STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

The Matter of the Application of MARY E. EDWARDS, BERNARD and CLAIRE LEFFLER, JAMIE L. SMITH, and PAUL SUTTON

Petitioners,

For a Judgment Pursuant to Article 78 of the New York Civil Practice Laws and Rules

Index No.: 811744/2016

Hon. Catherine Nugent-Panepinto

-against-

ZONING BOARD OF APPEALS OF THE TOWN OF AMHERST; UPSTATE CELLULAR NETWORK d/b/a VERIZON WIRELESS; and PUBLIC STORAGE, INC.;

Respondents.

REPLY MEMORANDUM OF LAW

I. INTRODUCTION

This Reply Memorandum of Law is submitted in reply to the Respondents' Motion to Dismiss the within Petition, and to respond to various preliminarily procedural issues raised by the Respondents, and to further clarify the manner in which the Respondents violated the law in granting the Special Use Permit to Upstate Cellular Network d/b/a Verizon Wireless.

II. PRELIMINARY PROCEDURAL ISSUES

A. STANDING

All Respondents have questioned whether or not the Petitioners have standing to bring this proceeding. However, as well be seen, each of the Petitioners in the instant case meet the standing requirements. As indicated in the Petition, which is verified as necessary pursuant to

the CPLR, and therefore, the allegations therein are the equivalent of a sworn affidavit. Moreover, in a Motion to Dismiss, the allegations in the Petition must be considered true.

Therefore, in paragraphs 2 through 5 of the Petition, each of the parties' state their address, all of which are very close to the proposed project, and in fact Petitioners Bernard and Claire Leffler's home is less than 200 feet from the cell tower boundaries. (All references to the Certified Record concerning this proceeding as developed by the Town of Amherst Respondents are designated as "R. __".) In paragraph 6 of the Petition, each of the Petitioners indicate the non-economic environmental reasons why they have brought this Petition. Therefore, Petitioners indicate that they have various concerns for their safety, since they allege that they reside in the "fall zone" of the proposed cell tower and are concerned about ice shear or throw from the tower during the winter months. They also indicate their concern for adverse effects that the cell tower may have on the wetlands that are adjacent to the proposed project, and are further concerned about the projects adverse effects on wildlife, particularly within the wetland area. Finally, they are concerned that the proposed cell tower will be a visual intrusion upon their residential neighborhood, and further adversely affect the amenities provided in nearby Garnett Park, as well as the biology and the naturally wooded landscape that is important to their quality of life in their neighborhood. With these concerns in mind, an appropriate analysis of the standing requirements in New York State in zoning and land use cases clearly indicate that the Petitioners have standing.

Therefore, there are three relevant Court of Appeals cases that stand as the landmark decisions concerning standing in land use in environmental cases such as this case. Starting with Society of Plastics Indus. v. County of Suffolk, 77 N.Y.2d 761 (1991), where the Court of Appeals determined that in a case dealing with the New York State Environmental Quality

Review Act, Environmental Conservation Law § 8-001 et. seq. (hereinafter cited as "SEQRA"), in order for a petitioner to have standing, the petitioner must show that their claims fall within the zone of interest of the statute which they are alleging was violated, and secondly, that they have been injured or will be injured in a manner different than the public at large.

Showing that the Petitioners' claim falls within the zone of interest of the statute at issue is never a difficult proposition, as the Petitioners are claiming that the environment and their neighborhood would be harmed, as in this case. As long as the Petitioners allege one or more of the issues that SEQRA is concerned with, or allege concerns with issues contained in the Town of Amherst Zoning Code as it relates to cell towers (hereinafter called "WTFs"), they meet the zone of interest test.

However, there has been much confusion in the cases dealing with the issue of whether or not a particular Petitioner was injured in a manner different than the public at large.

This brings us to the second major case, in the Matter of Sun-Brite Car Wash, Inc. v. Board of Zoning and Appeals of the Town of North Hempstead, 69 N.Y2d 406 (1987), the court indicated that where the petitioner owns property contiguous to or nearby the site where the action is to be carried out, an exception to the Society of Plastics' zone of interest rule exists, and an inference of standing is created. As the Court indicated:

> "While something more than the interest of the public at large is required to entitle the person to seek judicial review - - the petitioning party must have a legally cognizable interest that is or will be effected by the zoning determination - - proof that special damage or in fact injuries is not required in every instance to establish that the value or enjoyment of one's property is adversely effected *** thus, an allegation of close proximity may raise to an inference of damage or injury that enables a nearby owner to challenge the zoning board's decision without proof of actual injury."

69 N.Y.2d 4013-4014 (citations omitted).

Respondents in this proceeding, and indeed in every other land use proceeding, like to point out that the Court also indicated in Sun-Brite that the status of a neighbor does not "automatically provide the entitlement, or admission ticket, to judicial review in every instance." 69 N.Y.2d at 414.

However, Respondents generally leave out of their papers the fact that the "admission ticket" quotation refers to the first prong of the Society of Plastics test, that a petitioner must still raise issues within the zone of interest of the statute or ordinance at issue. Therefore, in land use cases, if the only issues raised are purely economic, rather than environmental or other adverse effects on the neighbors concerning safety or the nature of their neighborhood, the zone of interest test would not be met and therefore they would not have standing.

However, in the instant case, as previously indicated, the Petitioners in fact raise non-economic issues that fall within the zone of interest of SEQRA and the zoning ordinance provisions at issue herein, as well as the issues contained in the Town Law. Therefore, Petitioners meet the zone of interests test. Indeed, even without the inference and exception contained in Sun-Brite and other cases that hold proximity is an exception to the necessity to show injury different than the public at large, the instant Petitioners do allege injuries different than the public at large because the injuries that concern them relate specifically to their neighborhood, and not the general public.

Also see, e.g., Har Enterprises v. Town of Brookhaven, 74 N.Y.2d 524 (1989); La Delta v. Village of Mount Morris, 213 A.D.2d 1024 (4th Dept. 1995).

Finally, the third Court of Appeals decision that is relevant to the instant case concerning standing, is the recent case of Sierra Club v. Painted Post, 26 N.Y.2d 301 (2015). In that most

recent Court of Appeals standing decision, the Court held "that more than one person may be harmed does not defeat standing." Further that "[t]he harm that is alleged … need not be unique." Finally, the Court indicated that "the number of people that are affected by the challenged action is not dispositive of standing." 26 N.Y.2d at 311.

Also see, e.g., Shinnecock Neighbors v. Town of Southampton, 53 Misc.3d 874 (Sup. Ct., Suffolk Cty., 2016); Napolitano v. Town Board of Southeast, 51 Misc.3d 206 (Sup. Ct., Putnam Cty., 2015).

As can be seen, the Petitioners in this case have standing, not only due to the proximity of their homes to the proposed WTF, but also because of the environmental harms that they allege will occur if the WTF is built, and that those environmental harms are a direct injury to them different than the public at large.

III. PETITIONERS DID NOT FAILED TO NAME AND SERVE A NECESSARY PARTY

The Respondents claim that all necessary parties have not been served, and therefore, because the statute of limitations has expired, the case must be dismissed since the necessary party cannot be joined in the proceeding. They claim that the missing necessary party is Public Storage Prop VI, who they claim owns the property upon which they will be building the WTF. Therefore, since the owner of the property that is being leased to build the cell tower was not made a party to the action, they claim that a necessary party is missing.

The only problem with their argument is that Public Storage Prop VI was either purchased or merged into Public Storage, Inc., in 1995, subsequent to the purchase of the land at issue by Public Storage Prop VI. (See Exhibit "A" attached to this Memorandum).

Indeed, while the executed lease between Upstate Cellular Network d/b/a Verizon has not been included in the Certified Record, an acknowledgement from the wireless leasing manager

of Public Storage, dated July 21, 2016 authorizing Verizon to submit an application to build a WTF on their property, and indicating that they are the fee owner or the entity responsible for the management of 3671 Sheridan Drive is contained at Exhibit "F" of the Certified Record. Also contained in that Exhibit, is an "acknowledgment of signature authorization by the Senior Vice President and President of real estate group of Public Storage.

Finally, the property at issue is listed on the Public Storage, Inc. website. See Exhibit "B".

Therefore, the appropriate party to this proceeding is Public Storage, Inc., rather than Public Storage Prop. VI, and all necessary parties have been made Respondents to this proceeding.

IV. THE PETITIONERS HAVE EXHAUSTED ALL APPROPRIATE ADMINISTRATIVE REMEDIES AVAILABLE TO THEM

Respondents claim that any issues that they raise in this proceeding, which were not brought to the attention of the Town Respondents by the Petitioners prior to their approving the WTF, could not be considered in this proceeding since it is alleged that Petitioners did not exhaust their administrative remedies by bring those issues to the attention of the Town Respondents. The Respondents claim that none of the issues raised in this proceeding were in fact brought to the Respondents attention.

First of all, Respondents are factually incorrect. Most of the factual issues raised in this proceeding by the Petitioners were in fact raised during the only public hearing available to them. In addition, none of the Petitioners are lawyers, and therefore, cannot be faulted for not raising purely legal issues, as opposed to factual concerns. Indeed, it is the responsibility of the public officials to comply with the laws of the State of New York and the Town Ordinances,

regardless of whether or not any Petitioner indicated that the laws were not being followed, or whether or not any Petitioners even spoke at the public hearing. See, for example, Steubing v. Bringar, 511 F.2d 489 (2nd Cir. 1975).

Therefore, as previously indicated, the Petitioners and others raised many of the factual concerns and issues that are raised in this proceeding at the one public hearing that was held prior to approval of the WTF. So therefore, Neal Coffee spoke at the public hearing and indicated that

> "We do have concerns about the nature of the site in the sense of its environmental nature, it is next to Garnett Park which is a federal wetland and it is contiguous with that, the wildlife live there and so there is an issue there.
>
> One of the major concerns is obviously unsightliness. Some of the people who have signed our Petition who live on Dellwood Drive, so their houses are right behind or right in front of the proposed towers, so that would be an eyesore for them."

(R. Exhibit 16 at p.p. 16-17.)

Mr. Coffee when onto indicate,

> "Finally, I don't understand the selection of alternative sites, it seems like there was one site that had been proposed or considered that was slightly outside this ring, so if Verizon can consider some sites that are slightly outside the ring it seems to me that there were commercial properties, Northtown owns a lot of spaces just across Sheridan Drive that could have been explored that were not mentioned. One Northtown property was mentioned, but they own a whole set of properties that are very close to that proximity of the ring, so I am not sure if there's been sufficient due diligence in looking for any other possible alternate site."

(Id. at p.p. 17-18).

The next speaker was Carolyn Moy who indicated that:

> "Our main and my main concern is just, we have a lot of children in this neighborhood who still utilize this park and it has been perhaps . . throughout the day to the night we have besides being

> extreme residential, we have some real serious issues with safety and one of them is that it can be hazardous and I am wondering what type of generators they use, how noisy are they and if this a hazmat, is this registered with hazmat at all?"

Id. at p. 18).

Ms. Moy when onto indicate

> "We also have the safety of .. there is falls that can happen as you know with the towers, there is ice that comes off and there is - - we found out there can also be some mischievous kids in our neighborhood too and they probably find this rather interesting to come to and I don't know if there is really a fence that is high enough to keep these kids away at night."

(Id. at p. 19).

Finally, Ms. Moy indicated

> "There is also environmental which some addressed and I know some of the neighbors are really concerned because of the flooding that is already in the region. And you tear down - - I like to know what the footprint is, how much of our tree area do you have to take and what the drainage is."

(Id. at p.p. 20-21).

Another speaker at the public hearing was Terry Martina who indicated that

> "the second thing is my backyard floods all the time, them taking the trees down in that area alone is that going to help make my yard even more a swamp, I use it maybe one month except this year, one month of summer because it's so wet there, is wetland, that's what it does, I expect it.
>
> I have deer, fox, everything coming in there, okay, its fine. But if they take the trees down what is going to happen, are they going to plan on the drainage and if you are doing the drainage, is that going to impact the wildlife in the area? I don't know and that is something to question."

(Id. at p. 25).

Another speaker was Claire Leffler, one the Petitioners in the instant case and she indicated that

> "This Public Storage property is right next to our backyard and is 200 feet, it extends behind five houses which really are going to bear the brunt of whatever is decided.
>
> And I just want to say, of all the things we said about the drainage, and the trees and everything. Not really mentioned about the wildlife, I have two bucks in my backyard this morning, jousting with their horns which I have never in my life before. There are deer in those five backyards which is the Public Storage property, but they are there every day in and out. And raccoons and groundhogs and all the birds that are there."

(Id. at p. 30).

Finally, at the public hearing, Mr. Lusk, who is the attorney for Verizon, indicated concerning the visual analysis made of the tower, that "so, let's make it clear that we are not cutting off the top of trees to make the antenna work, we are going to be above the trees by about 18 feet, just to be clear, 17 or 18 feet." (Id. at p. 31).

Therefore, as can be seen, the effects on wetlands, drainage, flooding, Garnett Park, the wooded areas, wildlife and visual and aesthetic intrusions were all brought up at the public hearing, and to the extent that exhaustion was necessary by indicating those issues at the public hearing, these issues and concerns were raised.

Finally, even if there was a failure of exhaustion of administrative remedies, such a failure would not preclude raising those issues in this proceeding. As indicated by the Court in Jackson v. New York State Urban Development Corporation, 67 N.Y.2d 400 (1986) "[w]hile the affirmative obligation of the agency to consider environmental effects coupled with the public interests, lead us to conclude that such issues cannot be foreclosed from judicial review, petitioner's silence could not be overlooked in determining whether the agencies failure to discuss an issue in an EIS was reasonable." Therefore failure to exhaust administrative remedies by not raising a particular issue during the administrative process, does not foreclose the court's

consideration of those issues, but merely is one factor to take into account in determining whether the agency acted reasonably in fulfilling their SEQRA obligations. Certainly, an agency, or in this instance the Town Respondents, cannot blithely excuse a direct violation of law by claiming that the public did not complain about the violation prior to the decision being made.

For all the foregoing reasons, it is respectfully submitted that the Petitioners have exhausted the administrative remedy available to them.

V. THE RESPONDENTS VIOLATED SECTION 267-B OF THE TOWN LAW

As previously indicated in the Petition and Petitioners' previous Memorandum of Law, § 267-B of the Town Law requires the Zoning Board of Appeals to consider certain factors when issuing an area variance, and to provide a written decision concerning the manner in which those issues were considered, and in the written decision the reasons for the ultimate conclusion to grant or deny an area variance. The Respondents do not dispute that the requirements of 267-B were not followed, but rather they claim that the Zoning Board of Appeals provided waivers of certain zoning requirements rather than variances from those requirements.

It is true that the ZBA, rather than calling what they granted a variance, instead called it a waiver. The most important a waiver granted by the ZBA is the requirement in the zoning ordinance that a WTF be sited 500 feet or more away from a residence. In the instant case, the ZBA "waived" this provision, among others, and allowed the WTF footprint to be as close or less than 200 feet from the nearest residence, and all the Petitioners live within 500 feet of the WTF footprint.

The 500 feet requirement was obviously drafted for purposes of assuring the safety of nearby residences. Therefore, if the tower were to collapse and fall, homes within 500 feet could

be struck by the tower, particularly due to high wind that might break off a piece of the tower and fling it into the homes, or by striking the ground which may also fling the tower into a home. Similarly, the Petitioners fear of ice shear or throw is one that would be affected by the waiver of the 500 feet distance. This issue is underscored by Verizon's own engineer, who indicated that

> "we propose to design and supply a 82 foot tower for the above referenced site. The tower is to be designed for a basic wind speed of 90 mph with no ice and 40 mph with one inch radial ice…."

(See letter from Robert E. Beakom to Mr. John Fazzolari of August 2, 2016 contained at R. Exhibit M.)

Clearly, the Court can take judicial notice of the fact that in high wind events that happen periodically throughout Western New York winters, icicles can be blown off a high structure that has no buildings or trees to impede the ice shear or throw, and the high winds can take the ice some distance into a home or striking an individual in the backyards or front yards of the home. Given the actual design of only 40 miles per hour with ice on the WTF, the 500 feet requirement is very important to the safety of the Petitioners and other nearby residences, and therefore, a "waiver" of this requirement must be strictly complied with.

There simply is no difference between a "waiver" of a zoning requirement such as the 500 feet distance from a residence, and a "variance" of a zoning requirement of a 500 feet distance from residential homes. The Town of Amherst should not be allowed to avoid the requirements of New York State Town Law merely by calling the avoidance of a zoning requirement a "waiver" instead of a "variance". This is the classic "if it walks like a duck and quacks like a duck" situation.

Therefore, it is respectfully submitted that the requirements of § 267-B apply to this "waiver", and the Zoning Board of Appeals admittedly did not comply with the requirements of § 267-B of the Town Law.

VI. VIOLATION OF § 263 OF THE TOWN LAW

Respondents would limit the application of Town Law § 263, which requires zoning decisions or actions to be consistent with any approved comprehensive planning document in a town. As indicated in the Petition and prior Memorandum of Law, the Town of Amherst's planning staff indicated that granting a Special Use Permit for the WTF would not be consistent with the Town's Comprehensive Plan. Since the Zoning Board of Appeals granted a Special Use Permit for the WTF, along with waivers of zoning regulations, Respondents would limit consistency with a Comprehensive Planning document to "regulations". However, "regulation" is a broad term, and it is respectfully submitted that it encompasses any decisions by the Town Board or Zoning Board of Appeals that would allow for a change of use within a zoning district. In the instant case, the land is zoned R-3, only residential. While a Special Use Permit is allowed, as long as the Zoning Board of Appeals applies certain regulations within the zoning ordinance, consistency with the Comprehensive Plan is required according to those regulations. (See Zoning Ordinance § 8-6-6(A)(1)).

Of course, even if the Respondents were correct in limiting the application of § 263 of the Town Law, it is still one of the issues required to be review under the SEQRA regulations. Therefore, if a zoning action is taken in an inconsistent manner with the Comprehensive Plan, this would then require the drafting of an Environmental Impact Statement.

VII. ZONING BOARD OF APPEALS VIOLATED THE TOWN'S ZONING ORDINANCE, AS IT RELATES TO THE GRANTING OF A SPECIAL USE PERMIT FOR A WTF.

The violation of the Town of Amherst zoning ordinance, as it relates to the granting of the Special Use Permit for the WTF are incredibly numerous and varied. Throughout Section 6 of the Code, dealing with telecommunication facility standards, the code indicates the strong preference for sharing or co-location of WTFs (see, for example § 6-6-2(c) of the Town of Amherst Zoning Code) and further, to preserve the character of residential areas (6.7.2(e)).

In both the Petition and Petitioners' previous Memorandum of Law, Petitioners pointed out the priorities of the type of land or zones where WTFs are to be placed. (§ 6.7.4) That section also requires that "the petitioner shall submit a written report demonstrating that petitioner's review of the above locations in order of priority, demonstrating the technological reason for the site selection. If appropriate, based on selecting a site of lower priority, a detailed written explanation as to why sites of a higher priority were not selected shall be included with the application." (§ 6-7-4(e)) While a report was submitted concerning the technological reasons why the applicant only reviewed sites within a .10 of a mile radius, there were no reports submitted listing each of the seven priority zones and why none of them could be used.

At § 6-7-5, dealing with shared use of WTFs and other structures, it is required that

> "The petitioner shall submit a comprehensive report inventorying existing towers and other suitable structures within two miles of the location of any proposed new tower, unless the petitioner can show that some other distance is more reasonable and demonstrate conclusively why an existing tower or other suitable surface cannot be used."

Again, while a report was submitted indicating the reasons why the applicant believed that they only could cite the WTF within a .10 mile radius, no comprehensive report

inventorying existing towers or other suitable structures, even within the .10 mile radius, let alone a 2 mile radius, was submitted with the application. Attached as Exhibit "C", are various maps maintained by the Town of existing and proposed cell tower. As can be seen, there are many towers, existing or proposed, where co-location was not explored.

Similarly, at § 6-7-7(H) the code requires that

> "In the case of a new tower the petitioner shall be required to submit a written report demonstrating its efforts to secure shared use of existing towers or the use of alternative buildings or other structures within the town. Such report shall include an investigation of every tower and every structure with a height exceeding 60 feet from finished grade within two miles of the proposed location of the new tower. Copies of written requests and response for shared use shall be provided to the town in the application, along with any letters of rejection stating the reason for rejection."

Again, the written report indicating Verizon's efforts to secure shared use of existing towers or the use of alternative buildings or other structures within the town only indicated four sites, one of which had previously been denied by the Town, one being the site that was chosen by Verizon, and two other sites, neither of which were on co-location facilities. Moreover, there were absolutely no copies of written requests and responses for shared use", and "no letters of rejection stating the reasons for rejection" were submitted as are contained in the Certified Record.

At § 6.7.7(M)(2), it is required that the applicant provide "pictorial representations of 'before and after' views from key viewpoints both inside and outside of the Town as may be appropriate, including but not limited to … state and local parks, … and from any other location where the site is visible to a large number of visitors, travelers or residents." While four photographs and some artists' renderings were provided by the applicant, incredibly no

photographs or artist renderings were provided from the prospective of either Garnett Park or the Dellwood Drive residential community.

Section 6-7-12(D) requires that "after the public hearing and after formally considering the application, the ZBA may approve with conditions, or deny a Special Use Permit, its decision shall be in writing and shall be supported by substantial evidence contained in a written record…" There is no written decision where the reasons for the granting of the Special Use Permit is provided in the Certified Record. Petitioners previous Memorandum of Law indicated the necessity for written reasons in order for the Court to be able to provide an appropriate judicial review of the decision made.

Finally, at § 8-6-6, the review criteria for granting a Special Use Permit for a WTF is provided. That section also requires:

> "In rendering a decision, the ZBA shall consider and make findings, that the proposed use:
>
> 1. Will be generally consistent with the policies of the comprehensive plan; [As previously indicated, the site of the WTFs is inconsistent with the Town's Comprehensive Plan]
>
> 2. Meets any specific criteria set forth in this ordinance; [Petitioners have indicated in this Reply Memorandum of Law various specific criteria that have not been met)
>
> 3. Will be compatible with existing uses adjacent to and near the property; [Given the fact that this WTFs is sited adjacent to a public park, wetlands, and a residential community, it is certainly not compatible with existing uses adjacent to or near the property]
>
> 4. Will be in harmony with the general purpose of this ordinance; [Given the fact that the WTF is to be sited at the lowest priority as provided by the Town, and for all the other reasons indicated it is not in harmony with the general purposes of the ordinance.]

5. Will not tend to depreciate the value of adjacent property; [Placing a 92 foot cell tower next to a residential property will certainly adversely affect the value of the residential homes.]

6. Will not create a hazard to health, safety or the general welfare; [Given the design standard of only 40 mile per hour wind where there is ice on the cell tower, this certainly creates a hazard to safety.]

7. Will not alter the essential character of the neighborhood nor be detrimental to the neighborhood residences; [A cell tower will be both a visual and industrial intrusion upon both the adjacent Garnett Park and the residential community.]

8. Will not otherwise be detrimental to the public convenience and welfare."

Besides not fulfilling the review criteria of § 8-6-6(A), there is no written report in the record from the Zoning Board of Appeals indicating that they have considered this review criteria, and how granting the Special Use Permit and waivers meets the requirements of this criteria. Moreover, neither the resolution passed by the ZBA, or the oral comments at the public hearing and passage of the Special Use Permit, indicates the consideration of these review criteria. Therefore, as indicated, the ZBA has violated numerous requirements of the Town of Amherst Zoning Ordinance as it relates to the granting of a Special Use Permit for a WTF.

Finally, Petitioners reassert their claims in the Petition and initial Memorandum of Law concerning the violations of SEQRA and improper notice being provided to the Petitioners.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Town of Amherst has violated the provisions and regulations concerning SEQRA, New York State Town Law, and the Town of Amherst Zoning Ordinance. As such, the decision to grant the Special Use Permit must be voided, and an injunction entered until all the laws of the State of New York and the Zoning Ordinance of the Town of Amherst have been complied with.

DATED: Buffalo, New York
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Respectfully submitted,

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