referenced as an example.

G. Approval procedures, (2) Findings and decisions, the committee discussed whether to incorporate additional findings in this area, like those found in the City of Ithaca Code. The findings could be reworded as criteria that must be met. Committee members agreed to include the additional language if it was not repeated or redundant.

H. Location, the priority list lettering needs revising, as items may have been previously removed. Susan Brock will check and renumberate.

E. Priority of sitting locations, a question was asked to clarify #6 "on any other property in the town". This was explained as the lowest priority in determining site appropriateness, if the other 5 above preferred areas were not available. The committee will tackle this at the next meeting in October.

K. Visibility and Aesthetics, (2,3 &4) the most recent Aesthetics requirements, although similar in content, replaced the prior requirements in this section. These are the aesthetic requirements that the committee spent so much time crafting last year. The "at least 250 feet away from a structure that contains a dwelling unit" setback requirement was noted as still needing discussion, along with "1,500 feet from another small wireless facility". 4 (a) the language in "There shall be no external cables and wires related to the small wireless facility hanging off or otherwise exposed" was noted as possibly needing to match other sections with similar wording(maybe adding "on the wireless support structure" to clarify ambiguity). Chris Balestra would investigate the reasoning of why it was worded differently.

M. Recertification of small wireless facilities permit, 1 (c) Marty asked if there were criteria for when this should go to review. Discussion around wording the section so it doesn't imply that no permits were needed if there were changes. What types of modifications would require a modified permit (anything that changes RF emissions, etc.?) Marty recommended to add a section specific to modifications for these types of facilities to indicate when a modified permit is needed (rather than using the site plan modification criteria). He would follow up with Susan Brock on this.

Q. Liability insurance. One committee member asked who would the liability coverage proof come from? Independent contractors? Other companies? Subcontractors? Susan Brock stated that it is a common requirement when on town property, and the specific inclusions usually list the town, Board, employees, etc. This could be applied to contractors as well as owners. The town's insurance agent will review this language in detail.

The committee moved on to review, in detail, an email from Andrew and Marie Molnar related to the city's draft law language , with summarized points listed as follows:

1 & 2. Setbacks: Committee members were in favor of increasing the setbacks from the proposed 250 feet from dwelling units. Remove "DAS", as -that type is not often used. The setbacks will apply to all small cell antennas. Committee will discuss in October, when the full committee is present.

3. Insurance and pollution exclusion: "such [insurance] policy shall not include a pollution exclusion" was recommended by the residents and not opposed by the Committee members present or previously. Susan Brock stated the specific insurance language is still in review and will be discussed/researched with the town insurance agent for wording, availability, etc.

4. Random testing: Cost paid by carriers -City of Ithaca Law listed for reference. Set limit of times per year that this may come up? Annual in city, possibly same time frame as applicant testing and spacing to ensure that it ends up twice a year (one random and one applicant provided). The owner's testing section was referenced for the process if the test fails, the random testing has not been fully drafted yet, but it will likely be replicated in the random testing section. In event of violation, an increased frequency of testing should be in place, this language will need to be added to the proposed language and was briefly described by Susan Brock with committee member input. Committee agreed with this approach.
5. Revocability: City language was provided for reference and consideration. Susan Brock will follow up with the city for clarification on the clause when it "may" be required.
6. Certified Mail Notices: The residents recommended the city language require the applicant to provide names and addresses of all property owners and provide written notice of the public hearing by certified mail, and to add that the notification should to anyone within 1500 ft of the proposed site. It was noted that town does this currently, for property owners within 500 feet, with certification not necessary, due to being sent directly from town. Susan Brock asked if the committee would like language added that this cost shall be reimbursed to the town although not typical when a fee is charged for the permit initially. The committee disagreed with the residents - the town should continue to notify the neighbors, since then it is guaranteed that the notification gets done. The permit fee usually covers the cost to do so. The committee will determine if more than the standard 500 feet is recommended.
7. ADA: It was recommended to establish a procedure for disabled persons suffering from EHS to submit requests/grievances in ADA accordance. City language was provided, Susan Brock will research this need further.
8. Codes applying to all wireless transmitting antennas: The residents recommended adding the city language that would include private homes, ensuring all wireless transmitting antennas were covered by this code. It was not clear if there were exemptions in the town proposed language- the intent is that all would be subject to the code. Committee members present agreed.
9. Define "significant gap in coverage"- Including significant gap in coverage definition. Examples were not defined in comparable laws. The committee will revisit this in October.
10. Citizen deputized to test for RF emissions: The city code states that if an RF emission exceeding the limit is found, their code provision established a private right of action by any city resident against the facility owner to secure its removal with reimbursement of attorney's fees and costs if the resident prevails. Susan Brock needs more information about this provision by the city. There was a concern about the reliability of the equipment if a citizen were to perform their own test. Committee was also concerned that private citizens wouldn't be properly trained.

The Committee was satisfied with the red lined areas with the clarifications above and will focus on the yellow highlighted questions for the October meeting.

4. Other Business.

- Next meeting: October 13, 2021 (September meeting cancelled due to vacations)

- Agenda: Updated Telecommunications Law - Report on City Administration Committee meeting of September 23, 2021. *Bill G. will allow public comment at this meeting*

Bill G. motioned to go into closed session to seek advice of counsel at 7:05 PM. Motion was seconded by Eva, and all were in favor. Bill G moved, and Yvonne seconded to come out of closed session at 7:28 PM. All in favor.

DRAFT

New York Times Article: Apple iPhone 12 Review: Superfast Speed, if You Can Find It

The new iPhone has an improved design, but it's undermined by the wireless industry's messy rollout of ultrafast 5G networks.

By [Brian X. Chen](#)

Published Oct. 20, 2020 Updated Sept. 14, 2021

I started this [iPhone](#) review in the most peculiar way: by opening a map to find out where I could test it.

That's because [Apple](#)'s newest iPhones, for the first time, work [with 5G](#), the ultrafast fifth-generation wireless networks that will theoretically let people download a movie to their devices in seconds. The problem? The superspeedy 5G networks have not been rolled out everywhere.

I learned this the hard way. When Apple provided The New York Times with iPhone 12s to test on Verizon's 5G network, I quickly discovered that my neighborhood in the San Francisco Bay Area didn't have any 5G connection. So I went on a journey through San Francisco to find the superfast data speeds that Apple and Verizon executives promised when they [unveiled the new iPhones last week](#).

When I found places where I could connect to the fastest 5G networks, the iPhone experience was hugely gratifying. The network delivered download speeds to the phone that were up to seven times as fast as the best broadband services I have ever used.

But the locations where I tracked down ultrafast 5G were far less satisfying. At one point, I found the speedy connection in the back of a Safeway parking lot. Another time I was in front of a Pet Food Express. What would I do with an incredibly fast internet connection there?

In most parts of San Francisco, the iPhone instead drew data from a more [vanilla](#) flavor of 5G that Verizon calls "5G Nationwide," which is the connection that most of the country will get for the foreseeable future. Those download speeds ranged from much slower than to twice as fast as my older iPhone, which was on Verizon's 4G network.

That's all to say that despite the hype around 5G, the network underwhelmed. At this point, it should not be the primary reason to splurge on an expensive handset in a pandemic-induced recession.

The iPhone 12, with bright screens and a more robust design, is still a solid upgrade from past iPhones. But you will pay a premium: The device, which becomes available on Friday, starts at \$829, up from \$699 for last year's iPhone 11. (Another model, the iPhone 12 Mini, costs \$729 but has a smaller screen and ships later this year.)

I tested the iPhone 12 and the high-end iPhone 12 Pro, which starts at \$999, for about a week. Here's how that went.

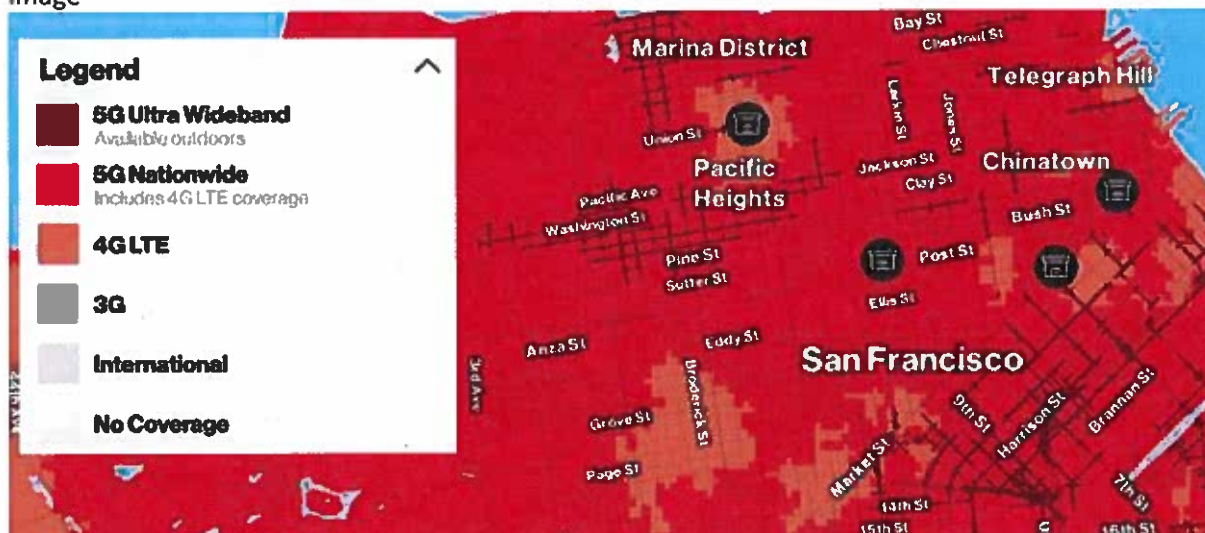
The Hunt for 5G

Phone carriers like Verizon and AT&T started rolling out 5G networks last year and have marketed them as superfast. But what they aren't telling you is that there are two flavors of 5G and that the one you will most likely get is not going to be the speedier one.

Here are the two versions of 5G in a nutshell:

- There's ultrafast 5G, which is called millimeter wave. (Verizon labels it "5G Ultra Wideband.") It travels very short distances and has trouble penetrating obstacles and walls. That makes it usable in outdoor spaces like street corners or parks, but probably not in our offices or homes anytime soon. Because of that, only tiny slivers of the country now have superfast 5G.
- Then there's "5G Nationwide," which is more widely available. It travels much farther, but carriers have said it will be only about 20 percent faster than 4G wireless networks.

Image



Credit...Verizon

I saw the differences in 5G firsthand when I opened the [Verizon coverage map](#) for San Francisco. Verizon used red to highlight locations with 5G Nationwide, while areas with the ultrafast 5G were marked in dark red. The overwhelming majority of the city was shaded in red, with only small areas in dark red.

To test ultrafast 5G, I drove to six locations that Verizon advertised as having the fast connection and used the [Speedtest app from Ookla](#), a network diagnostics company.

At three of the locations in the city's Marina district and Mission district, I was immediately disappointed. I walked up and down the streets, constantly refreshing websites and running the Speedtest app, but there was no superfast signal to be found. Instead, I got 4G or vanilla 5G connections.

Verizon said its engineers walked those same streets in the Marina over the weekend and were able to find the superfast 5G connection in one location but confirmed the signal had weakened in the other. (Verizon didn't immediately comment on the location in the Mission district.)

That led me to conclude that Verizon's coverage map was unreliable.

Still, I drove to three other locations in the city's Marina, Presidio Heights and South of Market districts. There, I finally found the fabled superfast 5G — and I was blown away.

Standing in front of a camera store in South of Market, I got 5G speeds reaching 2,160 megabits a second, which was 2,900 percent faster than 4G. Even where it was a tad slower — behind the Safeway parking lot in the Marina district — the 5G iPhone drew speeds of 668 megabits a second, which was 1,052 percent faster than 4G.

These were odd places to have blazing fast speeds, though. Even before the coronavirus pandemic, these areas did not have much foot traffic. The carriers have said ultrafast 5G speeds would be great for data-heavy tasks like streaming video, but I had no desire to do much streaming while standing on those street corners.

Why the nondescript locations? Karen Schulz, a Verizon spokeswoman, said the company ran into complex engineering tasks in San Francisco. While ultrafast 5G relies on access to light poles, most of the city's utilities infrastructure is underground. Verizon's progress to deploy 5G has run into red tape, she said.

When I tested the new iPhones on the vanilla 5G network, any speed improvement was hardly noticeable. In the best cases, vanilla 5G was twice as fast as 4G, or 209 megabits a second compared with 103 megabits on 4G. But in some locations, 5G was slower than 4G. In one part of the Mission district, for instance, 5G speeds reached 28 megabits a second compared with 39 megabits on 4G.

Ms. Schulz said that customers should initially expect the 5G Nationwide network to perform like 4G, and that performance and coverage would grow over time.

I'm not sure that's good enough. I've reviewed phones over the past 12 years and covered the transition from 2G to 3G, and from 3G to 4G. I have never seen a network rollout this confusing and spotty — 5G, simply, is a mess.

Everything Else

Setting aside the network issues, there's still a handset to review — and that brings much better news.

The design changes to the new iPhones are substantive. The iPhone 12 has a fancy OLED screen, a more modern display technology. So it looks brighter and has more accurate colors than the iPhone 11, which used LCD screen technology. (OLED was previously exclusive to Apple's high-end iPhones.) The edges of the phone are also now flat instead of round.

The changes have helped the handset shed some weight and thickness while maintaining a roomy 6.1-inch screen. It felt much more comfortable inside my pants pockets than the iPhone 11, which always seemed too thick.

Apple also said it had strengthened the display glass, making it four times less likely to break. It's difficult to test that scientifically, but I dropped the iPhone 12 and iPhone 12 Pro several times by accident on hard surfaces. They survived without any scuffs.

Also new is a charging mechanism that Apple calls MagSafe. It's basically a new standard to support faster charging via magnetic induction. The new standard will open doors to other companies to make accessories that magnetically attach to iPhones, such as miniature wallets.

I tested both the MagSafe charger and Apple's MagSafe wallet. But I preferred charging with a normal wire because it was faster, as well as carrying my own wallet, because it can hold more cards.

There's a major downside to all of the new features: We have to pay a lot for these phones. Apple is also no longer including charging bricks or earphones with the new iPhones since so many people already own power bricks and fancy wireless earbuds. While that will lead to less waste, this shift and the price jump may annoy plenty of people.

So Should I Buy?

It's tough to recommend splurging on a fancy phone in a pandemic. But here are [three quick questions](#) to ask yourself about whether it's time to upgrade:

- Can I still get software updates on my current phone?
- Is my device repairable for a reasonable cost?
- Am I happy with my phone?

If you answered no to any of the above questions, you will probably be happy investing in this upgrade.

But if you answered yes, wait it out. In a few years, the carriers will probably have a better handle on 5G. At that point, it may even be safe enough to leave the house again and reap the benefits of the mobile companions we carry everywhere.

*Brian X. Chen is the lead consumer technology writer. He reviews products and writes [Tech Fix](#), a column about solving tech-related problems. Before joining *The Times* in 2011, he reported on Apple and the wireless industry for *Wired*. [@bxchen](#)*

Selected provisions in Town of Fishkill's draft telecom law (drafted by Andrew Campanelli)

Q for COC: Who should be the Town of Ithaca's "gatekeeper" who initially reviews applications and determines completeness? (Important role--notice to applicant of incomplete application tolls the shot clock)

§150-126.6 Application Requirements

Applications for Special Permits under this Chapter 126 shall be made to the Building Inspector, who shall initially determine whether or not the application is complete and/or free of defects upon receipt of the same.

If the Building Inspector determines that the application is defective or incomplete, they shall promptly mail a **Notice of Incompleteness** to the applicant, in accord with §150-126.4, to toll the applicable shot clock, to ensure that the Town and the Planning Board are afforded sufficient time to review and determine each respective application.

Each application shall include the following materials, the absence of any one of which listed hereinbelow, shall render the respective application incomplete:

(1) Building Permit Application

A completed application for a building permit that shall identify all applicants, co-applicants, site developer(s), and wireless carrier(s) on whose behalf the application is being submitted, as well as the property owner of the proposed site.

(2) Filing Fees

The appropriate filing fees then being charged by the Town for Applications for Special Permit Applications

(3) A "Notice Address"

A "Notice Address," that being a specific address to which the Town, Planning Board, and/or Building Inspector may mail any type of notice, and that the mailing of same to such address shall constitute sufficient notice to any applicant, co-applicant, and/or their attorney, to comply with any requirement under this Chapter as well as any local, state and/or federal law

(4) Proof of Authorization for Site Occupancy

Where an applicant is not the owner of the real property upon which it seeks to install its equipment or facility, they shall submit proof of authorization to occupy the site at issue. If the applicant is leasing all or a portion of real property upon which it intends to install its new facility or equipment, the applicant shall provide a written copy of its lease with the owner of such property. The applicant may redact any financial terms contained within the lease, but it shall not redact any portion of the lease which details the amount of area leased nor the specific portion of the real property which the applicant has obtained the right to occupy, access, or preclude others from entering.

Attachment: Town of Fishkill_Draft Ordinance 930 (6232 : Resolution to Set the Public Hearing to Consider LL No. (Intro) of 2021 - Cell Town

§150-126.2 Definitions; Word Usage

For purposes of this article, and where not inconsistent with the context of a particular section, the defined terms, phrases, words, abbreviations, and their derivations, shall have the meaning given in this section. When not inconsistent with the context, words in the present tense include the future tense, words used in the plural number include words in the singular number, and words in the singular number include the plural number. The word “shall” is always mandatory and not merely directory.

ACCESSORY FACILITY OR STRUCTURE

An accessory facility or structure serving or being used in conjunction with a personal wireless service facility or complex and located on the same property or lot as the personal wireless services facility or complex, or an immediately adjacent lot including, but not limited to, utility or transmission equipment storage sheds or cabinets.

ACHP

The federal Advisory Council on Historic Preservation.

ADEQUATE COVERAGE

This definition is relevant to determination that must be made for all telecom facilities (see following pages)

Means that, as determined by the Planning Board, a specific wireless carrier’s personal wireless service coverage is such that the vast majority of its customers are able to successfully use the carrier’s personal wireless service the vast majority of the time, in the vast majority of the geographic locations within the Town, that the success rate of using their devices exceeds 97%, and that any geographic gaps in a carrier’s gaps in personal wireless services are not significant gaps, based upon such factors including, but not limited to, lack of significant physical size of the gap, whether the gap is located upon a lightly traveled or lightly occupied area, whether only a small number of customers are affected by the gap, and/or whether or not the carrier’s customers are affected for only limited periods of time. A wireless carrier’s coverage shall not be deemed inadequate simply because the frequency or frequencies at which its customers are using its services are not the most preferred frequency of the wireless carrier.

AMEND, AMENDMENT and AMENDED

Means and shall relate to any change, addition, correction, deletion, replacement, or substitution, other than typographical changes of no effect.

ANTENNA

An apparatus designed for the purpose of emitting radiofrequency (RF) radiation, to be operated or operating from a fixed location, for the provision of personal wireless service.

COMPLEX

The entire site or facility, including all structures and equipment, located at the site.

DEPLOYMENT

The placement, construction, or substantial modification of a personal wireless service facility.

DISTRIBUTED ANTENNA SYSTEM, DAS

A network of spatially separated antenna nodes connected to a common source via a transport medium that provides personal wireless services within a geographic area.

EFFECTIVE PROHIBITION

This definition is relevant to determination that must be made for all telecom facilities (see following pages)

A finding by the Planning Board that, based upon an applicant's submission of sufficient probative, relevant, and sufficiently reliable evidence, and the appropriate weight which the Board deems appropriate to afford same, an applicant has established that an identified wireless carrier does not have adequate coverage as defined hereinabove, but suffers from a significant gap in its personal wireless services within the Town and that a proposed installation by that applicant would be the least intrusive means of remedying that gap, such that a denial of the application to install such installation would effectively prohibit the carrier from providing personal wireless services within the Town. Any determination of whether an applicant has established, or failed to establish, both the existence of a significant gap and whether its proposed installation, at the site chosen, the specific location on that proposed site, and the proposed minimum height for the new facility, shall be based upon substantial evidence, as defined herein.

ELEVENTH HOUR SUBMISSIONS

An applicant's submission of new and/or additional materials in support of an application within 48 hours of the expiration of an applicable shot clock, or at an otherwise unreasonably short period of time before the expiration of the shot, making it impracticable for the Planning Board to adequately review and consider such submissions due to their complexity, volume, or other factors, before the expiration of the shot clock.

ENURE

To operate or take effect. To serve to the use, benefit, or advantage of a person or party.

EPA

The United States Environmental Protection Agency.

FAA

Here are the determinations that must be made for a permit to issue. Q for COC: Should the Ithaca Planning Board make these determinations and approve permits for ALL facilities? Should staff perform these actions for certain types of applications (co-locations, for ex)?

§150-126.8 Factual Determinations to be Rendered by the Planning Board

A. Evidentiary Standards

In determining Special Use Permit Applications for personal wireless service facilities, the Planning Board shall have sole discretion to determine what probative evidence it shall require each applicant to produce in support of its application to enable the Board to make each of the factual determinations enumerated below.

The Board shall have sole discretion to determine, among other things, the relevance of any evidence presented, the probative value of any evidence presented, the credibility of any testimony provided, whether expert or otherwise, and the adequacy of any evidence presented.

The Board shall not be required to accept, at face value, any unsupported factual claims asserted by an applicant but may require the production of evidence reasonably necessary to enable the Board to determine the accuracy of any factual allegations asserted by each respective applicant.

Conclusory factual assertions by an applicant shall not be accepted as evidence by the Board.

B. Factual Determinations

To decide applications for Special Permits under this section, the Planning Board shall render factual determinations, which shall include two (2) specific types of factual determinations, as applicable.

First, the Board shall render local zoning determinations according to Section (B)(i) hereinbelow.

Then, if, and only if, an applicant asserts claims that: (a) its proposed wireless facility or installation *is necessary to remedy a significant gap in personal wireless services for an explicitly identified wireless carrier*, and (b) that its proposed installation *is the least intrusive means of remedying a specifically identified significant gap or gaps*, the Board shall *additionally* render TCA determinations, in accord with Section (B)(ii) hereinbelow.

The Board shall separately record each factual determination it makes in a written decision and shall reference, or make note of, the evidence based upon which it rendered each of its factual determinations.

Each factual determination made by the Board shall be based upon substantial evidence.

For purposes of this provision, substantial evidence shall mean such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It means less than a preponderance but more than a scintilla of evidence.

Evidence which the Board may consider shall include any evidence submitted in support of an application, and any evidence submitted by anyone opposing a respective application, whether such evidence is in written or photographic form, or whether it is in the form of testimony by any expert, or any person who has personal knowledge of the subject of their testimony. The Board may, of course, additionally consider as evidence any information or knowledge which they, themselves, personally possess, and any documents, records or other evidence which is a matter of public record, irrespective of whether such public record is a record of the Town, or is a record of or is maintained by, another federal, state and/or other governmental entity and/or agency which maintains records which are available for, or subject to, public review.

The requirements for specific factual determinations set forth below are intended to enure to the benefit of the Town, its residents, and property owners, and not applicants.

If, and to the extent that the Planning Board fails to render one or more of such determinations, that omission shall not constitute grounds upon which the respective applicant can seek to annul, reverse or modify any decision of the Planning Board.

(i) Local Zoning Determinations

The Board shall make the following factual determinations as to whether the application meets the requirements for granting a Special Permit under this Article.

(1) Compliance with Section §150-106

Whether the proposed installation will meet each of the conditions and standards set forth within Section §150-106 in the absence of which the Planning Board is not authorized to grant a Special Permit under Section §150-106 or §150-126.

(2) Potential Adverse Aesthetic Impacts

Whether the proposed installation will inflict a significant adverse aesthetic impact upon properties that are located adjacent to or in close proximity to the proposed site or are otherwise situated in a manner that would cause the proposed installation to inflict a significant adverse aesthetic impact upon other properties or the surrounding community at issue.

(3) Potential Adverse Impacts Upon Real Estate Values

Whether the proposed installation will inflict a significant adverse impact upon the property values of properties that are located adjacent to, or in close proximity to the proposed site, or properties that are otherwise situated in a manner that would cause the proposed installation to inflict a significant adverse impact upon their value.

(4) Potential Adverse Impact Upon the Character of the Surrounding Community

Whether the proposed installation will be incompatible with the use and/or character of properties located adjacent to or in close proximity to the proposed site or other properties situated in a manner that would cause the proposed installation to be incompatible with their respective use.

(5) Potential Adverse Impacts Upon Historic Properties or Historic Districts

Whether the proposed installation will be incompatible with and/or would have an adverse impact upon, or detract from the use and enjoyment of, and/or character of a historic property, historic site, and/or historic district, including but not limited to historic structures, properties and/or districts which are listed on, or are eligible for listing on, the National Register of Historic Places.

(6) Potential Adverse Impacts Upon Ridgelines or Other Aesthetic Resources of The Town

Whether the proposed installation will be incompatible with and/or would have an adverse aesthetic impact upon or detract from the use and enjoyment of, and/or character of recognized aesthetic assets of the Town, including but not scenic areas and/or scenic ridgelines, scenic areas, public parks, and/or any other traditionally or historically recognized valuable scenic assets of the Town.

(7) Sufficient Fall Zones

Whether the proposed installation shall have a sufficient fall zone and/or safe zone around the facility to afford the general public safety against the potential dangers of structural failure, icfall, debris fall, and fire.

(8) Mitigation

Whether the applicant has mitigated the potential adverse impacts of the proposed facility to the greatest extent reasonably feasible. To determine mitigation efforts on the part of the applicant, the mere fact that a less intrusive site, location, or design would cause an applicant to incur additional expense is not a reasonable justification for an application to have failed to propose reasonable mitigation measures.

If, applying the evidentiary standards set forth in subparagraph A hereinabove, the Planning Board determines that the proposed facility shall inflict one or more of the adverse impacts described hereinabove to such a substantial extent that granting the respective application would inflict upon the Town and/or its citizens and/or property owners the types of adverse impacts which this provision was enacted to prevent, the Planning Board shall deny the respective application for a Special Permit unless the Board additionally finds that a denial of the application would constitute an effective prohibition, as provided for in Section (B)(ii) immediately hereinbelow.

(ii) TCA Determinations(1) Adequate Personal Wireless Services Coverage

Whether the specific wireless carrier has adequate personal wireless services coverage within the geographic areas for which the applicant claims a significant gap exists in such coverage.

(2) Significant Gap in Personal Wireless Services of an Identified Carrier

Whether the applicant has established, based upon probative evidence provided by the applicant and/or its representative, that a specific wireless carrier suffers from a significant gap in its personal wireless services within the Town.

In rendering such determination, the Board shall consider factors including, but not necessarily limited to (a) whether the identified wireless carrier which is alleged to suffer from any significant gap in their personal wireless services has adequate service in its personal wireless services at any frequency being used by the carrier to provide personal wireless services to its end-use customers, (b) whether any such alleged gap is relatively large or small in geographic size, (c) whether the number of the carrier's customers affected by the gap is relatively small or large, (d) whether or not the location of the gap is situated on a lightly traveled road, or sparsely or densely occupied area, and/or (d) overall, whether the gap is relatively insignificant or otherwise relatively *de minimis*.

A Significant Gap cannot be established simply because the carrier's customers are currently using the carrier's personal wireless services, but the frequency at which the customers are using such services is not the frequency most desired by the carrier.

(3) Least Intrusive Means of Remediating Gap(s) in Service

Whether the applicant has established based upon probative evidence provided by the applicant and/or its representative, that the installation of the proposed installation, at the specific site proposed by the applicant, and the specific portion of the site proposed by the applicant, and at the specific height proposed by the applicant is the least intrusive means of remediating whatever significant gap or gaps which the applicant has contemporaneously proved to exist as determined by the Planning Board based upon any evidence in support of, and/or in opposition to, the subject application.

In rendering such determination, the Board shall consider factors including, but not necessarily limited to: (a) whether the proposed site is the least intrusive location at which a facility to remedy an identified significant gap may be located, and the applicant has reasonably established a lack of potential alternative less intrusive sites and lack of sites available for co-location, (b) whether the specific location on the proposed portion selected site is the least intrusive portion of the site for the proposed installation (c) whether the height proposed for the facility is the minimum height actually necessary to remedy an established significant gap in service, (d) whether or not a pre-existing structure can be used to camouflage the facility and/or its antennas, (e) whether or not, as proposed, the installation mitigates adverse impacts to the greatest extent reasonably feasible, through the employ of stealth design, screening, use of color, noise mitigation measures, etc., and/or (f) overall whether or not there is a feasible alternative to remedy the gap through alternative, less intrusive substitute installations, such as the installation of multiple shorter installation, instead of a single microcell facility.

(iii) Finding of Effective Prohibition or Lack of Effective Prohibition

If, applying the evidentiary standards set forth in subparagraph A hereinabove, the Planning Board affirmatively determines that the applicant has failed to establish either: (a) that an identified wireless carrier suffers from a significant gap(s) in its personal wireless services within the Town, and/or (b) that the applicant has failed to establish that the proposed installation is the least intrusive means of remediating any such gap or gaps, then the Planning Board may deny the application pursuant to Section (B)(i) hereinabove, and such denial shall not constitute an "effective prohibition."

If, applying the evidentiary standards set forth in subparagraph A hereinabove, the Planning Board affirmatively determines that the applicant has established both: (a) that an identified wireless carrier suffers from a significant gap in personal wireless services within the Town, and (b) that the proposed installation is the least intrusive means of remedying such significant gap or gaps, then the Planning Board shall grant the application, irrespective of any determinations the Board may make pursuant to Section (B)(i) hereinabove, because any such denial would constitute an “effective prohibition.”

