MINUTES OF THE MEETING OF THE ZONING BOARD OF APPEALS
TOWN OF RICHLAND
1 BRIDGE STREET, PULASKI, NY 13142

DATE: Tuesday, February 16, 2021

PLACE: H Douglas Barclay Courthouse, Grand Jury Room

BOARD MEMBERS PRESENT: Richard Telian, Marshall Minot, Charles Deaton, Jamie Foster, and George Harding

OTHERS IN ATTENDANCE: John Howland, Julie Peterson, Joe Harris, Tom Erwin, and Jared Lusk

CALL TO ORDER: The meeting was called to order by Mr. Minot at 6:30 p.m.

Variance Application 20-69 submitted by Blue Sky Tower LLC for Joseph & Paula Harris located at 4551 State Route 13. Use variance application for the construction of a 180' telecommunications tower. Mr. Minot received some information from the Oswego County Planning Board which he read aloud and submitted as part of the minutes regarding the variance standards for public utilities. A public hearing was held at last month's meeting and it was met with no dissension. ***A motion was made by Jamie Foster, application 20-69 submitted by Blue Sky Tower LLC and all of the information that Nixon Peabody has submitted, located at 4551 State Route 13, Joseph & Paula Harris's property, that the application be approved, the motion was seconded by George Harding. In a roll call vote, members voted as follows: Deaton, yes; Foster, yes; Telian, yes; Harding, yes; Minot, yes, because the applicant has shown need in that area, that it is the best location in that area, and after reviewing NYS case law on cell towers being a public utility that it meets the criteria that they see as being definitive of a use variance for a public utility. A motion was made by George Harding and seconded by Jamie Foster to have Marshall Minot remain Chairman of the zoning board of appeals. All members were in favor with a vote of "AYE." A motion was made by George Harding and seconded by Jamie Foster to approve the ZBA minutes for January 18, 2021 with the suggested amendments. All members were in favor with a vote of "AYE."***

MEETING ADJOURNED: ***A motion was made by Jamie foster to adjourn the meeting at 6:55 p.m.***

Respectfully submitted by
Julie Peterson
Clerk

From: Tim Konetchy
Sent: Wednesday, January 27, 2021 2:26 PM
To: Marshall Minot
Cc: John Howland
Subject: RE: Cell Tower Approval - T/Richland

Good afternoon,
I understand that you want to backup your decision with a strong legal foundation and I will try to help, although I am not an attorney and this does not constitute legal advice. Please discuss this with your municipal attorney if necessary.

- The relevant case law can reviewed here: https://law.justia.com/cases/new-york/court-of-appeals/1993/82-n-y-2d-364-0.html
- Under "New York law and the Public Utility Standard" (page number 2-3 of https://www.dos.ny.gov/lg/publications/Wireless_Telecommunications_Facilities_Manual.pdf), you can find an explanation of the zoning implications for such utilities.
- Here in the NYS memo titled "MUNICIPAL REGULATION OF CELLULAR TELEPHONE TOWERS AND ANTENNAS" (https://www.dos.ny.gov/cnsl/lu01.htm), it is stated that "...even if a variance is necessary, a zoning board of appeals must grant approval if the cellular phone company is able to show that there are no reasonable alternative locations available which would allow the company to provide the same level of service to the cell (geographic area) in question."

It is therefore my understanding that for utilities, under which telecommunications fall, you are limited in the scope of your review.
Best,
Tim

From: Marshall Minot <marshallminot@outlook.com>
Sent: Wednesday, January 27, 2021 2:14 PM
To: Tim Konetchy <Tim.Konetchy@oswegocounty.com>
Cc: John Howland <jhowland101@twcny.rr.com>
Subject: Cell Tower Approval - T/Richland

I am the chair of the T/Richland ZBA and am receipt of your approval of a cell tower application for a use variance in Port Ontario. Obviously the conditions of a typical use variance cannot be met. I believe my entire board will be in favor of approval but I need some legal justification to approve a use variance which obviously does not met use variance conditions. Simply saying that it is a public utility is not enough. What legal justification exists that allows for the approval of this application other than some vague statement that it's a public utility and therefore not subject to use variance criteria? What makes a public utility exempt?

Sent from Mail for Windows 10

Towers Built on Speculation

There are towers being proposed by companies that do not have immediate plans for the installation of antenna (towers built on speculation). Companies who build these towers hope to lease space to providers. Since these towers do not fit under the definition of "personal wireless service facilities" in the federal Act, they do not receive the same treatment under federal law. They have no protection under federal law and likewise, would not be considered a public utility under state law. The definition of public utility in the case law has assumed that a service is being provided. Until the company shows proof of an agreement for attachment by a provider with FCC license approval, they are subject to the same zoning laws as non-wireless applicants.

Municipalities should require as part of the application process proof (such as a letter of intent from a provider) that the proposed tower will serve a wireless telecommunications provider with a valid FCC license to provide service to the area. Municipalities should consider how they want to apply local regulations to speculative towers, and to modify these regulations accordingly. Even if the municipality wants to encourage these types of towers in an effort to minimize the total number of towers, a separate definition and approval procedure should be provided. The existing zoning definitions should also be reviewed to determine whether these towers are allowed under the current regulations.

Municipalities should discuss speculative towers with representatives of the providers servicing its area. The providers may not have a need for a proposed tower to be built on speculation in the location proposed or, for other reasons, will not be able to use it. These concerns need to be raised by the board prior to any approvals, to avoid construction of a tower that is never used or is used by only one provider when it was indicated that several would be able to locate on it.

wireless telecommunication services. Your community will almost certainly receive an application for the placement of some type of tower or antenna. For those municipalities that have experienced this already, it is likely that there will be more applications in the future as the industry grows. The wireless telecommunications industry can play an important role in developing local legislation and resolving problems. There are competing concerns as the industry strives to build out its network as fast as possible while municipal leaders attempt to maintain community character and aesthetics. However, industry representatives also live and work in communities much like the ones in which they are trying to site facilities, and municipal officials and community residents are becoming increasingly dependent on the services that the industry provides. While disputes may not always be easily resolved, working relationships can be formed with the providers who are licensed to serve your area.

Bringing state and local government representatives together with industry representatives is encouraged to the extent that the Federal Communication Commission (FCC) has created the Local and State Government Advisory Committee (LSGAC). The LSGAC advises the FCC on issues of concern to state and local governments. In addition to submitting recommendations to the FCC on behalf of state, local, and tribal governments, the LSGAC has taken an active role in bringing representatives together to produce creative solutions to legal and regulatory issues that will promote the interests of consumers, governments, and the industry alike. The members of the LSGAC are a valuable resource to state and local government officials who have questions or comments about the FCC's rules and proceedings. The LSGAC maintains a Web site at www.fcc.gov/statelocal.

New York Law and the Public Utility Standard

The federal Act preserves local government zoning authority over the placement of wireless telecommunications facilities despite the restrictions placed on decisions. However, municipalities must operate within the constraints of state legislation on how zoning decisions are made. In order to regulate and make decisions about wireless telecommunications facilities, municipalities must first understand federal law and then proceed under the applicable state statutes. Municipalities may adopt regulations that allow wireless telecommunications facilities in districts as of right and require a variance in others, may place limitations on height and distance from property lines, may treat the placement of facilities as a special use, or may require site plan approval. The time periods and procedures provided in state law will apply as for other types of applications. Remember however, that all of these actions must be taken within the parameters of the federal Act discussed above.

The New York courts have developed an important standard relating to wireless telecommunications facilities. In New York State, public utilities are entitled to more lenient standards when applying for a variance and do not have to prove the statutory standards for variances. The Court of Appeals established the standard in 1978 in the case of Consolidated Edison Co. of New York, Inc. v. Hoffman.[1] To be granted a variance, the utility must demonstrate that the site is necessary to provide safe and adequate service and that there are compelling reasons, economic or otherwise, for the variance to be granted. Additionally, when the intrusion is minimal, the showing by the public utility should be reduced. In 1993, the Court of Appeals held that cellular telephone companies are considered public utilities.[2]

The 1993 decision left several unanswered questions. Most importantly, under the public utilities test, what is adequate service for a telecommunications provider? Until some more guidance is provided by the courts, there is no clear answer. Since there is no real guidance under state law for a municipality to determine if adequate service exists, when confronted with this question, it may be helpful for municipalities to review the presented evidence to determine whether there is proof of compelling reasons to obtain the variance, taking into consideration the level of intrusion into the community. A provider seeking a variance should present proof to the board that alternative sites have been considered and that significant gaps in coverage would still exist if a facility was placed on any of the alternative sites.[3] A municipality should also consider the evidence presented on capacity and coverage weaknesses.[4]

If the municipality determines that there is no compelling reason (i.e., the applicant has not illustrated a significant gap in coverage), it may deny the application without reaching the question of adequate service. In this situation, the municipality should be prepared to show in its denial the impact of the tower, alternatives available, and how those alternatives are viable options. If compelling reasons exist, the municipality will then have to consider whether the site is needed to provide safe and adequate service.

Municipalities should review their zoning law and local definitions. Many municipalities have zoning laws which define public utilities and offer preferential treatment. Wireless telecommunications facilities may fit into the local definition even when the municipality does not intend that result. The local regulations may provide more latitude in siting than even the case law, and should be amended if the municipality wants to avoid this result.

HOW WIRELESS WORKS

NOTE TO THE READER: A glossary of technical terms and acronyms is included as Appendix A in this manual for your reference.

Wireless telecommunications refers to the wide range of services provided by telecommunications companies intended to allow voice and data to flow to and from mobile users. The services take many forms but have in common a short-range two-way radio link to provide the connection between a mobile user and a nearby base station.

Part of the Telecommunications Act of 1996 involved the reallocation of the radio spectrum for the purpose of providing wireless services. Potential wireless licensees were permitted to bid for the privilege of deploying and operating wireless networks in one or more service areas called "Major Trading Areas" (MTA) across the country. There are now multiple wireless service providers offering services in each MTA.

Each service provider is deploying networks and upgrading equipment and facilities for the purpose of meeting the growing demand for wireless services. New technology is also being deployed to increase the speed at which wireless subscribers can access data-intensive applications—such as graphics, real-time video, and a host of high-end multimedia applications traditionally reserved for wired network connections. Some of the newer technologies require more spectrum allocations. More base station facilities are required to support the growing number of subscribers and the increasing need for higher data transfer rates. With these developments it is expected that service providers will continue to apply to municipalities for new base station construction and co-location approval (see Figure 1).

When a service provider establishes coverage in an area, part of the network design requires knowing how many subscribers are expected to use the service in each sector of their network (i.e., "cell"). When user demand approaches

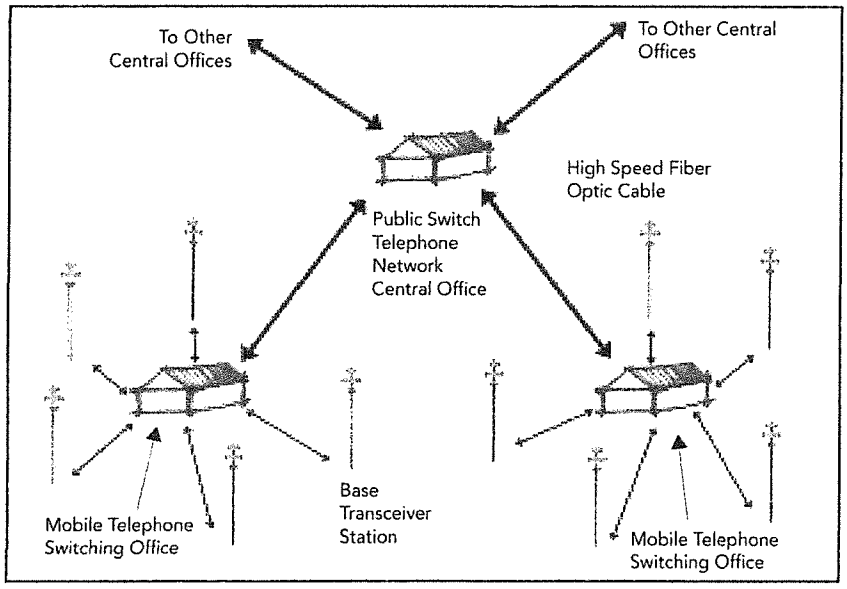

Figure 1: Wireless Telecommunication Network

DEPARTMENT OF STATE, OFFICE OF
GENERAL COUNSEL
ANDREW M. CUOMO, GOVERNOR ROSSANA ROSADO, SECRETARY OF STATE

Legal Memorandum LU01

MUNICIPAL REGULATION OF CELLULAR TELEPHONE TOWERS AND ANTENNAS

Municipal regulation of cellular telephone towers and antennas is one of the most debated of current local government land use issues. During the past two decades there has been a great increase in the use and demand for cellular telephone service. One product of this growth has been a sharp acceleration of demand for new areas to be served and consequently an increase in the number of cellular telephone transmission facilities and antennas erected.

Communities across the State have been presented with applications for cell phone tower sites. Many people believe that towers will spoil the landscape if unregulated, or that electromagnetic radio transmission is hazardous to health. Moreover, many municipalities do not have comprehensive regulations in place to deal with them. Yet cellular phone transmission has been declared by the state's highest court to be a public utility, meaning that municipal zoning must allow it a reasonable opportunity to exist and to serve its market. In 1993, the New York Court of Appeals in Cellular Telephone Co. v. Rosenberg[1] held that cellular telephone service is a public utility, and that cellular phone towers are "public utility facilities", which gives them greater protection against restrictive zoning rules than if they were deemed instead to be ordinary commercial uses of land. If a community classifies cell towers as an allowed use in a given zoning district, reasonable standards may be enacted, and reasonable conditions may be imposed by the reviewing board. But even if a variance is necessary, a zoning board of appeals must grant approval if the cellular phone company is able to show that there are no reasonable alternative locations available which would allow the company to provide the same level of service to the cell (geographic area) in question.

The Department of State's Counsel's Office has kept current with this issue, and has included it among our available presentation topics at local training seminars. One approach, taken by many communities, is the adoption of a short-term moratorium on cell tower permits. A moratorium on land use permit approvals effectively stops all new tower construction until the municipality has had a chance to analyze the overall planning issue and to decide where, and under what conditions, tower construction may proceed. It should be emphasized that moratoria have been upheld by the courts for only short durations. Also, the courts have allowed moratoria to exist only in cases where the municipality is actively engaged in a study of its comprehensive plan or its zoning regulations during the course of the moratorium, with particular attention being paid to the use or uses involved.[2]

One community came up with an innovative way to camouflage a tower while maintaining the rural character of the tower site: it permitted the construction of a farm silo to house and hide the tower. The decision of the Appellate Division, Fourth Department in Village of Honeoye Falls v. Town of Mendon Zoning Board of Appeals[3] presents a textbook example of how the principles of administrative jurisprudence may work to bring about a satisfactory--as well as innovative--resolution of competing concerns in the field of zoning and the siting of telecommunications towers. In this case, Rochester Telephone Mobile Communications sought site plan approval and a conditional use permit to locate a cell tower in a rural area of the Town of Mendon. Central to the approved site plan was the construction of a farm-type silo which would essentially hide the 150-foot tall monopole tower. The zoning board of appeals determined that such a silo would not only provide visual screening, but would also be in keeping with the rural-agricultural nature of the area. Residents of a nearby residential subdivision, as well as the Village of Honeoye Falls, objected, and won a reversal at the State Supreme Court level. On appeal to the Appellate Division, Fourth Department, however, the board of appeals was upheld.

The Appellate Division found that the approval of a silo was well within the board's jurisdiction to impose reasonable conditions related to visual screening and character of the neighborhood. The Court reiterated the well-settled rule that the determination of a local zoning board of appeals should not be set aside unless clearly illegal, arbitrary, or an abuse of its discretion, where the decision is rational and supported by substantial evidence. The

Court also restated the rule that it will not substitute its judgment for that of the board, even if an opposite conclusion could logically be drawn from the evidence, where the board's determination falls within the parameters outlined above. [4]

You may also wish to read our Technical Series publication titled Planning and Design Manual for the Review of Applications for Wireless Telecommunications Facilities.

FOOTNOTES

[1] 82 N.Y.2d 364, 604 N.Y.S.2d 895 (1993)

[2] Cellular Telephone Co. v. Village of Tarrytown, 209 A.D.2d 57, 624 N.Y.S.2d 170 (2nd Dept.,1995).

[3] 237 A.D.2d 929, 654 N.Y.S.2d 534 (4th Dept.,1997).

[4] 237 A.D.2d at 930, 654 N.Y.S.2d at 535