

TOWN OF CORTLANDT
STATE OF NEW YORK, COUNTY OF WESTCHESTER

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In the Matter of the Application of:

**Homeland Towers, LLC and New York SMSA Limited
Partnership d/b/a Verizon Wireless**

**SUPPLEMENTAL
MEMORANDUM IN
FURTHER OPPOSITION**

For Special Permit and Site Plan Approval

Premises: 52 Montrose Station Road
Cortlandt Manor, NY 10567

SBL: 44.07-1-4

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**SUPPLEMENTAL MEMORANDUM IN
FURTHER OPPOSITION**

Respectfully Submitted,
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Preliminary Statement

This Supplemental Memorandum is being submitted in Further Opposition to the 140-foot, 14 story cell tower Homeland Towers, LLC and New York SMSA Limited Partnership d/b/a Verizon Wireless (hereinafter "*Homeland/Verizon*") seek to construct in a bucolic residential neighborhood at 52 Montrose Station Road Cortlandt Manor, NY.

This Supplemental Memorandum addresses the memorandum submitted by HDR summarizing their review of *Homeland's/Verizon's* application materials as well as *Homeland/Verizon's* response thereto.

POINT I

Homeland/Verizon's Application Does Not Meet The Standard To Grant A Special Use Permit

Applications for telecommunications facilities must be evaluated under the Public Necessity standard. *Cellco P'ship v. Town of Clifton Park, New York*, 365 F. Supp. 3d 248, 256–57 (N.D.N.Y. 2019). An applicant must prove that the new wireless telecommunication facility it proposes is "a public necessity that is required to render safe and adequate service" and that there are ***compelling reasons*** why their installation location is more feasible than at other locations. *See T-Mobile Northeast LLC v. Town of Islip*, 893 F. Supp.2d. 338 (2012).

An applicant is required to prove:

1. that there are ***significant*** gaps in a specific wireless carrier's service, ***and***
2. that the location of the facility will remedy those gaps, ***and***
3. that the facility presents a "minimal intrusion on the community."

See T-Mobile 893 F. Supp. 2d at 355 *citing* Site Acquisitions, Inc. v. Town of New Scotland, 2 AD.3d 1135, 1137, 770 N.Y.S.2d 157, 160 (3d Dept. 2003).

Verizon has failed to meet the **Public Necessity** standard because they have not proven a significant gap in cellular service. Recent case law – *ExteNet Systems, Inc. v. Village of Flower Hill*, No. 19-CV-5588-FB-VMS (E.D.N.Y. July 29, 2022) – reiterated the Second Circuit Court’s holding in *Willoth* 176 F.3d 630, 643 (2d Cir. 1999). While noting that “improved capacity and speed are desirable (and, no doubt, profitable) goals in the age of smartphones, ... they are not protected by the [TCA].” *Id.* The Court found that under New York law, the lack of “public necessity” can justify a denial. “In the context of wireless facilities, public necessity requires the provider ‘to demonstrate that there was a gap in cell service, and that building the proposed [facility] was more feasible than other options.’” *Omnipoint Communications Inc. v. The City of White Plains*, 430 F.3d 529 (2d Cir. 2005). Further, the Judge in the *Flower Hill* case held that “the lack of a gap in coverage is relevant here and can constitute substantial evidence justifying denial...And, since one reason given by the Board for its decision was supported by substantial evidence, the Court need not evaluate its other reasons.”

The applicant bears the burden of proof and must show that there is a significant gap in service – not just a lack of 5G, 4G or any other level of network service. A cell phone is able to “downshift” – that is from 5G to 4G or from 4G to 3G, etc. – if necessary, to maintain a call throughout coverage areas. Unless there is an actual gap, the call will continue uninterrupted. Therefore, there is only a significant gap when there is no service at all.

FCC Mobile Coverage Maps
Indicate Full Coverage

Attached as Exhibits “A” and “B” are current FCC Mobile LTE Coverage Maps on which the proposed cell tower site has been pinpointed. According to the FCC website:

the map shows the 4G LTE mobile coverage areas of the nation’s four largest mobile wireless carriers: AT&T Mobility, T-Mobile, UScellular, and Verizon. Specifically, it shows where customers can expect to

receive 4G LTE broadband service... The map includes separate layers for each carrier's broadband and voice coverage. Voice coverage areas represent where customers should expect to make and receive mobile voice calls and send and receive texts over the 4G LTE network....

<https://www.fcc.gov/BroadbandData/MobileMaps/mobile-map>

The FCC map is interactive in that an address can be searched and selections can be made for each carrier singly or in combination. For purposes of this memorandum, only Verizon coverage has been selected. Exhibit "A" shows Verizon 4G LTE Voice coverage (shaded pale orange) for the area surrounding the proposed facility site. Exhibit "B" shows Verizon 4G LTE Data coverage (shaded a darker orange) for the same area. One must believe that *Verizon* accurately reported its cellular coverage to the FCC and that the resulting FCC coverage map truly represents the coverage available. Each map shows full coverage for the area in question without any significant gaps in coverage.

Unless *Verizon* now contends that the information it has provided to the FCC is false or inaccurate, it cannot claim that any significant gap in coverage exists.

Additionally, as noted in our initial Memorandum in Opposition, *Verizon* itself (on its website) claims that it has coverage in the relevant area. Regardless of any disclaimers *Verizon* posts with their online coverage map, it nonetheless touts to existing and potential customers that there is widespread, full coverage in the area surrounding the proposed facility. Although the map legend has a white colored symbol for "No Coverage," there is no area at, around, or in close proximity to 52 Montrose Station Road which is labeled "No Coverage."

Further, absence of a specific frequency is not sufficient to prove a significant gap in coverage. There must be an *actual* gap – meaning no service at all.

Based upon the FCC coverage map as well as *Verizon's* own coverage map, there is no

significant gap in *Verizon's* wireless service. Where there is no significant gap, there is no public necessity. Where there is no public necessity *Homeland/Verizon* has failed to meet their burden and their application should be denied.

It should also be noted that as part of its proof of a gap in service, *Verizon* submits 5-year-old Drive Test Data that was collected in 2017. One can only wonder why current data was not submitted.

POINT II

Homeland/Verizon's Proposed Facility Violates Both The Intent And The Requirements of the Town's Zoning Code

We reiterate that the whole purpose behind Town zoning regulations is to preserve the character, integrity, and quality of its neighborhoods.

The intent of this chapter is to minimize the negative impact of telecommunications towers... assure an integrated, comprehensive review of environmental impacts of such facilities and protect the health, safety and welfare of the Town of Cortlandt.

Town Code §277-1 Purpose and legislative intent.

Homeland/Verizon plans to build its tower in an R-40 Single-family residential district. §277-7 of the Town Code establishes the priority of locations for the siting of telecommunications towers. Preference for the siting of cell towers places priority of location as follows:

- A. (1) ...
 - (a) On existing telecommunications towers or other tall structures.
 - (b) Collocation on a site with existing telecommunications towers or structures.
 - (c) In nonresidentially zoned areas of the Town, including on municipally-owned properties.
 - (d) In nonresidentially zoned areas of the Town.
 - (e) On other property in the Town....

Clearly, siting for cell tower facilities is prioritized to locate them *away from residential areas*. Of the five (5) categories of location outlined by the Code, the proposed *Homeland/Verizon* tower falls into the lowest, least desirable, most detrimental location possible.

Homeland/Verizon has failed to show sufficient reason to allow the proposed tower to be erected in a residential area. Absent a clear showing of a compelling reason for the selection of a residential site rather than a higher priority site, the application should be denied.

POINT III

The Proposed Wireless Facility Will Inflict Substantial Adverse Impacts Upon the Aesthetics and Character of the Area

Code §277-5 E sets forth one of the policy goals as “Promoting and encouraging, wherever possible, the placement of a telecommunications tower in such a manner as to cause minimal disruption to aesthetic considerations of the land, property, buildings and other facilities adjacent to, surrounding and in generally the same area as the requested location of such a telecommunications tower.”

The proposed tower will cause “disruption to aesthetic considerations of the land, property, buildings and other facilities adjacent to, surrounding and in generally the same area as the requested location of such a telecommunications tower” in direct contravention of §277-5 E. Moreover, the “shall” language of §277-6 O requires that towers be sited *so as to have the least practical adverse visual effect* on the environment and its character, and the *residences* in the area of the telecommunication tower site.

It is beyond argument that the proposed facility will stand out and dominate the skyline in a neighborhood where the homes are no taller than two stories. Clearly a one hundred forty

(140) foot cell tower at the proposed location will have impacts on both the aesthetics of the neighborhood as well as the value of the homes located there.

Homeland/Verizon's own previously submitted photographs show that the tower will rise above and be visible from the nearby residences. But more to the point, ***no photographs were taken from the viewpoint of the individual homes.*** It's these views – from the patios and porches, from the living rooms and kitchens – that will be destroyed.

Federal courts around the country, including the United States Court of Appeals for the Second Circuit, have held that significant or unnecessary adverse aesthetic impacts are proper legal grounds upon which a local government may deny a zoning application seeking approval for constructing a wireless telecommunication facility. *See Omnipoint Communications Inc. v. The City of White Plains*, 430 F.3d 529 (2nd Cir. 2005); *T-Mobile Northeast LLC v. The Town of Islip*, 893 F. Supp.2d 338 (2012); *Crown Castle NG E. Inc. v. Town of Greenburgh, N.Y.*, 552 F. App'x 47, 50 (2d Cir. 2014).

A municipality “may consider ... the height of the proposed tower, the proximity of the tower to residential structures, the nature of uses on adjacent and nearby properties, the surrounding topography, and the surrounding tree coverage and foliage. We, and other courts, have held that these are legitimate concerns for a locality.” *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 994 (9th Cir. 2009) *See also Sprint Telephony PCS, L.P. v. City of San Diego*, 543 F.3d 571, 580 (9th Cir. 2008) (stating that the zoning board may consider “other valid public goals such as safety and aesthetics”); *T-Mobile Cent., LLC v. Unified Gov't of Wyandotte County, Kan.*, 546 F.3d 1299, 1312 (10th Cir.2008) (noting that “aesthetics can be a valid ground for local zoning decisions”); and *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir.1999) (recognizing that “aesthetic concerns are a valid basis for zoning

decisions”).

Homeowners are best suited to accurately assess the nature and extent of the adverse aesthetic impacts upon their homes from an irresponsibly placed wireless telecommunication facility. This is especially true of homeowners whose property is adjacent or in close proximity to a proposed cell tower.

The United States Court of Appeals for the Second Circuit has recognized that when a local government is considering an application for a wireless facility, it should accept statements and letters from the actual homeowners, *as direct evidence of the adverse aesthetic impacts* that a facility would inflict upon nearby homes – *i.e.*, because they are in the best position to know and understand the actual extent of the impact they stand to suffer. *See, e.g., Omnipoint Communications Inc. v. The City of White Plains*, 430 F.3d 529 (2d Cir. 2005).

Letters from nearby homeowners – those who would be most affected – were previously included with our initial Memorandum in Opposition as **Exhibit “A.”** These letters detail the dramatic adverse impacts their properties would suffer if the proposed installation of a wireless telecommunication facility were permitted to proceed. They describe the reasons they moved to their neighborhood and how they love their beautiful, natural surroundings.

The specific and detailed impacts described by the adjacent and nearby property owners constitute “substantial evidence” of the adverse aesthetic impacts they stand to suffer because they are not limited to “generalized concerns,” but instead contain detailed descriptions of how the proposed facility would dominate the views from their backyards, decks where they enjoy their morning coffee and entertain family and friends, their front yards, bedroom windows, living rooms, and from all over their properties.

As additional evidence of the adverse impact the proposed cell tower would bring, letters

from real estate professionals were annexed to our initial Memorandum in Opposition as **Exhibit “B.”** These letters estimate that property values would be reduced by as much as 20%, and that these homes would be more difficult to sell, even at lowered prices.

These are the precise type of injurious impacts that the Town’s Telecommunications Tower Siting and Special Use Permit Law was specifically enacted to prevent. Such clear adverse impacts go far beyond the “minimal intrusion on the community” standard promulgated by the Courts.

Homeland/Verizon submits a report from Lane Appraisals, which purports to contradict the opinions of the realtors submitted with our initial Opposition. It should be noted that Lane, located in Larchmont, is not a local real estate business. Local realtors - like those whose reports were submitted with our initial Opposition – are in a far superior position to evaluate the effect a cell tower would have on nearby homes.

Conclusion

There is no dispute that an applicant must prove that there are *significant* gaps in wireless service, that the location of the facility will remedy those gaps, *and* that the facility presents a “minimal intrusion on the community.” This has been reiterated in the recent *Flower Hill* case, where the failure to prove a gap in cellular coverage caused an application to be denied. Lack of a specific frequency is not sufficient to prove a significant gap in coverage. There must be an actual gap meaning no service at all.

Homeland/Verizon has failed to prove the existence of a significant gap in service. Data submitted to the Federal Communications Commission by *Verizon* reveals full cellular coverage of the area surrounding the proposed site. It cannot be said then that there are significant gaps in coverage which would warrant granting the application, especially where the adverse impact to

the community exceeds a “minimal intrusion.”

For the reasons stated above, as well as those stated in our initial Memorandum in Opposition, *Homeland/Verizon's* application should be denied.

Dated: Merrick, New York
October 14, 2022

Respectfully Submitted,

Andrew J. Campanelli

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EXHIBITS IN OPPOSITION

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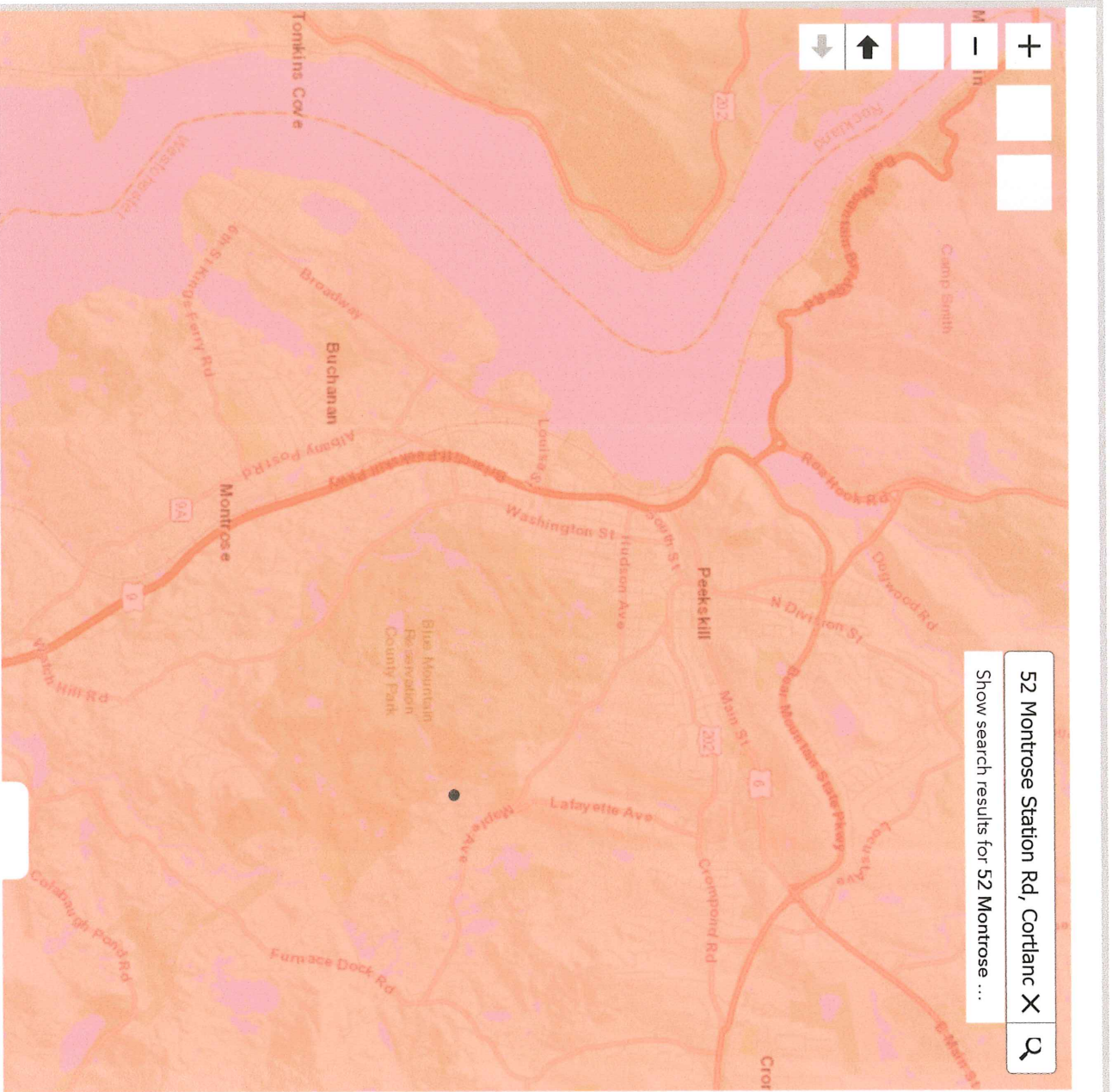
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Exhibit List

- A FCC Verizon 4G LTE Voice Mobile Coverage Map
- B FCC Verizon4G LTE Data Mobile Coverage Map

EXHIBIT A



Layer List

Legend

Layers



Verizon LTE Voice

AT&T
Mobility LTE
Data

Verizon LTE Voice

AT&T
Mobility LTE
Voice

T-Mobile
LTE Data

T-Mobile
LTE Voice

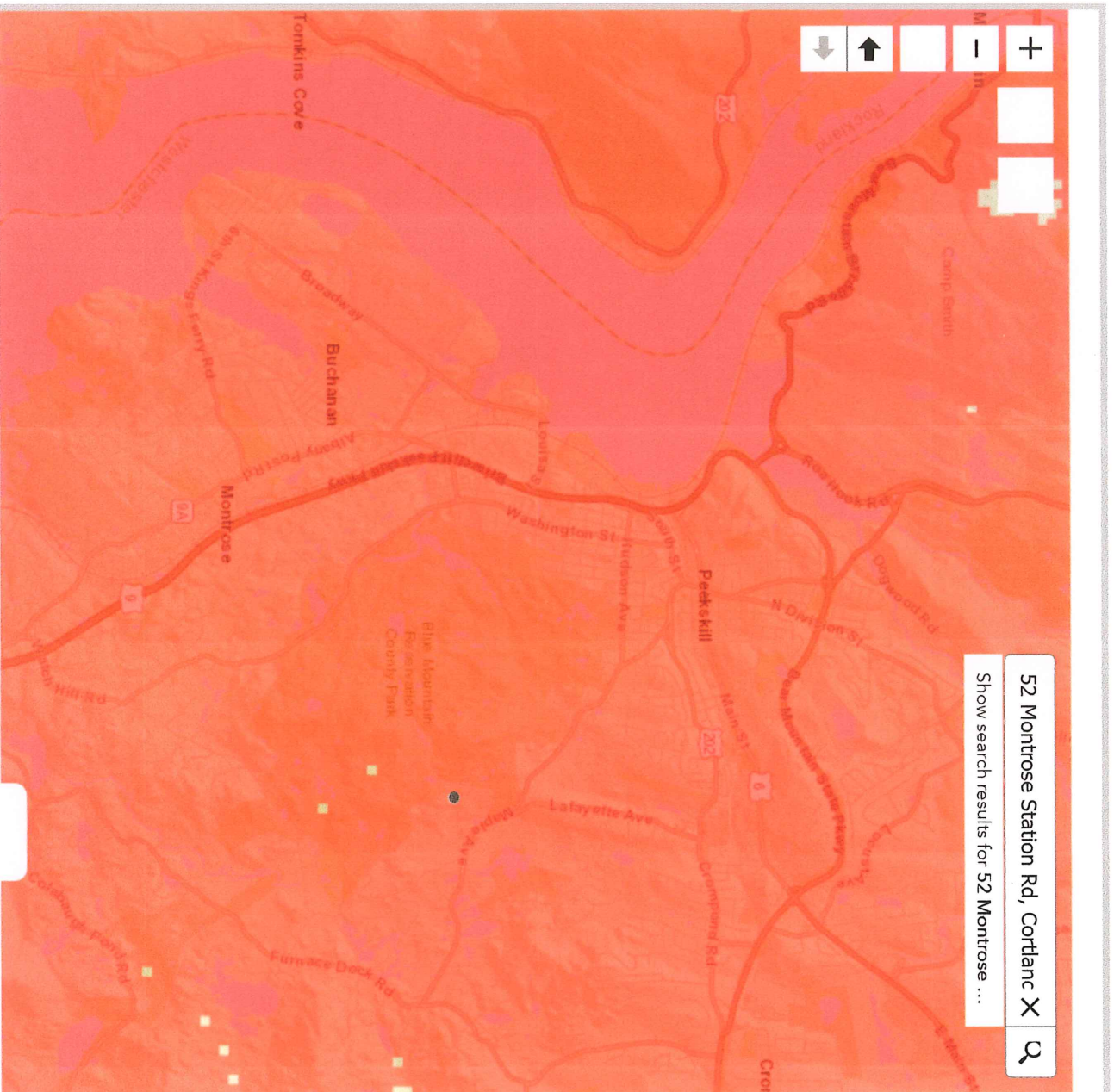
UScellular
LTE Data

UScellular
LTE Voice

Verizon LTE
Data

Verizon LTE
Voice

EXHIBIT B



Layer List

Legend

Layers



- Verizon LTE Data
- AT&T Mobility LTE Data
- AT&T Mobility LTE Voice
- T-Mobile LTE Data
- T-Mobile LTE Voice
- Uscellular LTE Data
- Uscellular LTE Voice
- Verizon LTE Data
- Verizon LTE Voice

- Verizon LTE Data
- Verizon LTE Data

Data download links:

[Download Broadband Mapping Files \(Shapefiles\)](#)