

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,

VERIFIED PETITION

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

Index No.: _____

-against-

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

Respondents.

Petitioners, by their attorneys, **LIPPES & LIPPES**, Richard J. Lippes, of counsel,
respectfully alleges as follows:

I. INTRODUCTION

1. Petitioners are commencing this special proceeding challenging the action of the Zoning Board of Appeals of the Town of Amherst (“ZBA”), which issued a Special Use Permit and variances concerning property located at 3671 Sheridan Drive in the Town of Amherst, County of Erie and State of New York for the construction of a wireless telecommunications cell tower on land owned and leased from Public Storage, Inc.. The ZBA issued both a Special Use Permit for such construction, and issued a Negative Declaration pursuant to the New York State Environmental Quality Review Act, Environmental Conservation Law §8-0101, et. seq. (hereinafter designated as “SEQRA”) indicating that there will be no significant adverse environmental consequences from the construction of the cell tower so that an environmental impact statement need not be drafted. Petitioners believe that the area variances were granted

contrary to the requirements of SEQRA, as well as Section 267-B(3) of the Town Law of the State of New York, as well as violations of the Town of Amherst Ordinances, and is inconsistent with the Town of Amherst Comprehensive Plan, and therefore, seeks to void the decisions made concerning the granting of the Special Use Permit and area variances/waivers, and to obtain an injunction until such time as the ZBA fully complies with the laws at issue as more fully set forth herein.

II. PARTIES

2. Petitioner Mary E. Edwards, owns and resides on property located at 231 Dellwood Road, in the Town of Amherst, County of Erie and State of New York adjacent to the site of the proposed cellular tower.

3. Petitioners Bernard and Claire Leffler, own property and reside at 225 Dellwood Road, in the Town of Amherst, County of Erie and State of New York nearby the site of the proposed cellular tower.

4. Petitioner, Jamie Smith, owns property and resides at 220 Dellwood Road, in the Town of Amherst, County of Erie and State of New York, nearby the site of the proposed cellular tower.

5. Petitioner, Paul Sutton, owns property and resides at 244 Dellwood Road, in the Town of Amherst, County of Erie and State of New York, nearby the site of the proposed cellular tower.

6. Each of the Petitioners bring this special proceeding because of various concerns they have for their safety, since they reside in the “fall zone” of the proposed cell tower and ice shear from the tower during the winter months. They are also concerned about the adverse effects that the cell tower may have on wetlands that are present throughout the area at issue, and

which provide many environmental benefits, including helping to avoid flooding in the area, and providing habitat for various flora and fauna. They are also concerned that the proposed cell tower will be a visual intrusion upon their residential neighborhood, and the amenities provided in the nearby Garnett Park. They also wish to protect the biology and naturally wooded landscape that is important to their quality of life in their neighborhood.

7. Respondent, Zoning Board of Appeals of the Town of Amherst has the responsibility to assure that all actions taken by the ZBA are taken in accordance with the laws of the State of New York, including SEQRA, the Town Law of the State of New York, and the ordinances of the Town of Amherst. In the instant case, the ZBA is particularly responsible for insuring that all procedures of SEQRA were complied with and that the substantive mandates of SEQRA have been carried out. Moreover, the ZBA is mandated to follow the requirements of the New York State Town Law determining whether or not to grant area variances to the applicant, and to assure that all appropriate individuals were notified of the proposed Special Use Permit so that they could provide appropriate impute at the public hearing held concerning this project.

8. Respondent, Upstate Cellular Network d/b/a Verizon Wireless maintains their offices at 1276 John Street, Suite 100, in the Town of West Henrietta, in the State of New York. They are the project sponsors and proposed developers of the cellular tower and as such, they are made Respondents herein as parties necessary to effectuate the equitable relief requested in this proceeding.

9. Respondent, Public Storage, Inc., is a real estate investment trust, located at 701 Western Avenue, Glendale, California. As the owner of the land upon which the cellular tower

is proposed to be built, Public Storage, Inc. are made Respondents herein as parties necessary to effectuate the equitable relief requested in this proceeding.

III. FACTS

10. The Upstate Cellular Network d/b/a Verizon Wireless (hereinafter cited as “Verizon”) proposes to build an 82-foot cellular tower with a 4-foot lighting rod, on a 11.5 foot x 16 foot outdoor equipment platform with ice shield and wireless telecommunication antennas installed on the tower, together with other site improvements on land owned by and leased from Public Storage, Inc. at 3671 Sheridan Drive in the Town of Amherst. However, the site at issue proceeds from Sheridan Drive to the back portion of the Public Storage property, which property runs contiguous to the backyards of Petitioners and other residents on Dellwood Road. In spite of the fact that the Town of Amherst Zoning Code requires that the cell tower be no closer than 500 feet from residential property lines, the proposed cell tower is significantly closer and required a waiver or variance from the 500 foot requirement. Moreover, the location of the cell tower is either upon or nearby federal jurisdictional wetlands that are prevalent throughout the neighborhood. In addition, the site of the proposed tower is nearby Garnett Park, a heavily used active park for neighborhood residents and others, including park amenities and baseball fields. Therefore, the site at issue is particularly inappropriate for the neighborhood in which it is sited.

11. In spite of the fact that the Petitioners herein have never had any problems with their cellular service, including the Petitioners and residents that use Verizon Wireless, Verizon has indicated that there is a gap in cellular service in the Millersport/Sheridan cell requiring new service.

12. Similarly, Verizon claims that there are no other facilities or land that is available to them in which to place a cellular tower, except the site of the proposed project. Verizon

claims that the project will not pollute, will not create noise or vibration, will not create any significant increase in traffic, will not create any environmental problems, will not increase population density, and will not create any demand on government facilities. For these reasons, Verizon claims the project will not create any detriment to adjoining properties or changes in the character of the neighborhood.

13. Verizon filed its application for the Special Use Permit and variances on August 5, 2016. The application included various exhibits, including an Environmental Assessment Form, required by SEQRA, that Verizon drafted.

14. On September 20, 2016, the ZBA held a public hearing, after which it issued a Negative Declaration pursuant to SEQRA, indicating that there will no significant adverse environmental effects, and granting the Special Use Permit to Verizon, including the requested variances/waivers of the Town of Amherst Zoning Code.

15. The Zoning Board in its Negative Declaration, indicated there would be no significant environmental consequences from the granting of the Special Use Permit and variances/waivers in a totally conclusory manner, without indicating the required reasoning behind those conclusions, as will be further explained in this Petition.

16. Likewise, in granting the variances/waivers, the ZBA did not indicate the reasons why such grant of the area variances/waivers complied with the requirements of Section 267-B(3) of the Town Law.

17. Moreover, as will be further explained in this Petition, the ZBA failed to notify many of the required property owners of the proposed action and public hearing, including some of the Petitioners herein, in violation of the Town of Amherst Zoning Code.

IV. VIOLATIONS OF TOWN OF AMHERST ZONING CODE

18. The Town of Amherst Zoning Code, Section 8-2-3(b)(1), requires that prior to the issuing the Special Use Permit concerning the proposed cellular tower, that all residents within 500 feet of the site of the proposed cellular tower, be notified of the proposed action on the Special Use Permit, as well as the date, time and place of the public hearing.

19. Nevertheless, Petitioners Jamie Smith and Paul Sutton, who live well within the 500 foot radius of the project site, did not get notice of the proposed project or public hearing, and therefore, did not attend the hearing due to lack of such notice. Therefore, the right to provide input concerning the proposed project at the public hearing was denied to them by failing to properly notify them of the hearing.

20. Petitioners Claire and Bernard Leffler also failed to get notice of the proposed project and public hearing, although they did attend the public hearing.

21. Finally, Petitioner Mary Edwards did receive notice of the hearing, but did not attend the meeting.

22. By not notifying Petitioners Paul Sutton and Jamie Smith of the project and public hearing, as well as other residents that live within 500 feet of the proposed project, Petitioners and other members of the public's rights to be notified of the hearing so that they could provide input and participate in the hearing were denied to them, in violation of Section 8-2-3(B)(1) of the Town of Amherst Zoning Code.

V. VIOLATION OF SECTION 267-B(3) OF THE TOWN LAW

23. In order to issue an area variance, certain requirements must be met by the applicant as required by Section 267-B(3) of the Town Law. These requirements include that the ZBA must take into consideration the benefit to the applicant if a variance is granted, as weighed

against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination, the law requires that the ZBA consider:

“(1) Whether an undesirable change will be provided in the character of the neighborhood or detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method feasible for the applicant to pursue, other than an area variance; (3) whether the required area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical and environmental conditions to the neighborhood or district; and (5) whether the alleged difficulty was self-created which consideration shall be relevant to the position of the Board of Appeals, but shall not necessarily preclude the granting of the area variance.”

24. The courts have regularly indicated that the most important factor to consider is whether an undesirable change will be produced in the character of the neighbor or detriment to the nearby property will be created by the granting of the area variance.

25. Cognizant of the requirements of Section 267-B, which are also referenced in the Amherst Zoning Ordinance at Section 8-13-1, Verizon provided the ZBA with a 2-page analysis of why the requested variances/waivers would meet the requirements of Section 267 of the Town Law.

26. Concerning the requirement of consideration of whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance, Verizon indicated that there will be no undesirable change in the neighborhood and therefore no detriment to nearby properties because the proposed facility will not pollute, create noise or vibration, increase pollution density, create any demand on governmental services, and will not create any increase in traffic. They further indicated that “it is an inert facility and, as such, is in harmony with the orderly development of

the area as well as the nationwide wireless telecommunications system.” (See Statement of Verizon attached hereto as Exhibit “A”.)

27. Of course, even if it was true that the facility will not pollute or create adverse environmental consequences, as alleged by Petitioners in this instant proceeding, the mere fact of the industrial nature of the cellular tower being placed behind their residential homes on Dellwood Road clearly changes the character of the neighborhood, and is a potential detriment to nearby properties due there being within the fall zone of the proposed project.

28. Moreover, the 500 foot from residential property line requirement, as well as assuring that residential properties are not within the fall zone of the cellular tower, is a regulation meant to assure that the cell tower will not present any safety hazard to residents that live nearby.

29. Similarly, these requirements are present due to the potential of ice shear or throw from the cellular tower during the winter months. Indeed, Verizon’s engineer indicated in a report to the ZBA that the cell tower was engineered to withstand wind gusts up to 40 miles per hour in the winter months. However, unfortunately, during periods of high wind, wind gusts certainly occur at greater speeds than 40 miles per hour, making the issue and concern over the fall zone and ice throw of great significance to the Petitioners.

30. These safety concerns expressed, were not even mentioned by Verizon or the ZBA for purposes of either Section 267-B or for purposes of SEQRA.

31. Concerning whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance, Verizon merely indicates that it must be granted the requested variances/waivers or it will be unable to provide adequate service in their “Sheridan/Millersport” cell. While Verizon does not indicate in exhibit

B, their claim that this is the only site available to build the cellular tower upon, the fact remains that it is respectfully submitted that Verizon did not appropriately examine all of the other sites that might be available for such siting of the cellular tower according to the Zoning Code of the Town of Amherst. If other sites are available, then the benefits sought by the applicant can be achieved by building a cell tower at a different location.

32. The Town of Amherst Zoning Code at Section 6-7-4, indicates the nature of the property upon which a cell tower shall be built. Therefore:

“A. Petitioners for WTFs shall locate, site and erect said WTFs in accordance with the following priorities, one being the highest priority and seven being the lowest priority.

- (1) On existing towers or other structures without increasing the height of the tower or structure;
- (2) On Town-owned properties;
- (3) On existing towers or other structures when a material increase in height is required;
- (4) On properties in areas zoned for industrial use;
- (5) On properties in areas zoned for business or non-residential use;
- (6) On properties in areas zoned for agricultural use.
- (7) On properties in areas zoned for residential use.”

33. Moreover, the Zoning Code also requires in case of a new tower, that the applicant must investigate every tower and every structure with height exceeding 60 feet from finished grade within two miles of the proposed location of the new tower Section 6-7-4(a). Furthermore, “copies of written requests and responses for shared use shall be provided to the Town in the application, along with any letters of rejection stating the reason for rejection.”

34. In spite of the priorities listed in the Zoning Code, and the requirement that sites be investigated within a two mile radius, Verizon only investigated sites within a .10 of a mile, which only included four sites. Moreover, of the four sites, the two sites that Verizon rejected that were appropriate for a cell tower, did not contain any copies of written requests or responses

or letters of rejection stating the reasons for rejection, all in violation of the Town of Amherst Zoning Code.

35. In considering whether the requested area variance is substantial, Verizon does not provide an appropriate response to this requirement. Rather, Verizon merely claims that the variance requested from the 500 foot requirement corresponds to the need for the proposed tower and is sited at the only available location for the project. However, the need for the cellular tower has no relation to whether or not the requested variance is a substantial variance. Since the requirement that the cellular tower be sited at 500 feet from the property line of residential properties is a requirement to assure the safety of those properties and the residents who live in the properties, clearly, siting the cellular tower closer than the 500 feet limit is a substantial variance request.

36. Concerning whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district, Verizon claims that the project will enhance the public health, safety, welfare and convenience by providing a more efficient system of wireless telecommunication service for police, fire and other emergency services and to business, industry and individuals in the Sheridan/Millersport cell area. However, again, Verizon has ignored any appropriate response to this requirement. Indeed, there will be an adverse effect on the physical and environmental conditions of the neighborhood, given the fact that both the park use, the wetlands, and the residential nature of the neighborhood will in fact be adversely affected.

37. Finally, in responding to the whether the alleged difficulty is self-created, Verizon claims the hardship is not self-created but a function of the need to install a wireless telecommunications facility in an appropriate location to meet coverage and capacity needs.

Again, Verizon does not acknowledge or recognize the fact that the hardship is indeed self-created by definition, since Verizon chooses to build its cellular tower at a location where it knows or should know that the setback requirement will be violated.

38. While the ZBA in fact granted the Special Use Permit and the requested variances/waivers, the ZBA did not provide any written reasons or even any indication that the requirements of the Town Law were considered by the ZBA prior to granting the Special Use Permit and variances. Therefore, there is no explanation concerning whether or not the ZBA took into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant or what was considered by the ZBA in making such grant of the Special Use Permit and area variance.

VI. NONCOMPLIANCE WITH THE COMPREHENSIVE PLAN

39. The Town of Amherst has adopted an official Comprehensive Planning document. Zoning decisions must be consistent with the Comprehensive Planning Document. Town Law Section 263.

40. The Planning Department of the Town of Amherst has acknowledged that the proposed cell tower is in fact inconsistent with the Comprehensive Plan of the Town of Amherst.

41. Therefore, in answering the question of whether or not the location of the proposed cell tower “will be generally consistent with the policies of the Comprehensive Plan”, the Planning Department indicated that:

“The proposed project is not consistent with the policies of the Comprehensive Plan, particularly policy 3-5 (Apply Design Standards to Enhance Community Appearance and Sense of Place) and 5-5, (Promote commercial development patterns that reduce neighborhood impacts). The project is located within 500 feet of 13 [plus or minus] single-family residential properties and requires

the waiver or variance of several standards provided for within Sections 6-7 of the Zoning Code (Telecommunication Facilities Standards), including but not limited to the requirement to locate the facility at least 500 feet from residential property lines. This project will have negative visual impacts on a limited area where there are single-family residences.”

See Memorandum of Planning Department of September 13, 2016, attached hereto as Exhibit “B”.

42. Concerning the requirement of the Comprehensive Plan that the proposed cell tower “will be compatible with existing uses adjacent to and near the property”, the Planning Board indicated that “existing uses adjacent to and near the property include commercial uses, single-family residential uses and public parkland. The proposal is not compatible with the adjacent residential use or public parkland.”

43. The Planning Board also indicated that the project is not in harmony with the general purpose of the Amherst Zoning Ordinance given the proximity to single-family residential properties, and that the proposed projects visual impacts may tend to depreciate the value of adjacent residential property.

VII. VIOLATION OF SEQRA

44. Pursuant to SEQRA, the ZBA acted as “lead agency” to make SEQRA determinations and as such had the responsibility to assure that all laws and regulations pursuant to SEQRA were carried out.

45. According to the regulations promulgated pursuant to SEQRA:

The basic purpose of SEQR is to incorporate the consideration of environmental factors into the existing planning, review and decision-making processes of state, regional and local government agencies at the earliest possible time. To accomplish this goal, SEQR requires that all agencies determine whether the actions they directly undertake, fund or approve may have a significant impact

on the environment and, if it is determined that the action may have a significant adverse impact, prepare or request an environmental impact statement.

6 NYCRR §617.1(c).

46. Further, the regulations indicate that:

In adopting SEQOR, it was the legislature's intention that all agencies conduct their affairs with an awareness that they are stewards of the air, water, land and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations.

6 NYCRR § 617.1(b)

47. The regulations contained at 6 NYCRR § 617.7 indicate that an EIS must be prepared if the proposed action "may include the potential for at least one significant adverse environmental impact." 6 NYCRR § 617.7(a)(1) [emphasis added].

48. Conversely, to determine that an EIS will not be required for an action, "the lead agency must determine either that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant." 6 NYCRR § 61.7.7(a)(2).

49. In determining whether there may be significant adverse environmental impacts, the regulations at 6 NYCRR § 617.7 list the following factors, among others, which if they exist, would require the preparation of an environmental impact statement:

(ii) The removal or destruction of large quantities of vegetation or fauna; substantial interference with the movement of any resident or migratory fish or wildlife species; impacts on a significant habitat area; substantial adverse impacts on a threatened or endangered species of animal or plant, or the habitat of such a species; or other significant adverse impacts to natural resources;

•••

(iv) The creation of a material conflict with a community's current plans or goals as officially approved or adopted;

- (v) The impairment of the character or quality of important historical, archeological, architectural, or aesthetic resources or of existing community or neighborhood character;

•••

- (vii) The creation of a hazard to human health;
- (viii) A substantial change in the use, or intensity of use, of land including agricultural, open space or recreational resources, or in its capacity to support existing uses;

•••

- (xi) Changes in two or more elements of the environment, no one of which have a significant impact on the environment, but when considered together result in a substantial adverse impact on the environment;”

6 NYCRR § 617.7(c)(1).

50. An EIS provides the lead agency with all of the appropriate information concerning the effects of the project. Moreover, in considering whether to prepare an EIS, the lead agency must consider not only issues involved with the specific action that the lead agency is being asked to take, but all potential significantly adverse consequences of the project including those issues or permits that may be issued by other agencies. Just as surely, the EIS provides the public with this information, allowing them to knowledgeably provide input and comment on the environmental review process.

51. The lead agency is required to apply a “hard look standard” in fulfilling its SEQRA responsibilities, which requires an agency to:

- (1) Identify all areas of environmental concern; and
- (2) Take a hard look at the environmental issues identified; and
- (3) Provide a reasoned elaboration for the decisions that are made, including whether or not to do an environmental impact statement.

52. In the instant action, it is obvious that a number of the criteria in Section 617.7 are in fact implicated by the proposed cell tower. For example, it is clear, and confirmed by the Planning Board Memo at Exhibit “D”, that the cell tower is inconsistent with the character of the neighborhood or community and is in material conflict with the communities’ current plans or goals as officially approved or adopted.

53. Verizon prepared an Environmental Assessment Form which is required by SEQRA. (Please see the Environmental Assessment Form attached hereto as Exhibit “C”.) The Environmental Assessment Form is required to provide the lead agency with the basic information needed to identify if there are any areas of environmental concern, and if an area of environmental concern was identified, the lead agency must prepare additional documents to determine whether or not those areas of environmental concern may cause a significant adverse environmental impact. However, if the initial Environmental Assessment Form is incorrectly filled out, or does not indicate an area of environmental concern which does exist, then the lead agency may neglect analyzing an area of environmental concern which was not identified.

54. That circumstance exists in the instant case. For example, question D-2(b) asks whether or not the proposed project would cause or result in alteration of, increase or decrease in the size of, or encroachment into any existing wetland, waterbody, shoreline, beach or adjacent area. In answer to this question, Verizon answered no, even though the area has substantial wetlands throughout. (See attached wetlands map prepared by the National Wetlands Inventory – V2 prepared by the US Fish and Wildlife Survey attached hereto as Exhibit “D”) At page 8 of the Environmental Assessment Form, the question deals with whether or not the proposed action will have outdoor lighting. While the applicant answered this question with a yes, in other documents presented to the ZBA, Verizon indicated that there would be no outside lighting.

(See at Exhibit “E”). On page 10 of the Environmental Assessment Form, it is asked whether or not there are any facilities serving children, the elderly, or people with disabilities (e.g., schools, hospitals, licensed day care centers, or group homes) within 1500 feet of the project site.

Verizon checked no to this question even though there is an active park, with baseball diamonds, where children play and congregate within 1500 feet of the proposed cell tower.

55. In the Environmental Assessment Form at page 11, it is indicated that 100% of the proposed site is properly drained, and it is indicated that there is a very high water table. These two points indicate that if there are any adverse effects on any of the wetlands, this may increase flooding problems to the residential homes in the neighborhood, but this issue of flooding was specifically ignored by Verizon and the ZBA, and no independent analysis was done by the ZBA concerning whether or not this project may increase flooding problems.

56. At page 12 of the Environmental Assessment Form, it asks whether or not the project site contains any species of plant or animal that is listed by the federal government or New York State as endangered or threatened, or does it contain any areas identified as habitat for an endangered or threatened species. Similarly, whether or not the project site contains any species of plant or animal that is listed by New York State as rare, or as a species of special concern. Verizon indicated no to each of these questions. However, given the fact of the wetlands that exists on or near the site, which are generally significant areas for both flora and fauna and habitat of both, it was negligent for Verizon and the ZBA to do no independent analysis of whether or not any wildlife or significant plants exists on or near the site that may be adversely effected by the construction and continued presence of the cell tower. It is not enough to just state in a conclusory fashion that these flora and fauna do not exist without doing a reconnaissance of the area to determine if this is correct.

57. In answer to what extent the cell tower will be observed and its visual effects on aesthetics in the neighborhood, as required, Verizon provided photographs with the cell tower superimposed on the photographs. (See attached as Exhibit “E” the visual EAF Addendum and pictures supplied.) However, as can be seen from the pictures, they were all taken during the summer months when there was significant foliage, and none of them were taken from either Garnett Park, or from the residences in the neighborhood. Therefore, the Visual Addendum and pictures totally understate the visual and aesthetic impacts that the cell tower may have on the community.

58. As previously indicated, the ZBA issued a Negative Declaration, indicating that there will be no significant adverse environmental consequences. (The Negative Declaration is attached hereto as Exhibit “F”.)

59. As previously indicated, the SEQRA regulations require the lead agency, in adopting either a Negative Declaration indicating that there will be no significant adverse environmental consequences so that an Environmental Impact Statement need not be drafted, or a positive declaration indicating that there may be at least one significant adverse environmental consequence, so that an Environmental Impact Statement must be drafted, must provide a reasoned elaboration for their determination. The reasoned elaboration must provide not just a conclusion that a particular area of environmental concern does not exist, but must give their reasoned analysis for this conclusion. As can be seen from page 2 of the Negative Declaration, entitled “Reasons Supporting This Determination”, numbers 1, 2, 3 and 4 are mere conclusions without any analysis or reason for the conclusion. Therefore, the Negative Declaration does not deal at all with whether or not adverse effects on the wetlands exist, causing further flooding, or the issue of wildlife or important vegetation. Furthermore, again in a conclusory fashion, the

ZBA indicated that the project is not expected to create any material conflict with the Comprehensive Plan, even though they were informed by the Planning Department of the inconsistencies with the Comprehensive Plan.

60. Concerning whether or not the project will significantly impair the character or quality of important aesthetic resources or existing community or neighborhood character, there is minimal analysis provided by the ZBA concerning this issue, only recognizing that there are adjacent single-family residential homes and public parkland adjacent to the proposed project, and further recognizing that the project may have a small or moderate negative impact on visual resources. However, the ZBA did not indicate any analysis or reasons why the project will not significantly impair the character or quality of the existing community or neighborhood character, even after recognizing that it is adjacent to the residential homes and parkland.

61. Again, at number 8, the ZBA concludes that the project will not cause a substantial change in the use, or intensity of use, of land including agricultural, open space or recreational resources, or in its capacity to support existing uses. Again, there is no reason or analysis given for this conclusion, as is required, and of course no discussion of why the cell tower will not affect the enjoyment and use of Garnett Park, even though there will be a significant aesthetic intrusion upon the parkland by the construction of this cell tower.

62. Therefore, the ZBA has failed to properly provide a “reasoned elaboration” for its determinations in the Negative Declaration, and as such, has violated the procedures of SEQRA requiring that the Negative Declaration must be voided and an injunction entered until such time as SEQRA is fully complied with.

**VIII. FOR A FIRST CAUSE OF ACTION:
VIOLATION OF SECTION 267-B OF THE TOWN LAW**

63. Petitioners repeat, and reallege and incorporate each paragraph hereinbefore mentioned.

64. As previously indicated, and for the reasons stated, the ZBA incorrectly determined that certain requirements for granting an area variance were met by Verizon.

65. Moreover, as indicated, the ZBA did not provide any indication that it engaged in the analysis required by Section 267-B, and it did not provide any written analysis or reasons for granting the area variances/waivers and the Special Use Permit.

66. For all of the foregoing reasons, the ZBA did not fulfill its responsibilities and the requirements of Section 267-B of the Town Law.

**IX. FOR A SECOND CAUSE OF ACTION:
VIOLATION OF SECTION 263 OF THE NEW YORK STATE TOWN LAW**

67. Petitioners repeat, reallege and incorporate each paragraph hereinbefore mentioned.

68. Section 263 of the New York State Town Law, requires that, in towns that have officially adopted a Comprehensive Plan, that all zoning decisions must be made consistent with that plan and not contrary thereto.

69. As previously indicated, the ZBA grant of the requested variances and Special Use Permit was inconsistent with the officially adopted Town of Amherst Comprehensive Plan.

70. For the foregoing reasons, the ZBA has violated Section 263 of the Town Law.

X. FOR A THIRD CAUSE OF ACTION:
VIOLATION OF SEQRA

71. Petitioners repeat, reallege and incorporate each paragraph hereinbefore mentioned.

72. The ZBA violated both the procedure and substance of SEQRA by issuing a Negative Declaration without identifying all areas of environmental concerns, and without providing a reasoned elaboration for the Negative Declaration.

73. For the foregoing reasons, the ZBA has violated the procedural and substantive requirements of SEQRA, it has not properly applied the hard look standard required, and has violated SEQRA's substantive requirements in not requiring the preparation of an environmental impact statement.

XI. FOR A FOURTH CAUSE OF ACTION:
VIOLATION OF THE TOWN OF AMHERST ZONING CODE

74. Petitioners repeat, reallege and incorporate each paragraph hereinbefore mentioned.

75. For the reasons stated, both Verizon and the ZBA violated the Town of Amherst Zoning Code in not properly notifying the Petitioners of the public hearing, and not properly requiring a full review of available alternative sites within a two mile radius, without doing a proper visual analysis, and for the other reasons stated in this Petition.

76. Therefore, Verizon and the ZBA have violated various sections of the Town of Amherst Zoning Code.

WHEREFORE, Petitioners respectfully pray that the Court void the actions of the Zoning Board of Appeals, in granting the Special Use Permit and the variances/waivers, and void the Negative Declaration issued by the ZBA pursuant to SEQRA, and further issue an injunction enjoining any activities by Verizon concerning the advancement of this project, until such time as the ZBA has fully complied with all the laws of the State of New York and the Ordinances of the Town of Amherst, and for such other and further relief that the Court deems just and proper. No prior request for this relief has made to this or any other court.

DATED: Buffalo, New York
October 20, 2016

Yours, etc.,



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