entirely residential area surrounded by historical sites. Consequently, the decision-making processes for both applications and the considerations relevant to each are far from identical.[11] Because the Dranesville Facility and proposed facility are not similarly situated, differential treatment of the two facilities does not constitute arbitrary and capricious conduct, and plaintiffs' claim fails in this respect.

Plaintiffs also assert that the Board acted arbitrarily and capriciously by selectively applying the provisions of the Comprehensive Plan, disregarding plaintiffs' evidence regarding the lack of alternative sites and technologies, and espousing an impermissible preference for DAS technology and public lands. Pls.' Summ. J. Br. at 24. Specifically, plaintiffs argue that they demonstrated that there were no adequate alternative sites, but that the Board arbitrarily disregarded that information and failed to consider plaintiffs' evidence of compliance with the Comprehensive Plan. Id. at 23; Pls.' Reply Br. at 9. Plaintiffs assert that "[w]here Applicants demonstrate compliance" with the Comprehensive Plan "to the satisfaction of both Staff and Planning Commission, only to have evidence of compliance ignored by the Board, the result is arbitrary under Virginia law and thus cannot constitute substantial evidence under federal law." Pls.' Summ. J. Br. at 24. In response, the Board correctly acknowledges that the Comprehensive Plan does not favor DAS technology over stealth designs,[12] but encourages applicants to consider various types of mitigation, including use of alternative technologies. Def.'s Opp'n Br. at 8 n.6. The Board contends that the Applicants failed to establish that other forms of mitigation,

[11] Moreover, although neither party has raised this issue, it appears that the Board evaluated the Dranesville Facility according to a different edition of the Comprehensive Plan. Portions of the Policy Plan specific to telecommunications facilities were amended in 2013. Those amendments led to the addition of Objective 42(c), which calls for the consideration of micro-cell technologies like DAS. See Proposed Comprehensive Plan Amendment, available at http://www.fairfaxcounty.gov/dpz/comprehensiveplan/amendments/s12-cw-2cp.pdf.

[12] Both this concession and the plain language of the Comprehensive Plan make plaintiffs' preemption argument irrelevant. Pls.' Summ. J. Br. at 25.

including use of DAS nodes or alternative sites, would not be feasible or adequate alternatives that would produce less of an impact. Id. at 19.

Plaintiffs misconstrue the requirements of the Comprehensive Plan by arguing that simply designing a facility to resemble a bell tower and labeling it as "stealth" or providing camouflage is sufficient to gain approval under the 2232 and special exception processes. This argument ignores the clear provisions of the Comprehensive Plan, which call for co-location on existing facilities when available, Objective 42(a); mandate consideration of feasible "camouflage structure design and/or micro-cell technologies," Objective 42(c); express a preference for public sites when they provide a "similar or equal opportunity to minimize impacts," Objective 42(d); and require that an applicant show that the proposed facility will have "the least visual impact...as compared with alternate sites." Objective 42(k). By requiring the plaintiffs to demonstrate that the proposed facility was consistent with these provisions, the Board did not arbitrarily or selectively apply the Plan; rather, it is plaintiffs who seek to selectively follow the Plan's provisions and rely exclusively on stealth design.

Moreover, the Board was not required to defer to any recommendations or determinations made by Staff or the Planning Commission and is permitted under Virginia law to overturn those decisions. Va. Code Ann. § 15.2-2232(B); Zoning Ordinance § 9-001. The Planning Commission and Staff's finding that the proposed facility was in compliance with the Comprehensive Plan can serve as relevant evidence, but it can be outweighed by other evidence in the record. Va. Beach, 155 F.3d at 430-31. Based on the Board's de novo review of the substantial evidence in the record, the Board reasonably reached a different conclusion than those entities. The Staff and the Planning Commission's satisfaction with plaintiffs' evidence does not demonstrate that the

Board's contrary decision was arbitrary and capricious or that the Board ignored relevant evidence.

In addition to misinterpreting the Comprehensive Plan and Virginia law, plaintiffs also misconstrue the weight of the evidence for and against their proposal in asserting that the Board arbitrarily ignored the evidence plaintiffs presented. Plaintiffs argue that they proved that DAS was not a feasible alternative. Plaintiffs base this argument almost entirely on Dugan's testimony, referring to Dugan as an "expert witness" whose testimony was unrebutted and stating that no party objected to his expert qualifications. Pls.' Summ. J. Br. at 12. Contrary to plaintiffs' assertion, it is unclear whether Dugan was designated as an expert witness for the administrative proceeding; however, it is clear that Dugan was not designated as an expert for the purposes of this litigation.[13] Therefore, as the Board argues, Dugan's statements and opinions should be evaluated solely on the basis of what is contained in the written record. See Def.'s Opp'n Br. at 16-17. The Board contends that that record shows that Dugan's opinions and reports are unreliable and unsupported by any data or methodology. Id. at 15-16.

Drawing all reasonable inferences in favor of the plaintiffs and even assuming that Dugan was in fact properly qualified as an expert, the quantum of evidence Dugan provided does not show that the Board lacked substantial evidence or acted arbitrarily and capriciously when it denied the Applications, particularly when compared to the contradictory evidence presented by the opposition. With regards to the use of DAS technology, Dugan opined that DAS was not a

[13] Although plaintiffs' counsel stated to the Board that plaintiffs had asked the Planning Commission to qualify Dugan as an expert witness, J.A. at 1362, the transcript of the Planning Commission meeting does not indicate that Dugan was actually presented as an expert witness. J.A. at 0012 (introducing Dugan to the Planning Commission only as "an engineer who is working on behalf of Verizon Wireless"). Moreover, this Court ordered that review of the Board's decision in the case would be based exclusively upon the Written Record and that there would be no additional disclosure of expert testimony or expert discovery or reports. Agreed Order Amending the Joint Report and Discovery Plan [Dkt. No. 15].

feasible option due to the low height of DAS nodes and the area's sloping terrain. J.A. at 1365-66. When testifying before the Planning Commission, Dugan stated that DAS nodes "only offer of [sic] spot coverage or capacity relief to a very small area" due largely to their lower antenna height, that a "substantial number of DAS nodes [would be] necessary to equate to the level of coverage and capacity afforded by the proposed facility," and that existing poles would have to be replaced by taller ones to make the option feasible. J.A. at 0013-14. Dugan's testimony simply indicated that a large number of nodes and higher poles might be required, which might make the option more expensive but not unfeasible. Moreover, Dugan's opinion that DAS nodes would not be "less intrusive," J.A. at 0014, is irrelevant because the Fourth Circuit does not follow the "least intrusive means" approach to wireless facility applications, and Dugan was testifying about technological alternatives not about visual impact.

Even when applicants present the testimony of numerous experts, the views of the community "will often trump those of...experts in the minds of reasonable legislators." Va. Beach, 155 F.3d at 430-31. Numerous community members expressed their opinions and offered specific evidence to contest Dugan's assertions. For example, opponents presented evidence that DAS nodes are already in use at various locations in Fairfax County and that the nodes "work very well where there's a lot of topographical challenges" because that is "what they're designed for." J.A. at 1394. With this contradictory evidence and community opposition, and absent additional supporting data from Dugan, the Board was justified in rejecting Dugan's conclusions. Moreover, there is no evidence from which a reasonable juror could find that the Board actually ignored Dugan's evidence in reaching its decision; rather, the record indicates only that it found substantial evidence contradicting it.

Plaintiffs also argue that Dugan's testimony and reports demonstrate that there were no existing or alternative sites that would adequately serve the Applicants' needs, and that the Board arbitrarily disregarded that evidence. The dispute over the availability of alternative sites focused primarily on the Providence Baptist Church Steeple ("Providence Steeple") and the Wolftrap Fire Station #42 ("Fire Station"). The Providence Steeple is an existing structure that already hosts wireless carriers and would have room for co-location of at least a 40-foot antenna,[14] and the Fire Station is a public site owned by Fairfax County that could host a flag pole monopole.

SAACT submitted uncontradicted evidence that the Applicants had originally characterized the Fire Station as their "ideal location," but had to choose the ACUMC site instead because the Fire Station was deed restricted and unavailable, assertions that were found to be incorrect. J.A. at 0876, 1373. Applicants later changed their proposal and stated that the Fire Station would be a viable location, but only in conjunction with a site at ACUMC. J.A. at 0242. This "two-site strategy" involved a site to the east, which CWS stated had to be ACUMC, and a site to the west, which CWS stated the Fire Station could provide. J.A. at 1236. CWS affirmatively stated in its application materials that it had no immediate intention of developing the site to the west. Id. Dugan represented to the Planning Commission that the Fire Station alone was not an adequate alternative to the proposed facility because relying solely on a site at the Fire Station would leave a .75 mile gap in coverage along Leesburg Pike. J.A. at 1316. Verizon also sent the Planning Commission a letter stating that the Fire Station would "benefit our

[14] There is dispute over the exact height at which an antenna could be placed on the Providence Steeple. Opponents of the proposed facility stated that the antenna could be located at 55 feet, J.A. at 0180-11-12, while Dugan testified to the Planning Commission that it could only be located at 40 feet. J.A. at 0013. Neither side provides additional support and the Court cannot draw reasonable inferences in either party's favor; however, the Board was presented with these conflicting assertions regarding height, meaning that Dugan's testimony in this respect was at least contested, if not rebutted.

network" but would not replace the need for the site at ACUMC. J.A. at 1243. Regarding the Providence Steeple, Dugan represented that the site would not be a suitable alternative because it would not be tall enough and, at a distance of .5 miles from ACUMC, would be "too far from the heart of the target area." J.A. at 1316.

Plaintiffs' arguments are unconvincing on their face, especially in light of CWS's earlier position that the Fire Station was the "ideal location" and the short distance between the Providence Steeple and ACUMC. Moreover, these arguments do not adequately address other options raised by opponents. For instance, the applicants did not address the feasibility of alternative arrangements such as a monopole at the Fire Station in combination with DAS nodes to cover the purported .75 mile gap on Leesburg Pike; a lower tower at the proposed site in conjunction with a monopole at the Fire Station; expansion of an existing tower; or co-location on the Providence Steeple in combination with an additional monopole at the Fire Station or DAS nodes. See Def.'s Summ. J. Br. at 27-28. Opponents presented maps, charts, testimony, and other evidence supporting such alternative solutions that provided the Board with enough conflicting evidence that, in combination with the evidence of adverse impact and inconsistency with the Comprehensive Plan, provided the Board with substantial evidence on which to base its denial. See, e.g., J.A. at 0336, 0659-64, 1391-94.

Plaintiffs contend that the Board's reliance on community input violated the substantial evidence standard, and contrast Dugan's expert testimony with the testimony and evidence presented by opponents, describing the latter as "unsubstantiated claims" based on conjecture and speculation. Pls.' Summ. J. Br. at 28-29. Plaintiffs also argue that the "number of persons expressing concerns, standing alone, does not make evidence substantial," and that it is irrelevant that almost all of the proposal's supporters were also members of ACUMC. Id. at 29 (quoting

Petersburg Cellular P'ship v. Bd. of Supervisors of Nottoway Cnty., 205 F.3d 688, 695 (4th Cir. 2000) ("Petersburg Cellular")); Pls.' Opp'n Br. at 15 (citing T-Mobile Ne. LLC v. City Council of Newport News, Va., 674 F.3d 380, 389 (4th Cir. 2012) ("Newport News")).

Plaintiffs' attempt to minimize the weight of the community opposition is misplaced. The opposition to this proposal far outweighed the community opposition in Newport News, where the court "note[d] the absence of repeated and widespread opposition" and described the turnout as "anemic" when just one person sent an email and three people spoke at a hearing in opposition. Newport News, 674 F.3d at 390 (internal quotation marks omitted). To the contrary, the community opposition here was consistent and widespread, far exceeding one email and three speakers. A survey of residents who lived within .75 miles of the proposed site showed that over 200 of those local residents or 91% of those surveyed opposed the facility. J.A. at 0637, 1380-81. In addition, a total of 750 individuals signed petitions opposing the site, J.A. at 0637, 62 citizens sent Supervisor Foust emails expressing their opposition, J.A. at 1419, and 17 citizens spoke before the Board on behalf of SACCT and local residents. Def.'s Summ. J. Br. at 3.

This opposition was not only consistent and widespread but was also "specific, organized, and grounded in valid concerns." New Cingular Wireless PCS, LLC v. Fairfax Cnty. Bd. of Supervisors, No. 1:10cv283, 2010 WL 4702370, at *5 (E.D. Va. Nov. 10, 2010) aff'd, 674 F.3d 270 (4th Cir. 2012). The residents conducted field tests regarding coverage, J.A. at 0654, sent dozens of emails, responded to surveys and petitions, J.A. at 1380-82, met with CWS and Staff, and gave detailed presentations to the Planning Commission and the Board. See, e.g., J.A. at 0636-65. The community's concerns were not "irrational," contra Pls.' Opp'n Br. at 15, but instead focused on the proposed facility's compliance with the Comprehensive Plan. For instance, residents pointed out that the proposal lacked harmony and consistency with the

surrounding neighborhoods and structures, J.A. at 1385, failed to consider locating the facility on a pre-existing structure, ignored the impact on historical vistas, J.A. at 1374, and lacked adequate screening to mitigate visual impact. J.A. at 1382-84.

Similarly, many of the emails sent by opponents to Supervisor Foust and the Planning Commission listed eight specific objections, including that the proposed facility was "contrary to the spirit and language of the Fairfax County Comprehensive Plan," that the facility's proposed height was "inappropriate for the neighborhood" because it would "tower over the buildings, homes and trees in the area" and would lack adequate screening, that the scale of the facility was not consistent with existing local bell towers, that the proposed facility would impair vistas of and from historical sites, that alternative sites and technologies should be considered first, that the proposed facility would increase traffic issues, and that the community opposed the tower. See, e.g., J.A. at 0457-0511.

The opposition did raise concerns that have previously been deemed unreasonable or impermissible under the Act, including health concerns, the danger of children climbing on the tower, and the potential for the tower to collapse, see, e.g., J.A. at 0044, but the overall weight of the community concerns was "objectively reasonable because they were based on known experience about the effects that commercial uses can have on a residential neighborhood" and particularly on this specific neighborhood. See Petersburg Cellular, 205 F.3d at 695. In contrast, the citizens who emailed and spoke in favor of the facility were smaller in number and were almost exclusively members and trustees of ACUMC, many of whom wrote that the proposed facility would financially benefit the church to enable it to continue with its ministries. See, e.g., J.A. at 0180-60. Financial benefit to a private entity has never been deemed a valid concern under the Act or Comprehensive Plan, and even without this vested financial interest, the citizens

in favor of the proposed facility were outnumbered by the opposition and did not present anywhere close to the number of specific arguments raised by opposition. Therefore, because the Board based its denial of the Applications in part on "the reasonably-founded concerns of the community... undoubtedly there is substantial evidence to support the body's decision." Petersburg Cellular, 205 F.3d at 695. (internal quotation marks and emphasis omitted).

Accordingly, plaintiffs have not provided sufficient evidence from which any reasonable juror could find that the Board's decision to deny the SE Application and reverse the Planning Commission's acceptance of the 2232 Application was not supported by substantial evidence and was arbitrary and capricious. Therefore, summary judgment will be granted to the Board on Counts I and IV.

### E. Count II: Prohibition of Service

In Count II, plaintiffs allege that the Board's decision prohibits or has the effect of prohibiting the provision of "personal wireless services" by Verizon and therefore violates 47 U.S.C. § 332(c)(7)(B)(i)(II). Pls.' Summ. J. Br. at 30. The Act defines "personal wireless services" to "mean commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services." 47 U.S.C. § 332(c)(7)(C)(i). The Federal Communications Commission ("FCC") ruled in 2007 that wireless broadband Internet access services do not qualify as "personal wireless services" under that definition but are instead treated as "information services." Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, 22 F.C.C.R. 5901, 5901-02 ¶ 1 (2007). "Information services" are nonetheless protected by the Act when "a wireless service provider use[d] the same infrastructure to provide its 'personal wireless services' and wireless broadband Internet access

service." Id. at 5923-24, ¶ 65. Therefore, when there is "[c]ommingling" of services at a proposed facility, the facility is deemed to be a "personal wireless facility." Id.

The Court reviews a claim of effective prohibition of service de novo. Loudoun Cnty., 748 F.3d at 192 (citing 47 U.S.C. § 332(c)(7)(B)(v)). Although the Court has determined that Verizon does not have standing in this litigation, in the interest of creating a complete record, the plaintiffs' argument about this issue will be addressed. To prevail on a prohibition of service claim, a wireless carrier must show either "that a local governing body has a general policy that essentially guarantees rejection of all wireless facility applications," or that "denial of an application for one particular site is 'tantamount' to a general prohibition of service." T-Mobile Ne. LLC v. Fairfax Cnty. Bd. of Supervisors, 672 F.3d 259, 266 (4th Cir. 2012) (citations omitted) ("Fairfax Cnty."); see also New Cingular, 674 F.3d at 275-76.

Under the latter theory, a plaintiff must demonstrate both "a legally cognizable deficit in coverage amounting to an effective absence of coverage" and a lack of "reasonable alternative sites to provide coverage." [15] Fairfax Cnty., 672 F.3d at 268. Demonstrating a lack of reasonable alternatives requires showing that "further reasonable efforts to gain approval for alternative sites would be fruitless." Id. (internal quotation marks omitted). A plaintiff's burden of proof on a prohibition of service claim "is substantial and is particularly heavy when...the plaintiff already provides some level of wireless service to the area," because "the Act cannot guarantee 100 percent coverage." Id. Therefore, a plaintiff cannot demonstrate prohibition of service in "the ordinary situation in which a local governing body's decision simply limits the level of wireless

[15] The Applicants presented evidence of "need" using letters of interest from T-Mobile and Sprint. J.A. at 0696-97. These letters of interest are not helpful to plaintiffs because they were non-binding expressions of interest and spoke only of improving wireless service in the area rather than resolving an effective absence of coverage.

services available" or merely by showing that alternative sites would not eliminate the entire coverage deficiency or provide the same level of coverage as the proposed facility. Id. at 268-69.

Although a denial of coverage claim is "a fact-bound inquiry," the Fourth Circuit has found that a local county board's decision denying an application did not prohibit service where there were "genuine factual disputes" about the absence of service in an area, and where the board demonstrated through a record of prior approvals that it was not generally hostile to wireless services. 360° Commc'ns Co. of Charlottesville v. Bd. of Supervisors of Albemarle Cnty., 211 F.3d 79, 87-88 (4th Cir. 2000) ("360 Commc'ns"); see also T-Mobile Ne. LLC v. Howard Cnty. Bd. of Appeals, No. 12-1682, 2013 WL 1849126, at *15 (4th Cir. May 3, 2013) (stating that the Fourth Circuit "also consider[s] a zoning board's past decisions on applications" in an assessment of whether future efforts would be fruitless).

Plaintiffs have not argued that the Board has a general policy guaranteeing rejection of all applications for wireless facilities, nor is there any evidence that the Board does have such a policy. Instead, Verizon claims that it demonstrated an effective absence of coverage through Dugan's testimony and propagation maps, arguing that the Board and the proposal's opponents did not present any expert testimony or professionally prepared data contradicting Dugan's evidence. Pls.' Summ. J. Br. at 31. The Board counters that Verizon's evidence did not demonstrate any significant gap in coverage and showed only that Verizon sought to improve existing coverage and provide capacity relief. Def.'s Summ. J. Br. at 22-23. The parties also dispute whether the 4G LTE service plaintiffs seek to provide is a "commercial mobile service" covered by the Act. The Board argues that Verizon seeks only to provide wireless internet services that are "information services" rather than a "commercial mobile service." Id. at 25-26. Plaintiffs respond that the data and voice services are commingled and thereby protected and, in

the alternative, that the FCC's recent reclassification of mobile broadband Internet access as a mobile service is controlling.[16] Pls.' Opp'n Br. at 28-29.

The parties raise these arguments regarding "information services" only in their summary judgment papers, without explicit discussion of the distinction between "personal wireless services" covered by § 332(c)(7) and any services beyond that section's purview. Had the Board made its decision after March of 2015, the issue would be easily resolved, because the FCC's March 2015 ruling clearly reclassifies the 4G LTE coverage Verizon seeks to provide as a "commercial mobile service;" however, because the Board made its decision in December 2014, the relevant inquiry is whether Verizon has demonstrated that the proposed facility would use the same infrastructure to provide both "personal wireless services" as defined before March 2015 and 4G LTE coverage. Plaintiffs contend that the "inherently interdependent design" of "wireless telecommunications and information networks" means it is "impossible to isolate 'data' sites...from 'voice' sites" under the terms of the statute, Pls.' Reply Br. at 15, because "when the Verizon Wireless network offloads data traffic to a 4G LTE site, voice communication through other sites on the Verizon Wireless network improves." Pls.' Opp'n Br. at 28. Plaintiffs further argue that the use of "modern voice transmission technologies such as a Voice over LTE and High Definition Voice" show that an LTE network still carries voice communications and is commingled with "personal wireless services." Id. at 28-29.

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[16] In March 2015, after the Board denied the Applications, the FCC reclassified mobile broadband Internet access service as a "commercial mobile service," meaning that an effective prohibition of wireless broadband services now violates the Act. Protecting and Promoting the Open Internet, 30 F.C.C.R. 5601, FCC 15-24, GN Dkt. No. 14-28, 178 ¶ 388 (Mar. 12, 2015). The FCC stated that the "classification decisions" made in that ruling would "apply only on a prospective basis." Id. at 134 ¶ 308 n.792. Therefore, this reclassification has no relevance to this lawsuit. Verizon is engaged in legal efforts to overturn that classification decision. Pls.' Opp'n Br. at 29, 29 n.8.

To support these assertions, plaintiffs point to Dugan's testimony before the Board regarding these "technical realities." Id. (citing J.A. at 1363-64). During that testimony, Dugan discussed the growth in "data uses" that require Verizon to upgrade to 4G LTE, the improved signal levels "required to provide voice and data services" on LTE smartphones, and Verizon's use of "voiceover LTE," which Dugan described as "the voiceover riding over a high-speed broadband network" and producing "[h]igh definition quality." J.A. at 1363-64. Dugan did not refer to "voiceover LTE" in his testimony before the Planning Commission or in his report to the Planning Commission, nor did he discuss any type of coverage other than 4G LTE in those submissions.

Neither plaintiffs' assertions nor Dugan's testimony demonstrate that Verizon intended to commingle "personal wireless services" and wireless broadband Internet services at the proposed facility. Instead, the record indicates that Verizon sought to use the proposed facility to provide wireless broadband Internet services including 4G LTE and Voiceover LTE. Few courts have addressed this issue, but at least one court has found that a proposed site intended to provide only 4G service did not qualify as a "personal wireless facility" under the FCC's pre-2015 rulings because it would be used "solely to provide an 'information service.'" Clear Wireless LLC v. Bldg. Dep't of Lynbrook, No. 10-CV-5055, 2012 WL 826749, at *6-7 (E.D.N.Y. Mar. 8, 2012).[17] In Clear Wireless, the wireless provider "implied that a failure to upgrade to 4G could negatively impact...personal wireless services, leading to a deficiency in voice services;" however, the court found that the provider had not supported this assertion "beyond an anecdote about an increase in dropped calls." Id. at *7. Plaintiffs in this case have not provided even that

[17] This case and an additional case, Arcadia Towers LLC v. Colerain Twp. Bd. of Zoning Appeals, No. 1:10-CV-00585, 2011 WL 2490047 (S.D. Ohio June 21, 2011), appear to be the only two decisions addressing a prohibition of service claim regarding "information services," and they are the only two cited by the parties in their summary judgment briefs.

amount of evidence. At best, plaintiffs' assertions and Dugan's testimony show that the proposed facility would improve voice coverage currently provided by other sites. Plaintiffs do not show that the proposed facility would provide both 4G LTE coverage and "personal wireless services" at the same site, using the same infrastructure. Plaintiffs' contentions about "Voice over LTE and High Definition Voice" similarly fail to show that the proposed facility would commingle "personal wireless services" and "information services," because Dugan's testimony indicates that "Voice Over LTE" is simply another type of wireless broadband Internet service. See J.A. at 1364.

Even if Verizon could show that 4G LTE and "personal wireless services" would be sufficiently commingled at the proposed site to qualify the site as a "personal wireless facility," Verizon still cannot make out a prohibition of service claim because it has not proven that there is an effective absence of coverage. Instead, "Verizon Wireless freely concedes that it is trying to enhance its network and provide better service to its customers." Pls.'Opp'n Br. at 25. Verizon represented to the Planning Commission and Board that it sought to "improve its wireless telecommunications network" in the area, thereby acknowledging an existing level of service. J.A. at 0767. Plaintiffs also stated in their Amended Complaint that Verizon "is in the process of transitioning its technology to 4G or Long Term Evolution ("LTE") service. LTE offers not only higher capacity (call volume) per site, but also makes possible additional wireless services such as mobile data and location-based services, thus expanding the utility and reliability of wireless services." Am. Compl. ¶ 17. Verizon also claimed that without a sufficient number of cell sites in any one area, Verizon would "not be able to provide uninterrupted service." Id. ¶ 19. These representations reflect Verizon's desire to provide 100% coverage and to improve and expand its

services, not to resolve a legally cognizable gap in those services. Such goals are not protected by the Act.

Similarly, Dugan represented to the Planning Commission and Board that Verizon had to "build ahead of the curve in order to meet the demand for service," J.A. at 0079, and needed to "upgrade their networks;" that the proposed facility would "provide coverage benefits as well as capacity off-loading benefits," J.A. at 1364; that it was "critical for Verizon Wireless to relieve traffic" from nearby sites, J.A. at 0013; and that the proposed facility would "[i]ncrease capacity," J.A. at 0016, "improve service and provide better handoff between the existing sites serving the heavily traveled Leesburg Pike," and provide "0.5-1.0 mile of enhanced new 4G LTE service to the area." J.A. at 0723. Dugan's statements before the Planning Commission and the Board consequently referred only to improving existing coverage and increasing capacity for offloading from existing sites in the area, rather than to remedying any effective absence of coverage in the area. See J.A. at 0012-14, 1363-64. In fact, Dugan stated that "LTE service is currently available in the area," but that the latest form of technology required better signal levels because it does not work "in all areas at all times." J.A. at 1363-64. Therefore, plaintiffs' evidence demonstrates that there are existing Verizon sites in the area providing coverage, that there is at most a one-mile gap in 4G LTE coverage but not in 3G or traditional voice coverage, and that Verizon wishes to improve 4G LTE coverage rather than resolve an absence of coverage. Such improvements may be desirable, but they are not protected from local decision-making under 47 U.S.C. § 332(c)(7)(B)(i)(II).

Despite Verizon and Dugan's characterization of the issue, Verizon persists in arguing that there is in fact evidence of an effective gap in coverage, relying primarily on the propagation maps produced by Dugan. These maps were based on a target signal level of -95 dBm RSRP

(reference signal received power) and showed an area of white space denoting in-building coverage that fell below that level. J.A. at 0724, 730-32. According to Dugan's testimony and the maps, the proposed facility would resolve this gap, id.; however, these maps, like Dugan's testimony, are focused exclusively on a particular level of 4G LTE service, rather than 3G or traditional voice coverage. Dugan stated that RSRP "is generally the preferred signal measurement used for LTE networks" and acknowledged that the maps contained a margin of safety (fade margin)[18] because below this threshold "the connection and download speed of broadband wireless internet services degrades dramatically." J.A. at 0724. Dugan's testimony shows that the white space on the maps does not correspond to an effective absence of overall coverage but rather to a diminished level of wireless internet services. Although these maps demonstrate that the Board's decision may have the effect of limiting the level of data or wireless internet services Verizon can provide, they do not prove that there is an effective absence of coverage that the Board's decision would prohibit Verizon from resolving.

Moreover, Dugan's propagation maps conflict with marketing maps available on Verizon's website, which show full 4G LTE coverage where Dugan's show white space, and which state that even when 4G LTE is not available customers may connect to 3G service instead. J.A. at 0824. Although Dugan and Verizon argue that these marketing maps "are not an exact representation of coverage," J.A. at 0724, they serve both to cast doubt on the reliability of Dugan's testimony and to provide relevant evidence that Verizon has significant existing coverage in the area, even if it is not full 4G LTE coverage at all times in all places. Therefore, even if Dugan's maps demonstrate some gap in 4G LTE wireless and data coverage, they do not meet Verizon's heavy burden of demonstrating an effective absence of all forms of coverage.

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[18] The extent of this fade margin was not identified by either Dugan or Verizon. Def.'s Summ. J. Br. at 25.

Furthermore, Dugan did not provide any data or other evidentiary basis for his maps and conclusions, and Verizon did not provide any additional data beyond Dugan's maps and testimony to demonstrate an effective absence of coverage. In particular, the Board highlights Verizon's failure to submit field test data, complaint logs, dropped or lost call data, maps for projected DAS coverage on Route 7, or a propagation map for voice only service rather than data service. Def.'s Summ. J. Br. at 24.[19] Dugan stated that Verizon uses "a wide variety of propagation models, drive tests, customer complaints, and other things" to determine where facilities are needed, J.A. at 0079; however, neither Dugan nor Verizon presented evidence of, or data from, these models or tests beyond the propagation maps. Dugan stated that his analysis was based on drive test data, J.A. at 0724-25, but he never provided that data or any other data supporting the maps or his testimony, even though he has done so in other cases where he served as an expert witness. See Omnipoint Commc'ns Enters., L.P. v. Zoning Hr'g Bd. of Easttown Twp., 331 F.3d 386, 392 (3d Cir. 2003) (Dugan oversaw "drive tests in which approximately six hundred forty actual calls were made using eight cell phones of various providers" to track the number of dropped calls and instances of no service.); see also New Cingular Wireless PCS v. Zoning Hr'g Bd. of Weisenberg Twp., No. 06-2932, 2009 WL 3127756, at *4 (E.D. Pa. Sept. 29, 2009) (defendants' expert conducted drive tests and reviewed the drive tests conducted by Dugan and another expert). If Dugan collected any such data in this case he did not present it to the Planning Commission or the Board.

[19] SACCT presented an email chain showing that Staff requested such additional information from Verizon before issuing its report, J.A. at 1098-1101, and Staff later told the Planning Commission that the Applicants did not provide everything suggested but did submit an amount of information consistent with other 2232 applications. J.A. at 0081, 0613. Verizon emphasizes Staff's statement that the additional requested information was not required or essential and argues that dropped call logs are an antiquated metric not required to demonstrate an absence of coverage. Pls.' Reply Br. at 15 (citing J.A. at 0613).

Instead, it was the opponents of the proposed facility who crowd-sourced data, J.A. at 0654, and conducted multiple field tests which demonstrated that Verizon customers had strong to adequate service in the area of the purported coverage gap. J.A. at 0180-55-59. Although the members of SACCT are not professional engineers, that they furnished this data, and Dugan and Verizon did not provide anything like it, further highlights the plaintiffs' overall lack of evidence. At the very least, SACCT's evidence showed that "genuine factual disputes" exist over the absence of coverage in the relevant area. See 360° Commc'ns, 211 F.3d at 87-88. This showing provides a sufficient basis to find that the Board's decision did not result in a prohibition of service.

Finding that on this record Verizon has not demonstrated an effective absence of coverage does not mean that dropped call data or any specific forms of evidence are required to prove a prohibition of service claim; rather, this finding is based on Verizon's failure to meet its "particularly heavy" burden of proof by supplying sufficient evidence to demonstrate an effective absence of coverage. At most, Verizon's evidence indicates that the Board's decision prevents Verizon from improving existing service, particularly wireless internet and data service, but it does not demonstrate that the decision prohibits Verizon from providing personal wireless services under the terms of the Act.

Even if Verizon had proven that there are cognizable gaps in coverage, Verizon must also demonstrate that no reasonable alternative sites could provide that coverage and that further efforts to gain approval of alternate sites would be futile. In determining the availability of other sites, the Fourth Circuit has explicitly rejected the use of "any specific formula" such as the "least intrusive means" test used by several circuits and focuses instead on "a fact-based analysis of the record." Fairfax Cnty., 672 F.3d at 266-67; see also 360° Commc'ns, 211 F.3d at 87.

Plaintiffs argue that they "meticulously examined 14 alternative sites before concluding that Andrew Chapel was the only feasible location" for the proposed facility, Pls.' Reply Br. at 17, and cite Staff and the Planning Commissions' findings that they adequately explored alternative sites. Pls.' Opp'n Br. at 25. That these entities credited plaintiffs' assertions is irrelevant to the prohibition of service claim and does not compensate for plaintiffs' lack of additional evidence on the issue, because, as stated before, neither the Court nor the Board owes deference to Staff or the Planning Commission's determinations.

Moreover, simply "examining" alternative sites does not suffice; Verizon must also show that those sites are not reasonable alternatives that would resolve at least some of Verizon's purported coverage gap. The parties' debate over alternatives focused in particular on the availability of the Fire Station, the Providence Steeple, DAS nodes, or some combination thereof. Verizon again relies almost exclusively on Dugan's testimony and propagation maps to support its claim that it adequately examined and eliminated those options. Dugan stated that he made a site visit to the Fire Station and Providence Steeple, and that those sites did not "fulfill the objectives" of the proposed facility. J.A. at 0724. Regarding the Fire Station, CWS stated that the site was "too far west," J.A. at 1290, and Dugan stated that the site would leave a "0.75 mile coverage gap" and would "not provide enough coverage overlap" with the existing facilities in the area to allow for capacity relief. J.A. at 0724. Plaintiffs assert that these conclusions were "carefully documented with scientific evidence," Pls.' Opp'n Br. at 26, but that evidence consists only of Dugan's propagation maps, which are not only unsupported by data or methodology but also demonstrate a large overlap between the coverage the Fire Station and the proposed facility would respectively provide. J.A. at 1310-12. Beyond this evidence, plaintiffs' main additional argument is that a 2232 review and other steps would be required to build a facility at the Fire

Station, but there is no indication that meeting these requirements would be difficult given the Board's interest in that site being considered, see J.A. at 1426, and it is well established that "the difficulties in meeting such restrictions are insufficient to establish that a provider lacks reasonable alternatives." Fairfax Cnty., 672 F.3d at 269; see also New Cingular, 674 F.3d at 276.

Dugan ruled out the Providence Steeple as being too short and far away from "the target area" to meet coverage objectives, even though it is a half mile from the proposed facility. J.A. at 0724. He did not produce a propagation map or any additional data to demonstrate the coverage that the Providence Steeple might provide or how that coverage might be inadequate. Instead, he made additional unsupported assertions that reducing the proposed antenna height would "compromise" and "reduce[]" service in contrast to the proposed height, which would instead "provide service to a far wider area." Id. Again, he presented no evidence demonstrating exactly how much coverage the Providence Steeple or a lower antenna at the proposed site would provide.

Dugan's assertions that DAS nodes are not feasible were similarly conclusory and contradicted by evidence of existing nodes in the area. Additionally, Dugan did not present evidence regarding how a combination of any of these options—the Fire Station, Providence Steeple, a lower tower at ACUMC, and/or DAS nodes—might affect coverage. Therefore, plaintiffs fail to demonstrate that alternative sites would not serve at least some of Verizon's purported coverage needs. Dugan's testimony shows only that these alternative sites might not serve those needs as well as the proposed facility, which is insufficient to prove that they are not reasonable alternatives. Fairfax Cnty., 672 F.3d at 269 (affirming the denial of plaintiff's application where its "several declarations, along with some exhibits" simply presented "very

general conclusions regarding the feasibility of alternative locations, including repeated assertions that the locations 'would not allow T–Mobile to meet its coverage objectives'").

Plaintiffs try to save Dugan's testimony by arguing that the Board's decision to disregard his testimony "was based on nothing more than the unsupported opinion of a single Supervisor." Pls.' Summ. J. Br. at 32. This argument appears to refer to Supervisor Foust's estimate that there was a 60% overlap in coverage between the Fire Station and the proposed facility. J.A. at 1426. Supervisor Foust appears to have based his opinion at least in part on Dugan's propagation maps, which show a substantial overlap between the coverage that the Fire Station and the proposed facility would each provide that opponents estimated to measure from 50 to 70%. J.A. at 0114-15. These maps demonstrate that the Fire Station could provide at least half of the desired coverage. Plaintiffs' failure to provide any evidence to the contrary, other than their conclusory statements that the Fire Station would "not provide enough coverage overlap" for capacity relief, means they have not satisfied their heavy burden of proving that the Board has prohibited them from providing coverage.

Moreover, plaintiffs fail to demonstrate that further efforts to obtain approval of alternate sites or designs would be fruitless. Plaintiffs claim that the process of working with Staff to refine the proposed facility, only to have the proposal rejected by the Board, demonstrates that further efforts would be fruitless. Pls.' Reply Br. at 19. They also argue that the Board's refusal to accept any structure with the height plaintiffs require and refusal to consider evidence in support of plaintiffs' proposed structure shows an "unalterably closed mind." Id. at 20 (internal quotation marks and citations omitted); Pls.' Summ. J. Br. at 33.

As discussed above, the Board's justification for rejecting the proposed facility was not simply that it was "too tall," contra Pls.' Summ. J. Br. at 33; rather, the Board's rejection was

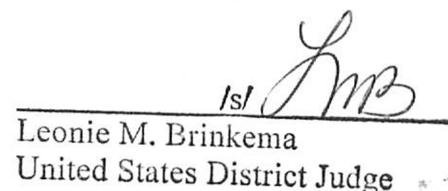
based on the proposal's overall visual impact and noncompliance with multiple provisions of the Comprehensive Plan and Zoning Ordinance. Nothing in this record shows that the Board is unwilling to accept any proposed wireless facility. In fact, although this evidence is not in the record, the Board represented that it has approved 550 applications since 2010, 87 of which were Verizon's applications, Def.'s Opp'n Br. at 10, and the Fourth Circuit has recognized the Board's "strong history of approving wireless facilities." Fairfax Cnty., 672 F.3d at 269. Additionally, in issuing its denial of the Applications, the Board expressed interest in the availability of alternative sites and technologies, including the Fire Station and DAS, J.A. at 1461, thereby reflecting its willingness to approve wireless structures that do comply with the Comprehensive Plan and Zoning Ordinance. Because further efforts by plaintiffs to design such structures would not be fruitless, Verizon cannot demonstrate a lack of reasonable alternatives.

Therefore, plaintiffs have not carried their "heavy burden" of demonstrating that this particular denial constituted a general prohibition of service, see Fairfax Cnty., 672 F.3d at 268, and have not provided sufficient evidence from which a reasonable juror could find that the Board violated 47 U.S.C. § 332(c)(7)(B)(i)(II). Accordingly, summary judgment will be granted for the Board on Count II.

## III. CONCLUSION

For the reasons stated above, the plaintiffs' Motion for Summary Judgment will be denied and the defendant's Motion for Summary Judgment will be granted by an appropriate Order to be issued with this Memorandum Opinion.

Entered this 22nd day of October, 2015.



/s/

Leonie M. Brinkema
United States District Judge

Alexandria, Virginia