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.

MEMORANDUM OF LAW IN SUPPORT OF PETITION

I. INTRODUCTION

Petitioners commenced this Article 78 proceeding challenging the action of the Zoning Board of Appeals of the Town of Amherst (hereinafter cited as "ZBA"), in issuing a Special Use Permit and variances concerning property located at 3671 Sheridan Drive in the Town of Amherst, for the construction of a wireless telecommunication cell tower on land owned and leased from Public Storage, Inc. The ZBA issued a Negative Declaration, indicating that it would not be necessary to draft an Environmental Impact Statement since the project will not have a significant adverse environmental impact pursuant to the New York State Environmental Quality Review Act, Environmental Conservation Law § 8-0101, et. seq. (hereinafter designated as "SEQRA").

Petitioners believe that the area variances were granted contrary to the requirements of SEQRA, as well as § 267-B(3) of the Town of 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. Therefore, this proceeding seeks to void the decisions made concerning the granting of the Special Use Permit and area variance, 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. FACTS

The Upstate Cellular Network d/b/a Verizon Wireless (hereinafter cited as "Verizon") applied for a Special Use Permit pursuant to the Town of Amherst zoning ordinances, to build an 82-foot cellular tower with a 4-foot lighting rod, on an 11.5 foot x 16 feet 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. whose address is at 3671 Sheridan Drive in the Town of Amherst. 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.

The placement of the cell tower is within 500 feet of the residents who live on Dellwood Road, as well as being nearly contiguous to Garnett Park, an active Town of Amherst park. Moreover, while Verizon takes the position that wetlands are contiguous to the proposed area where the cell tower is to be built, but not in the wetland area, the United States Fish and Wildlife Service has previously designated the entire area as wetlands. See U.S. Fish and Wildlife wetlands map, attached hereto as Exhibit "A".

While the Town of Amherst Zoning Code, requires that cell towers be no closer than 500 feet from residential property lines, the proposed cell tower is significantly closer and required a variance from the 500-foot requirement.

Since the site of the cell tower is nearby the backyards of residential properties, significantly closer than the Zoning Code allows for safety purposes, as well as being either close by or in federal jurisdictional wetlands that are prevalent throughout the neighborhood, and it is also next to Garnett Park, which is a heavily used active park for neighborhood residents and others, including park amenities and baseball fields regularly used by children, it is respectfully submitted the site at issue is particularly inappropriate for the neighborhood in which it is sited.

Nevertheless, Verizon argued to the ZBA that the site at issue is the only site available to them that meets their coverage needs for cellular access.

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

> "A. Petitioners for WTFs [cell towers] 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 structures;
> (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."

While Verizon indicated in its filings with the ZBA that the area in question is zoned for industrial or commercial uses, in fact the zoning is R-3, which contemplates residential uses. Therefore, the proposed site is in fact the lowest priority land use for siting of cell towers.

To assure that the priority siting is met, the Zoning Code requires, in the case of a new cell 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 are required to be provided to the town in the application, along with any letters of rejection stating the reasons for the rejection. In spite of the requirements of the Amherst Zoning Code, as far as the requirement for written request and responses of other cell towers or structures with height exceeding 60 feet within a two mile radius, no such letter request or letters of rejection were presented to the ZBA according to the requirements of the Amherst Zoning Code.

Moreover, in spite of the priorities listed in the Zoning Code, and the requirement of sites being investigated within a two mile radius, Verizon only investigated sites within .10th of a mile, which only included four sites, one of which was Garnett Park that was rejected by the Town, and another being the Public Storage site upon which Verizon wishes to build the cell tower. Therefore, they indicated to the ZBA, without any letters requesting or rejecting their request to site their cell tower, only two other sites within the .10 mile radius, the Sunny 1, Drive In site on Millersport Highway near Sheridan, and property of Northtown Automotive on Sheridan Drive. (See Map at Ex. 4 of the Certified Record).

While only these three alternative sites were considered, the Court can take judicial notice of the commercial nature of Millersport Highway and Sheridan Drive to understand that there are many other potential commercial properties that could have been contacted to determine whether or not the cell tower could be sited on such commercially zoned property, rather than in a residential neighborhood. However, there is no indication in the certified record

that any other sites were reviewed, and as indicated, no letters of requests or rejection from even the two alternative sites were provided to the ZBA.

III. THE ZBA DID NOT COMPLY WITH THE REQUIREMENTS OF SECTION 267-B(3) OF THE TOWN LAW WHEN IT GRANTED THE VARIANCES TO VERIZON.

As previously indicated, Verizon requested a variance from the 500 foot setback from residential properties, as well as a variance from setback as it applies to the fencing of the property. In order to issue an area variance pursuant to § 267-B(3) of the Town Law, 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."

In response to the requirements of § 267-B(3), Verizon provided the ZBA with what they considered a two page analysis of why the requested variances would meet the requirements of § 267 of the Town of Law. (See the two page analysis at Exhibit "R" of the Certified Record).

As indicated in the Verified Petition, at paragraphs 35-37, even the two-page analysis provided by Verizon to the ZBA was merely conclusory and did not provide the ZBA with correct information. However, regardless of the analysis that Verizon supplied to the ZBA

concerning the requirements of § 267-B(3), it was not Verizon's job to fulfill the requirements of § 267-B(3), but rather a non-delegable duty of the ZBA itself.

The ZBA meeting dealing with the cell tower was held on September 20, 2016. At that meeting, a public hearing was held concerning the two requested variances or waivers, immediately after which, with no discussion at all concerning the requirements of § 267-B(3), the ZBA voted to issue a Negative Declaration pursuant to SEQRA, and then immediately thereafter voted to grant the Special Use Permit and variances requested. (See the transcript of the meeting of September 20, 2016 at Exhibit 26 of the Certified Record. The minutes of the September 20, 2016 meeting and the actions taken at that meeting are contained at Exhibit 25 of the Certified Record). In neither the transcript of the meeting, or in the minutes of the meeting, is there any discussion or other consideration of the 267-B(3) considerations.

Even if the ZBA had considered the requirements of § 267-B(3), and determined that each of the criteria were met so that it was appropriate to grant the variances requested, a decision of an administrative body that issues such decision without explanation or reasoning, is by definition, arbitrary and capricious. As indicated, there is simply no explanation or reasoning contained in the Certified Record concerning whether or not the ZBA ever considered the requirements of §267-B(3), or ever discussed the requirements therein. Indeed, the only thing in the Certified Record was the two-page analysis by Verizon, which would be considered argument, rather than any consideration that might have been made by the ZBA.

The courts of New York will not sustain an administrative decision where the administrative body issues no written explanation. The courts have held that an administrative decision without a sound basis in reason and without regard to the facts is arbitrary and capricious and constitutes an abuse of discretion. Scherbyn v. Wayne Finger Lakes Bd. of

Cooperative Educational Services, 77 N.Y.2d 753,759 (1991). In Engleson & Van Liere, Inc. v. Village of Sodus Point, 135 A.D.2d 1141 (4th Dept. 1987) the court held that findings of fact which show the actual grounds of the decision are necessary for an intelligent judicial review of administrative decisions. Where an administrative body fails to explain the reasoning for its decision, the reviewing court is powerless to affirm. South Blossom Venture LLC v. Town of Elma, 46 A.D.3d 1337 (4th Dept. 2007) leave to appeal dismissed, 10 N.Y.3d 852 (2007). See also, Foxluger v. Gossin, 75 A.D.2d 1014 (4th Dept. 1980) appeal after remand, 83 A.D.2d 791; Moudis v. McDuff, 286 A.D. 485 (1st Dept. 1955); Langhorn v. Jackson, 206 A.D.2d 666 (3rd Dept. 1994); Paloma Homes, Inc. v. Petrone, 10 A.D.3d 612 (2nd Dept. 2004); Price v. Co. of Westchester, 225 A.D.2d 217 (3rd Dept. 1995); Sidor v. NYS Dept. of Soc. Services, 32 A.D.2d 944 (2nd Dept. 1969); Mariotti v. Turecki, 27 A.D.2d 798 (4th Dept. 1967); Badrow v. City of Tonawanda, 26 AD2d 611 (4th Dept. 1966).

Therefore, it is clear that the requirements of 263-B(3) were never considered or discussed, at least as contained in the Certified Record, and therefore, in approving the area variances requested, the ZBA is in violation of § 263-B(3) of the Town Law, and the determinations made at that meeting to grant the Special Use Permit and variances, must be voided.

IV. THE ZBA IS IN VIOLATION OF TOWN LAW § 263, SINCE GRANTING THE SPECIAL USE PERMIT AND VARIANCES DO NOT COMPLY WITH THE OFFICIALLY ADOPTED COMPREHENSIVE PLAN OF THE TOWN OF AMHERST.

There can be no question that the approved siting of this cell tower is inconsistent with the Comprehensive Planning document formally approved by the Town of Amherst, as required

by Town Law § 263. Indeed, the Planning Department of the Town of Amherst has acknowledged that the proposed cell tower is in fact inconsistent with the Comprehensive Plan.

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 from the Planning Department to Marjorie Jaegear, the Town Clerk, of September 13, 2016, contained at Exhibit 15 of the Certified Record).

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."

The Planning Department 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.

Again, there is nothing in the transcript of the ZBA meeting, or the meeting minutes which indicate that the ZBA even considered whether or not the Special Use Permit and variances would be inconsistent with the Comprehensive Plan of the Town of Amherst, and therefore the grant of the Special Use Permit and variances would be in violation of § 263 of the Town Law. However, leaving aside the fact that there is no indication that the ZBA ever considered this issue, the fact remains that according to the Planning Department, which has the most expertise in interpreting the Town of Amherst planning documents, the siting of the cell tower at the instant location is in fact inconsistent with the Comprehensive Plan, and therefore violates § 263 of the Town Law, and the ZBA approvals must be voided on this ground as well.

V. VIOLATION OF TOWN OF AMHERST ZONING CODE

The ZBA violated the Town of Amherst Zoning Code in a number of additional respects. For example, the Zoning Code requires that residents within 500 feet of the proposed project be given written notice of the public hearing on the project § 8-2-3(B)(1). Nevertheless, as indicated in the Verified Petition, Petitioners Jamie Smith, Paul Sutton and Claire and Bernard Leffler did not receive the required notice even though they live well within 500 feet, and therefore notice was required. While Petitioners Claire and Bernard Leffler did attend the public hearing, Petitioners Jamie Smith and Paul Sutton were denied their right to receive such notice, and therefore did not appear at the hearing to provide the input which they would have liked to provide objecting to the placement of the cell tower. Therefore, the ZBA was in violation of § 8-2-3(B)(1).

Next, the Zoning Code requires a visual analysis of the cell tower, to determine what impact the cell tower might have on the site lines of surrounding properties, and from how far away the cell tower could be seen. In order to fulfill this requirement, Verizon submitted various

maps and other analysis, including renderings through photographs of what the cell tower would look like.

Importantly, those photographs, which are the most understandable aspect of the visual analysis to lay Zoning Board members and residents, were only taken during high foliage season, and none of the photographs show what the cell tower might look like during fall, winter and spring months when the trees might be bare. Moreover, none of the photographs submitted where taken from the nearby residential properties, to show whether or not there may be a significant visual intrusion upon the residential neighborhood. Therefore, Verizon failed to properly fulfill their obligations to present a complete visual analysis to the ZBA, and the ZBA failed in their responsibility to assure that they have reviewed an appropriate visual analysis. (See the photographs referenced at Exhibit P of the Certified Record).

Finally, as previously indicated, the Amherst Zoning ordinance requires that an applicant for the siting of a new cell tower must provide an alternative analysis of whether or not the cell tower could be co-sited on another cell tower or on certain buildings within a two mile radius. Moreover, Verizon was required to supply to the ZBA letters of requests to site the cell towers on alternative properties, as well as rejection letters of the alternative properties that were approached, but declined to allow the cell tower to be built on their property.

Verizon totally failed to meet these requirements. First of all, as previously indicated, Verizon only considered alternative properties within .10 mile radius, rather than the two mile radius required by the Zoning Ordinance. Secondly, Verizon only indicated it considered two other sites within .10 radius, besides the site chosen and Garnett Park which had already been rejected by the Town, even though there are numerous commercial properties on Millersport

Highway and Sheridan Drive even within .10 radiuses. Finally, Verizon did not supply any letters of requests or rejection to the ZBA, as required by the ordinance.

VI. SEQRA HAS BEEN VIOLATED BY THE ZBA

A. The statutory scheme of SEQRA.

In 1976, New York State enacted the New York State Environmental Quality Review Act. While SEQRA was patterned after its federal counterpart, the National Environmental Policy Act, 42 U.S.C. §4332, et. seq., SEQRA is broader in scope concerning when an environmental impact statement needs to be drafted, and imposes greater duties in so far as substantive requirements are placed on the decision–maker to choose environmentally sound projects, and to identify and mitigate any adverse environmental consequences to the greatest extent practicable. While the National Environmental Policy Act required the drafting of an environmental impact statement when there will be significant adverse environmental consequences to a major federal project, the New York State Legislature broadened the types of projects that would require an environmental impact statement, requiring such a statement whenever there may be an underlying significant adverse environmental consequence.

The legislature declared that the purpose of SEQRA was to:

> "declare a state policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state." ECL, §8 – 0101.

As the New York State courts have repeatedly held "a principal goal of SEQRA is to "'incorporate environmental considerations in the decision-making process at the earliest opportunity'" See, Matter of City Council of the City of Watervliet v. Town Board of the Town

of Coloney, 3 N.Y.3d 508, 822 N.E.2d 339, 789 N.Y.S. 2d A.D.8 (2004), citing Matter of Neville Koch, 79 N.Y.2d 416, 53 N.E.2d 256, 583 N.Y.2d 802 (1992) and 6 NYCRR 617.1(C).

The heart of SEQRA lies in its provision regarding environmental impact statements. The law provides that whenever an action may have a significant impact on the environment, an EIS shall be prepared. ECL §8–0109(2). This document is to contain all the information necessary to ensure that the decision–making body can ultimately determine to go forward or not with any project in a manner that would create the least negative impact to the environment, including a review of alternative sites or designs of the project.

As explained by the court in the Matter of Shawangunk v. Planning Board of Town of Gardner, 137 A.D.2d 273, 557 N.Y.S.2d 495 (3d Dept. 1990):

> "The heart of SEQRA is the environmental impact statement (EIS process) [Matter of Jackson v. New York State Urban Dev. Corp., 67 N.Y.S.2d 400, 415]… the EIS process is especially designed to ensure the injection of full, open and deliberative consideration of environmental issues into governmental decision–making. (*Akpan v. Koch*, 75 N.Y.2d 561, 569). The EIS process guarantees comprehensive review of a project's environmental effects, consideration of less intrusive alternatives to the proposed action, including 'no action', and consideration of mitigation measures. (ECL §8–0109 [2]; 6 NYCRR 617.14[C]; *Matter of Jackson v. New York State Urban Dev. Corp*., supra at 416. To ensure accountability of the lead agency and avoidance of any oversight in that agency's assessments, the regulatory scheme requires public access to the information by making the draft and final EIS available, with sufficient lead time to afford interested persons an opportunity to study the project, its environmental effects and proposed mitigation measures, and (ECL 8-109 {4]; 6 NYCRR §617.8 [C]; 617.9[A]; *Matter of Jackson v. New York State Urban Dev. Corp*., supra at 415–416). Additional safeguards are found in the substantive requirements that the lead agency must act and choose among alternatives so as to minimize adverse environmental consequences, consistent with other social, economic and policy considerations and must then make appropriate written findings to that effect. (ECL 8– 0109 [1][8]; 6 NYCRR 617.9 [2]; *Matter of Jackson v. New York State Urban Dev. Corp*., supra at 416, See *Akpan v. Koch*, supra at 570)" 157

A.D.2d at 275–276.

The first step under the SEQRA regulations is the appointment of a “lead agency", which is that agency principally responsible for carrying out or approving the project or activity, and which is charged with the responsibility for determining whether the project under consideration may have significant adverse environmental effects, and if so, to prepare an environmental impact statement or have it prepared. The “lead agency" is also the entity that is charged with carrying out the procedures mandated by SEQRA. Therefore, the lead agency “shall act and choose alternatives which, consistent with social, economic and other essential considerations, and to the maximum extent practicable minimize or avoid environmental effects …" ECL §8–1019(1). (emphasis added).

Once a lead agency is designated, the lead agency is then required to engage in the environmental review required by SEQRA, including determining whether or not there may be at least one significant adverse environmental effect, and if there may be adverse environmental effects, require the preparation of a draft environmental impact statement.

In making this decision, the next step in this process is for the lead agency to determine whether or not the action under consideration is considered a “Type I" action, “Type II" action, or an “unlisted action". Type I actions are those actions that because of their size, scope, or type “are more likely to require the preparation of an EIS than unlisted actions". 6 NYCRR §617.4(8). As further indicated in the regulations, “the fact that an action or project has been listed as a Type I action carries with it the presumption that it is likely to have a significant adverse effect on the environment and may require an EIS." 6 NYCRR §617.4(A)(1). The regulations then set out a roadmap for determining what type of action would be considered Type I actions, and a further roadmap to determine whether either a Type I or unlisted action have significant

environmental adverse effects so as to require an environmental impact statement.

Type II actions are those actions that are specifically listed in the regulations, and that are of such minor impact, that no further action under SEQRA needs to be undertaken. For example, maintenance or repairs involving no substantial changes in an existing structure would be considered a Type II action.

Finally, those actions that do not fall within the regulatory requirements listed for Type I actions or Type II actions are considered “unlisted actions". In the instant case, the ZBA designated the project as “unlisted.”

In following the sequential steps to determine whether or not an environmental impact statement needs to be drafted as outlined in the regulations, the next step after a lead agency is established and the project is determined to be Type I, Type II, or unlisted, is to compare the proposed project and its effects with a list of potential adverse environmental consequences contained in §617.7 of the regulations. Therefore, as indicated in the regulations, “to determine whether a proposed Type I or unlisted action may have a significant adverse impact on the environment, the impacts that may be reasonably expected to result from the proposed action must be compared against the criteria in this subdivision. The following list is illustrative, not exhaustive. These criteria are considered indicators of significant adverse impacts on the environment….." 617.7 (C)(1). The regulations then go on to list a number of potential areas where adverse environmental consequences may occur. The list includes the following potential environmental consequences:

> (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).

In applying these criteria, §617 (a) indicates that:

> "(a) the lead agency must determine the significance of any Type I or unlisted action in writing and in accordance with this section.
> (1) to require an EIS for a proposed action the lead agency must determine that the action may include the potential for at least one significant adverse environmental impact.
> (2) 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."

Therefore, as can be seen, the bar to determining when an environmental impact statement must be drafted is very low. As Judge Kevin Dillon has indicated in a previous case, City of Buffalo v. New York State Department of Environmental Conservation, 180 Misc.2d 243, 707 N.Y.2d 606 (Sup. Ct. 2000):

> "The substantive mandate of SEQRA is much broader than that of the National Environmental Policy Act (NEPA) 42 U.S.C.A. §4332 requires federal agencies to prepare an EIS for "any major

> federal action significantly affecting the quality of the human environment." This should be contrasted with §8-0109 of SEQRA which is more expansive in its terms. Subdivision two of this section requires an EIS for "any action which is proposed or approved which may have a significant effect on the environment." Only a 'low thresholds' is required to trigger SEQRA review." *Onondaga Landfill Systems, Inc. v. Flack*, 81 A.D.2d 1022, 440 N/Y.S.23 788 (4th Dept. 1981)."

707 N.Y.S.2d at 611.

In order to assure that the lead agency has the appropriate information in order to make a determination of significance, an Environmental Assessment Form "[EAF]" needs to be drafted. The EAF does not require the level of detail or the requirements of what must be included in an environmental impact statement, but rather, is merely a form that largely tracks the listed items in §617.7, and provides the lead agency with initial information concerning whether or not there may be adverse effects concerning each of the listed areas. The EAF may also be supplemented by individual studies or reports in any particular issue area, as well as supplemental written information. In the instant case, an environmental assessment form was drafted and provided to the lead agencies, as well as supplemental studies and information, in an attempt to show that there would be no significant adverse environmental consequences. However, it is the lead agency's responsibility to make an independent determination as to whether or not significant adverse environmental consequences exist.

Therefore, once the environmental assessment form is drafted and the lead agency compares the information in the environmental assessment form against the listed criteria in §617.7, the standard that is universally applied in determining whether or not a lead agency has fulfilled its SEQRA requirements concerning whether or not to draft an environmental impact statement was first espoused in the case of *H. O. M. E. S. v. New York State Urban Development*

Corporation, 69 A.D.2d 222, 418 N.Y.S.2d 827 (4th Dept. 1979), and eventually memorialized in the SEQRA regulations at 6 NYCRR 617.7(B), and is commonly called the "hard–look standard". That standard requires that the agency must:

> "1. Identify all areas of relevant environmental concerns; and
> 2. take a 'hard–look' at the environmental issues identified; and
> 3. Present a reasoned elaboration of why these identified environmental impacts will not adversely affect the environment, in the event that it is determined that an environmental impact statement need not be drafted."

Therefore, as previously indicated, in determining whether not a proposed project or action may have adverse effects on the environment, a lead agency is to compare the effects of the proposed action against the criteria listed in part 617.7, identify the areas of environmental concern, take a hard look at those areas of environmental concern to determine whether or not those areas of concern may have significant adverse environmental consequences, and then provide a reasoned elaboration for their decision, in writing, as to why they have decided to either require an environmental impact statement or that an environmental impact statement need not be required. If they determine that an environment impact statement need not be required, they issue what is called a "negative declaration". If a negative declaration is issued, that ends the environmental review under SEQRA.

It is important to note the standards upon which courts review SEQRA determinations. Therefore, as opposed to most other statutes, courts early on recognized that because of the importance placed on SEQRA responsibilities by the legislature, substantial compliance with SEQRA would not suffice, and the courts require that SEQRA be strictly and literally construed, along with strict and literal compliance with the procedural requirements indicated in the regulations. Matter of Rye town/King Civic Association v. Town of Rye, 82 A.D.2d 474, 422 N.Y.S.2d 62 (2d Dept. 1981) App. Dism. 56 N.Y.2d 985, 453 N.Y.S.2d 682 (1982); Schenectady

Chemicals v. Flack, 83 A.D.2d 460, 466 N.Y.S.2d 481 (3d Dept. 1991).

In the often quoted citation from Schenectady Chemicals, the court indicated:

> "By enacting SEQRA, the legislature created a procedural framework which was specifically designed to protect the environment by requiring parties to identify possible environmental changes 'before they have reached ecological points of no return'. At the core of this framework is the EIS, which acts as an environmental 'alarm bell'. It is our view that the substance of SEQRA cannot be achieved without its procedure and that any attempt to deviate from its provisions will undermine the laws expressed purposes. Accordingly, we hold that an agency must comply with both the letter and spirit of SEQRA before it would be found that it has discharged its responsibilities thereunder." (emphasis added) (citations omitted).

446 N.Y.S.2d at 420.

The courts of New York State continue to adhere to the strict and literal compliance standard as necessary to fulfill the goals of SEQRA, and not just because the legislature mandated that the act be carried out "to the fullest extent practicable," ECL §8–0103(6), but also to ensure that both the spirit and letter are followed, the court cannot allow a lead agency the rubric of "substantial compliance" to escape the environmental goals of the act. See, e.g., Coalition for Future of Stony Brook Vill. v Riley, 299 A.D.2d 481, 750 N.Y.S.2d 126 (2d Dept. 2002).

Moreover, the courts have also provided that when SEQRA or its regulations have been violated, the only appropriate remedy is to void the action taken by the lead agency, so that the lead agency would not treat the new work as a mere post–hoc rationalization of what had gone on before. The Court of Appeals decision in Tri-County Taxpayer Association v. Town Board, Etc., 55 N.Y.2d 41, 447 N.Y.S.2d 699 (N.Y.1997) is instructive. In that case, the Appellate Division, with two judges dissenting on the issue of remedy, determined that nullifying a vote of

the electorate that took place prior to SEQRA compliance "would serve no useful purpose to undo what has already been accomplished …." 47 N.Y.S.2d at 984.

However, the Court of Appeals adopted the position of the dissenters, holding that in order to properly ensure that the goals of SEQRA would be met, that the vote had to be nullified. The court stated:

> "It is accurate to say, of course, that by actions of rescission later adopted the town boards could have reversed the action authorizing the establishment of the sewer district. As a practical matter, for several reasons, however, the dynamics and freedom of decision–making with respect to a proposal to rescind a prior action is significantly more constrained then when the action is first under consideration for adoption".

55 N.Y.2d at 46.

Finally, while the procedural responsibilities under SEQRA require a strict standard of compliance, the lead agency is allowed discretion in fulfilling its substantive duties. However, even in this area, the broader discretion that resides with an agency concerning its substantive duties does not insulate the agency from judicial review. In the case of *Akpan v. Koch*, 75 N.Y.2d 561, 555 N.YS.2d 16 (1990) the court elucidated the standard of review concerning substantive matters.

> "Nevertheless, an agency, acting as a rational decision-maker, must have conducted an investigation and reasonably exercised its discretion so as to make a reasoned elaboration as to the effect of a proposed action on a particular environmental concern. Thus, while the court is not free to substitute its judgment for that of the agency on substantive matters, the court must ensure that, in light of the circumstances of a particular case, the agency has given due consideration to pertinent environmental factors."

555 N.Y.2d at 21 (citations omitted).

Therefore, with this statutory scheme and standard of review in mind, it is respectfully

submitted that the facts concerning this proceeding would indicate that the ZBA violated SEQRA by not complying with the "hard look" standard since no "reasoned elaboration" was provided in the Negative Declaration.

B. The Environmental Review In The Instant Case.

Verizon prepared an Environmental Assessment Form which is required by SEQRA. (Please see the Environmental Assessment Form at Exhibit G of the Certified Record). As indicated, 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.

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.

Also, 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 "A") 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. 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.

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 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.

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.

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 that an environmental impact statement must be drafted, and the lead agency must provide a "reasoned elaboration" for their determination to issue either a Negative or Positive Declaration. 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.

In the instant case, the ZBA issued a Negative Declaration, indicating that there will be no significant adverse environmental consequences. (See the Negative Declaration at Exhibit 14 of the Certified Record). However, the Negative Declaration was totally conclusory, and did not provide the analysis required of the "reasoned elaboration" necessary.[1]

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 and rather is just a rehashing of the requirements to be considered. Therefore, the Negative Declaration does not deal at all with whether or not adverse effects on the wetlands

[1] It is even unclear whether the Negative Declaration had even been reviewed by the ZBA prior to its adoption on September 20, 2016, since the date of its preparation is indicated as September 29, 2016.

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.

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.

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.

Therefore, as can be seen, the Negative Declaration is merely conclusory, listing the 617.7 environmental categories, but providing no analysis or reasoning for the determination that the particular category of environmental harm does not exist. Similarly, there is absolutely no discussion in the record or the transcript of the September 20 meeting of the ZBA concerning the Negative Declaration, other than voting for its adoption. The Department of Environmental

Conservation, the agency that drafted the SEQRA regulations, has provided guidance to agencies and municipalities concerning their responsibilities under SEQR. In the "SEQR Cookbook, a step by step discussion of the basic SEQR process (New York State Department of Environmental Conservation, Division of Environmental Permits, revised 2004, p. 7), it is indicated:

> "Every Negative Declaration must:
> - Identify the relevant areas for environmental concern;
> - Thoroughly analyze the relevant concerns; and
> - Document their determination, in writing, showing the reasons why the environmental concerns that were identified and analyzed will not be significant.
>
> Unsupported statements such as 'the action will not have a significant impact' or 'no significant impacts were identified in the EAF' are assertions that are not legally sufficient for a Negative Declaration. Such statements must be supported with adequate detail to explain why there will be no significant impacts."

The Courts have also weighed in on the "reasoned elaboration" requirement. For example, in Tonery v. Planning Board of Town of Hamlin, 256 A.D.2d 1097, (4th Dept. 1998), the court indicated:

> "Further, the lead agency must provide a reasoned elaboration for its determination of nonsignificance. Conclusory statements, 'unsupported by empirical or experimental data, scientific authorities or any explanatory information will not suffice as a reasoned elaboration for its determination of environmental significance or nonsignificance' (Matter of Tehan v. Scrivani, 97 A.D.2d 769, 771, 468 N.Y.S.2d 402, see also, Leibring v. Planning Board, 144 A.D.2d 903, 534 N.Y.S.2d 236)."

Therefore, as can be seen, the ZBA merely adopted a conclusory Negative Declaration, and like the requirements of Town Law § 267-B(3) did not provide any discussion or analysis of the 617.7 criteria and woefully failed to provide the "reasoned elaboration" required.

VII. CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this Court issue an Order and Judgment voiding and nullifying the grant of the Special Use Permit and the variance and waiver to Verizon, and issue an injunction concerning any construction of the cell tower project until such time as all of the laws of the State of New York have been fully complied with.

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Respectfully submitted,

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