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ZONING AND LAND USE PLANNING

Local Governments and Wireless Communications Towers

Nearly a decade ago, Congress enacted the Telecommunications Act of 1996 (the TCA).[1] Among other things, the TCA affects the provision of personal wireless services and includes procedures to regulate the construction of wireless communications facilities, including antennae towers. Section 332 of the TCA prevents local governments regulating "the placement, construction, and modification of personal wireless service facilities," from: (1) unreasonably discriminating among providers of functionally equivalent services, and (2) prohibiting or having the effect of prohibiting the provision of personal wireless services.[2] In addition, §332 requires local governments to act on any request for authorization to construct personal wireless service facilities "within a reasonable period of time."[3]

Congress and the courts have recognized local governments' legitimate interest in determining the placement of wireless facilities. For example, the U.S. Court of Appeals for the Second Circuit has determined that the TCA's goals do not "trump all other important considerations, including the preservation of the autonomy of states and municipalities."[4] Significantly, although Congress sought to construct a national wireless telecommunications infrastructure, it also chose to preserve all local zoning authority over decisions regarding the placement, construction, and modification of personal wireless service facilities,[5] subject only to the limitations set forth in §332(c)(7)(B). Indeed, the legislative history of the TCA makes it clear that §332 preserves the authority of state and local governments "over zoning and land use matters except in the limited circumstances" specified in that section.[6]

Since the TCA's enactment, many of the issues that had been raised by the wireless industry and by tower opponents have been settled. For example, it is now clear that a municipality may require that a wireless service provider seeking to erect an antenna to fill a service gap identify and evaluate alternative antenna sites and designs.[7] Also, it has been held that the TCA prohibits denial of an antenna siting request based on fear of health risks from radio frequency emissions provided that the antenna complies with FCC standards.[8] Moreover, a number of decisions by federal and state courts in cases involving towers proposed in communities on Long Island have helped to clarify the law on certain other issues.

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Aesthetics

One of those issues is "aesthetics." In New York, a municipality may deny an application under the TCA on the basis of aesthetics[9] — although aesthetics qualify as a permissible ground for denial of a permit only if there is "more than a mere scintilla" of evidence before the municipality on the negative visual impact.[10]

Thus, in *Cellular Telephone Co. v. Town of Oyster Bay*,[11] the Second Circuit affirmed a decision by U.S. District Judge Joanna Seybert of the Eastern District granting Cellular Telephone Company's summary judgment motion and entering an injunction against Oyster Bay after finding that the town's denials of two special permits were not based on substantial evidence under the TCA.

The Second Circuit pointed out that very few residents had expressed aesthetic concerns at the hearings and that those who did express them did not articulate specifically how the proposed cell sites would have an adverse aesthetic impact on the community. In fact, the circuit court emphasized, a few comments suggested that the residents who expressed aesthetic concerns did not understand what the proposed cell towers would actually look like. The Second Circuit held that the few "generalized expressions of concerns with 'aesthetics' cannot serve as substantial evidence" on which the town could base its denials.

More recently, in *Sprint Spectrum L.P. v. Board of Zoning Appeals of the Town of Brookhaven*,[12] U.S. District Judge Arthur Spatt of the Eastern District reached a different conclusion. Judge Spatt found, after reviewing the record, that there was substantial evidence to support the zoning board's conclusion that a proposed monopole would have a negative impact on aesthetics in the East Setauket community. First, Judge Spatt determined that the record indicated that the proposed monopole would be located in close proximity to historical surroundings, namely, 550 feet south of "the historic Route 25A" with a portion of the proposed site's property located within the Old Setauket Historic District Transition Zone.

Second, Judge Spatt observed that the record contained testimony from legislators, residents, members of civic and historical organizations and a real estate appraiser relating that the proposed monopole was incompatible with the surrounding area's historic nature and appearance. For example, one legislator submitted a letter noting the proposed monopole's adverse effect on preserving the historic nature of Route 25A, as the main street in East Setauket.

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Judge Spatt also pointed out that the record contained testimony that certain residents would have a view of the proposed monopole, especially during the winter months when there were no leaves on the trees.

Judge Spatt then concluded that, unlike in *Cellular Telephone* where the record contained "general statements of only a few residents who expressed their concern with aesthetics and their uninformed speculation on the visual nature of the proposed monopole," the record in *Sprint Spectrum* contained "specific and informed statements on the historical nature of the area and the incompatibility of the proposed monopole, even camouflaged as a flagpole, to the historic surrounding area."[13]

'Reasonable Period Of Time'

The TCA requires that municipalities act on any request for authorization to construct a communications tower "within a reasonable period of time after the request" is made.[14] As one might expect, that standard has led to significant amounts of litigation, including a recent Second Circuit opinion in *New York SMSA Limited Partnership v. Town Of Riverhead*[15] finding that a delay of about one year from the time Verizon Wireless filed an application to the time the Town of Riverhead Town Board issued a positive declaration under the State Environmental Quality Review Act (SEQRA), requiring Verizon to file an environmental impact statement, did not amount to an unreasonable delay.

As the Second Circuit noted, Verizon had filed its Special Permit Application (SPA) and an Environmental Assessment Form on March 8, 1999. On March 24, the town's environmental planner conducted an initial review and wrote a recommendation. On May 4, the town board designated itself the lead agency under SEQRA with regard to the SPA. On July 1, the planning board conducted a public hearing and Verizon submitted additional documentation, including a health report, a summer visual impact statement, and an engineering report. On Aug. 6, the planning board issued a resolution in favor of granting the application and requested that the height of the facility's antenna be extended. On Aug. 17, the town board issued a resolution authorizing the town clerk to advertise a public hearing on Sept. 21, 1999.

During the September hearing, Verizon made the same presentation it had made before the planning board, and a number of local residents stated their concerns about the proposed facility. The meeting was continued to Nov. 16 to address these concerns. On Nov. 15, Verizon submitted supplemental information concerning the height of the facility's antenna and its visual impact in response to some of the citizen comments made during the Sept. 21 hearing. On Nov. 16, the public hearing continued, and Verizon submitted a real property appraisal report contending that the facility would have no impact on adjacent real estate use and values. The meeting was again continued to allow the submission of written comments.

The legislative history of the [Telecommunications Act of 1996] makes it clear that §332 preserves the authority of state and local governments 'over zoning and land use matters except in the limited circumstances' specified in that section.

On Dec. 8, 1999, a consulting group retained by Verizon prepared an analysis of the proposed facility applying the SEQRA criteria for determining environmental significance and concluding that the project would have no significant adverse impact on the environment. On Dec. 14, during a work session meeting of the town board, Verizon submitted its winter visual analysis. On Dec. 21, the town board held its regular meeting and Verizon provided its last written submission, which included information about other viable sites for the facility. On Feb. 15, 2000, the town board issued a positive declaration under SEQRA. Verizon filed suit on March 14, 2000.

In affirming a decision by U.S. District Judge Leonard Wexler of the Eastern District denying Verizon's summary judgment motion and dismissing the case, the Second Circuit stated that, based on this chronology, there was "no indication" that the town had unreasonably delayed processing Verizon's SPA. After Verizon submitted its SPA, the circuit court stated, the town made "steady progress" in acting on the application. Moreover, the Second Circuit found, Verizon produced no evidence that the town had done anything other than attempt to meet the requirements of SEQRA to make an informed decision about the possible environmental impact of Verizon's proposed facility. It concluded that there was "no suggestion in the record" that the town had acted in bad faith in balancing the state directive of SEQRA to assess local environmental concerns and the federal imperative of the TCA to move with reasonable speed on Verizon's application.

Conclusion

As the *Town of Riverhead* decision suggests, the TCA is only one statute with which municipalities must comply when considering applications for wireless communications towers. In New York, they also must abide by SEQRA and by the rules applicable to the quasi-judicial body having jurisdiction over the application.[16] Indeed, to a very large extent, and notwithstanding the TCA, local governments need not treat applications for wireless communications antenna towers any differently than they treat other kinds of applications.

(1) 47 U.S.C. §§151, et seq.
(2) 47 U.S.C. §332(c)(7)(B)(i).
(3) 47 U.S.C. §332(c)(7)(B)(ii).
(4) *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 639 (2d Cir. 1999).
(5) 47 U.S.C. §332(c)(7)(A).
(6) Sen. Rep. No. 104-230, at 458 (1996); see also *Omnipoint Communications, Inc. v. Village of Muttontown*, 1999 U.S. Dist. Lexis 23004 (E.D.N.Y. June 15, 1999) (rejects provider's argument that village had no right to deny it the right to enter and place transmitting equipment on utility poles within the village or the right to enter the village to provide interstate or intrastate telecommunications services).
(7) *Voicestream Minneapolis v. St. Croix County*, 342 F.3d 818 (7th Cir. 2003); see also, *Sprint Spectrum, L.P. v. Willoth*, supra.
(8) *SBA Communications, Inc. v. Zoning Commission of the Town of Brookfield*, 112 F.Supp.2d 233 (D. Conn. 2003).
(9) *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 495 (2d Cir. 1999) (citing *Suffolk Outdoor Advertising v. Hulse*, 43 N.Y.2d 483, 490 (1977)).
(10) 166 F.3d 490 (quoting *Universal Camera v. NLRB*, 340 U.S. 474, 477 (1951)).
(11) 166 F.3d 490.
(12) 244 F.Supp.2d 108 (E.D.N.Y. 2003).
(13) Id. at 115; see also *Sitetech Group Ltd. v. Bd. of Zoning Appeals of Town of Brookhaven*, 140 F.Supp.2d 255, 262 (E.D.N.Y. 2001) (noting the sufficiency of the informed testimony by residents, members of civic, historical and senior citizen organizations on the historic and colonial appearance of Route 25A and the proposed monopole's incompatibility with that area).
(14) 47 U.S.C. §332(c)(7)(B)(ii).
(15) 2002 U.S. App. Lexis 18233 (2d Cir. Sept. 3, 2002).
(16) *Matter of Cilla v. Zoning Board of Appeals of the Town of Huntington*, 2002 N.Y. Misc. LEXIS 657 (Sup. Ct., Suffolk Co. 2002).