SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice
TRIAL/IAS, PART 7
NASSAU COUNTY

MADELEINE PERRIN, ANGELO COTRONEO, JOSEPH DiGENNARO, and JO-TINA DiGENNARO,

Petitioners,

- against -

BAYVILLE VILLAGE BOARD, VICTORIA SIEGEL, as MAYOR and in her individual capacity; TIMOTHY J. HORGAN, CAROL KENNEDY, JOHN LAURINE, and DOUGLAS G. WATSON, as TRUSTEES OF BAYVILLE VILLAGE and in their individual capacities; and JAMES A. REILLY, ESQ., as VILLAGE ATTORNEY OF BAYVILLE VILLAGE and in hisindividual capacity,

Respondents,

THE COUNTY OF NASSAU; NEW YORK SMSA LIMITED PARTNERSHIP D/B/A VERIZON WIRELESS; OMNIPOINT COMMUNICATIONS, INC.; SPRINT SPECTRUM L.P.; and NEXTEL OF NEW YORK, INC.,

Intervenor-Respondents.

RETURN DATE: 07/28/08
SEQUENCE NO.: 001, 006, 007

INDEX NO.: 9468-07

The following papers read on the motions (numbered 1-7):

Motion Sequence 001

Notice of Petition and Verified Petition.....1

Motion Sequence 006

Order to Show Cause [County of Nassau].....2
Affirmation in Opposition of Motion to Dismiss.....3
Reply Affirmation.....4

Memorandum of Law in Support of Motion to Dismiss Petition.....A
Reply Memorandum of Law.....B

Motion Sequence 007

Notice of Motion to Dismiss Petition [Bayville].....5
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Reply Affirmation in Support of Motion to Dismiss.....7

Upon the foregoing papers, (i) the Verified Petition pursuant to **CPLR Article 78** [Seq. 001] (ii) the Motion to dismiss the Petition pursuant to **CPLR §3211** and/or **CPLR §7804(f)** brought by intervenor-respondent COUNTY OF NASSAU (the "COUNTY") [Seq. 006], and (iii) the Motion to dismiss the Petition pursuant to **CPLR §3211** and/or **CPLR §7804(f)** brought by respondents BAYVILLE VILLAGE BOARD, VICTORIA SIEGEL, as MAYOR and in her individual capacity; TIMOTHY J. HORGAN, CAROL KENNEDY, JOHN LAURINE, and DOUGLAS G. WATSON, as TRUSTEES OF BAYVILLE VILLAGE and in their individual capacities; and JAMES A. REILLY, ESQ., as VILLAGE ATTORNEY OF BAYVILLE VILLAGE and in his individual capacity (the "BAYVILLE respondents") [Seq. 007]; are determined as follows.

In this proceeding pursuant to **CPLR Article 78**, petitioners challenge two resolutions of respondent BAYVILLE VILLAGE BOARD (the "VILLAGE BOARD") adopted on April 23, 2007 and filed on May 1, 2007 (the "Resolutions"). Resolution 2007-34 authorizes the VILLAGE BOARD to enter into a License Agreement with the COUNTY permitting the installation of, among other things, two microwave dish antennae and six omni-directional antennae on the Bayville Village Water Tower (the "Water Tower") for use by the Nassau County Police Department in its overhaul of the Nassau County Public Safety Radio System. Resolution 2007-33 states the finding of the VILLAGE BOARD that the proposed installation would cause no significant adverse effect on the environment, constituting a Negative Declaration pursuant to the **State Environmental Quality Review Act** ("**SEQRA**") and its implementing regulations. *See* **Environmental Conservation Law, Article 8; 6 NYCRR Part 617**. The Petition seeks vacatur of the Resolutions and punitive damages.

Petitioners assert that approval of the Resolutions was arbitrary and capricious, an abuse of discretion, and contrary to law. *See* **CPLR §7803(3).** First and foremost, petitioners argue that the Resolutions violate the deed, dated December 13, 1950 (the "Deed"), which conveyed the property on which the Water Tower is located to the Village. The Deed was subject to certain restrictions and covenants, including, in pertinent part, the following (the "Restrictive Covenant"):

> "...no use of the premises shall be made or permitted which would be offensive, dangerous or obnoxious to the owners or

> any owner (now or hereafter) of land within a radius of one mile of the premises whether by reason of smoke, odor, fumes or any other use whatsoever offensive to such owners or owner of land."

Deed, conditions, restrictions, covenants and agreements, ¶2.

Petitioners are among the class of persons protected by the Restrictive Covenant insofar as they live within a one-mile radius of the Water Tower. They argue that the approved installation is offensive, dangerous and obnoxious to them because microwave dishes and antennae such as those approved by the VILLAGE BOARD emit Radio-frequency Radiation ("RFR"), the safety of which is a subject of growing concern in the scientific and political communities. Petitioners assert that RFR is a threat to human health and well-being, based upon studies and journal articles depicting a correlation between RFR and a disproportionate incidence of cancer and other illnesses. According to Petitioners, the proposed use is not only objectively dangerous, but is also subjectively offensive to the individual owners protected by the Restrictive Covenant, as evidenced by the overwhelming opposition to the Resolutions expressed by petitioners and other Bayville residents at the public hearings. Petitioners conclude that, insofar as the Resolutions approve a use that is dangerous or offensive to the residents protected by the Restrictive Covenant, they violate the Deed and are therefore contrary to law.

In addition, petitioners argue that the Resolutions violate **SEQRA** and its implementing regulations. *See* **Environmental Conservation Law §§ 3-0301(1)(b); 3-0301(2)(m), 8-0113; 6 NYCRR Part 617. SEQRA** requires that an Environmental Impact Statement be issued before a project is approved by a local agency. The VILLAGE BOARD issued a Negative Declaration indicating "no significant adverse effect on the environment" based upon a report entitled "Environmental Effects of Antennas on Water Tower, dated December 18, 2006, prepared by Donald E. Cotten, PhD and Stuart Maurer, PhD (the "Report"). Petitioners claim that the Report was biased insofar as it was indirectly funded by Motorola, the company that had contracted to install the subject devices, as well as similar RFR-emitting devices at approximately 24 sites. Petitioners contend that the VILLAGE BOARD violated **SEQRA** by approving the installation without commissioning an independent study to be prepared by an unrelated environmental agency, with a health expert analyzing the data.

The COUNTY and the BAYVILLE respondents challenge petitioners' contentions and advance several procedural and substantive grounds for dismissal of the Petition which, for the sake of brevity, will not be repeated herein. The Court finds the respondents' most salient argument to be dispositive; namely, that the principles of

federal preemption bar this Court from determining that the RFR emissions resulting from the approved installation constitute a danger to petitioners which violates the Restrictive Covenant.

"Under the Supremacy Clause a state law that interferes with, or is contrary to federal law is invalid. There are three theories under which Congress preempts state law. First, under express preemption Congress expressly declares its intent to preempt state law. Second, under field preemption Congress impliedly preempts state law when federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the states to supplement it. Third, under conflict preemption Congress impliedly preempts state law when it actually conflicts with federal law." **Pinney v. Nokia, Inc.**, 402 F.3d 430, 453 (internal quotation marks and citations omitted).

Congress has delegated to the Federal Communications Commission ("FCC") the responsibility for regulating wire and radio communication service nationwide. **Federal Communications Act, 47 U.S.C. 151** *et seq.* The FCC has broad preemptive authority pursuant to the **Telecommunications Act of 1996** (the "TCA"). **Sprint Spectrum L.P. v. Mills,** 283 F.3d 404; **Cellular Phone Taskforce v. FCC,** 205 F.3d 82. Although Section 704 of the TCA preserves some local zoning authority regarding the placement, construction or modification of personal wireless service facilities, that authority is limited. In addition to certain procedural requirements with which local boards must comply, the TCA also imposes a substantive limitation. *See* **Cellular Telephone Co. v. Town of Oyster Bay,** 166 F.3d 490. In pertinent part, the TCA provides:

> "No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions."

47 U.S.C. §332(c)(7)(B)(iv) ("**Section 332(c)(7)(B)(iv)**").

In view of the overarching policy and design of federal regulation in the area of telecommunications, the question before this Court is whether, as an instrumentality of the State, the Court is barred from granting the relief sought herein, either by reason of express, conflict or field preemption. The parties have not presented, and the Court has not found, case law precisely resolving this issue.

A Federal Court interpreting **Section 332(c)(7)(B)(iv)** has held that a local zoning board cannot deny a land use permit to a FCC-compliant wireless service provider on the basis of the perceived health effects of RFR. **Cellular Telephone Co. v. Town of Oyster Bay,** 166 F.3d 490. The Court expressly stated that "health concerns" is an impermissible basis for decision, having the equivalent meaning as "environmental effects" in the statute. **Id.,** at 495 n.3. Although that decision is analogous and supports preemption in the instant case, it does not directly resolve the question of whether a different result may be reached where the wireless service facility violates a private contractual right, such as a restrictive covenant. (For purposes of discussion, the Court shall assume that RFR is among the sort of dangerous or offensive emission covered by the Restrictive Covenant here, without repudiating the COUNTY's argument that the Restrictive Covenant must be construed more narrowly. The Court, however, shall not read the Restrictive Covenant to permit a purely subjective definition of offense.)

The enforcement of a restrictive covenant did not offend the TCA where a wireless service facility was enjoined on the basis of a restrictive covenant limiting the area to residential use. **Chambers v. Old Stone Hill Road**, 1 NY3d 424. The injunction in **Chambers,** however, falls within the powers expressly preserved for state and local governments by the TCA – to regulate the placement, construction, and modification of personal wireless service facilities, subject to certain limitations. *See* **47 U.S.C. §332(c)(7)(A).** The enforcement of the covenant did not fall within any of the express limitations set forth in **47 U.S.C. §332(c)(7)(B);** specifically, it was not based on the perceived harmful effects of RFR. *See* **Section 332(c)(7)(B)(iv).**

The Federal Courts have carved out circumstances in which consideration of RFR as a basis for decision is not preempted by the TCA. A local zoning board does not violate the TCA if it bases its choice between two competing sites for the construction of a wireless telecommunications tower on the desire to minimize the level of RFR that would reach the surrounding locations; i.e., the so-called theory of "prudent avoidance." **New York SMSA Limited Partnership v. Town of Clarkson,** 99 F.Supp.2d 381. Further, a local governmental entity or instrumentality does not violate the TCA if it acts in a proprietary, as opposed to a regulatory, capacity. **Sprint Spectrum L.P. v. Mills,** 283 F.3d 404 (preemption did not bar a school district from imposing conditions regarding RFR emissions in the lease of its own property to a wireless telecommunications provider). None of the above cases, however, stands for the proposition that a State Court may *require* a local board to choose an alternate site, or to impose conditions on use, in order to limit RFR exposure.

Thus, it appears to be a question of first impression in this jurisdiction whether a zoning board's approval of federally compliant wireless service facility may be annulled

by a state Court on the ground that dangerous RFR emissions violate a restrictive covenant. By Order of this Court dated May 21, 2008, the Court gave the FCC an opportunity to be heard on the matter. The position of the FCC, as set forth in the letter dated June 18, 2008 [Seq. 006, Reply Aff., Exh. A], is that petitioners' application to enforce the Restrictive Covenant based upon the health effects of RFR is preempted by federal law, both because the FCC's RFR regulations occupy the field and because any State law determination challenging the safety of emissions within FCC approved levels directly conflicts with FCC policy. (Apparently, the FCC does not dispute petitioners' contention that the relief sought is not *expressly* preempted by the TCA, either in **Section 332(c)(7)(B)(iv)** or elsewhere.)

The views of the FCC regarding the preemptive force of its own regulations must be afforded substantial deference by the Court. **Medtronic, Inc. v. Lohr,** 518 U.S. 470, 496 (1996); **Cellular Phone Taskforce,** 205 F.3d at 96. As noted in an analogous context, "Congress has delegated authority to the [the agency] to implement the statute, the subject matter is technical, and the relevant history and background are complex and extensive. The agency is likely to have a thorough understanding of its own regulation and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements." **Geier v. American Honda Motor Co., Inc.**, 529 U.S. 861, 883 (quoting **Medtronic**, 518 U.S. at 496).

Giving appropriate weight to the opinion of the FCC, this Court cannot properly sustain petitioners' claim. In order to find that the Restrictive Covenant was breached by the adoption of the Resolutions, this Court would have to find that the incremental or cumulative RFR emissions resulting from the installation approved by the Resolutions would be harmful to residents within a one-mile radius of the Water Tower. No one disputes that the approved installation would be FCC-compliant. Therefore, a finding that it would result in a dangerous level of RFR would directly conflict with federal RFR testing and emission standards.

The FCC considers its testing and emission standards to represent "the best scientific thought on the RF limits necessary to protect the public health and provide a proper balance between the need to protect the public and workers from exposure to excessive RF electromagnetic fields and the need to allow communications services to readily address growing marketplace demands." FCC Brief, as Amicus Curiae, in the consolidated matters of **Murray v. Motorola**, Superior Court for the District of Columbia, Civil Division, C.A. No. 01-8479, p.10 (internal citations omitted) ("FCC Brief") [Seq. 006, Reply Aff., Exh. A]. Petitioners are seeking a determination that, in effect, would impose more stringent requirements than those imposed by the FCC. This is essentially "a back-door challenge to the .... adequacy of the RF standards the FCC

adopted." FCC Brief, p.16. When State law action contravenes a determination of the agency responsible for implementing a federal statute, such State law action "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." **Geier**, 529 U.S. 874-75. Insofar as it stands in conflict with federal law, the State law action is therefore preempted. *See* **Id.**, FCC Brief, p. 16. *See also* **Broyde v. Gotham Tower, Inc.**, 13 F.3d 994.

Petitioners' reliance on **Pinney**, 402 F.3d 430, is unavailing. In denying a motion to dismiss state law tort claims predicated upon the alleged effects of RFR, the Fourth Circuit in **Pinney** considered only express preemption. As stated by the Court in **Murray v. Motorola**, "the [respondents] are entitled to have this Court consider all of their preemption theories, not merely the one that was rejected in **Pinney**." **Murray v. Motorola,** *supra,* p.41. The FCC articulated several flaws in the **Pinney** decision, ultimately arguing that the **Pinney** analysis "cannot be squared with the uniform federal regulatory framework for the provision of wireless telephone services, or the primacy that the Communications Act gives the FCC in technical matters relating to RF transmissions." FCC Brief, p. 17-18. The Court in **Murray** agreed. *See* **Murray v. Motorola,** *supra,* p. 40-45.

In accordance with the foregoing, this Court determines that enforcement of the Restrictive Covenant would conflict with federal authority. Therefore, the Court need not belabor discussion on the issues of express or field preemption.

The petitioners' second argument offers a procedural basis for overturning the Resolutions which appears, on its face, to sidestep the preemption challenge. Petitioners argue that adoption of the Resolutions violated **SEQRA** and was arbitrary and capricious because the VILLAGE BOARD's environmental determination was based solely upon a study (as defined above, the "Report") funded by Motorola, the company hired to provide and install the equipment. Petitioners claim that the Report was unreliable because of Motorola's interest in the outcome, and that petitioners should have commissioned an independent study.

First, Petitioners cite no authority for the proposition that SEQRA mandates reliance upon sources of information that qualify as disinterested by any articulated standard. Second, petitioners have failed to establish, *prima facie,* that the VILLAGE BOARD's environmental determination was inadequate or that the reliability of the Report was compromised by the purported bias. The VILLAGE BOARD's determination, as set forth in Resolution 2007-33, delineates the factors considered, including (m) Public Health and Safety (Radio Frequency Emissions) and (o) Cumulative Impacts. With respect to RFR, the VILLAGE BOARD's determination in paragraph (m)

essentially recognizes that federal standards govern emissions and that the facility will be required to comply with FCC regulations. The Report measured the exposure levels at various critical locations and compared them with FCC "maximum permissible exposure" standards. Based upon its calculations, the Report concluded that the level of electro-magnetic radiation from the additional antennae will be far below the health and safety standards established by the FCC. Petitioners offer no evidentiary facts to undermine the methodology or substance of the Report. That the Report may be incomplete, in petitioners' view, is insufficient to sustain a claim that the VILLAGE BOARD's reliance thereon was irrational. To the extent that petitioners imply that the VILLAGE BOARD should have applied any other health and safety standard in making its environmental determination, that claim is barred by the doctrine of preemption, as discussed above.

The Court notes that the petitioners are concerned about the cumulative RFR issuing from the existing and additional antennae, and that the Report does not purport to measure that effect. The VILLAGE BOARD has addressed this concern in paragraph (o) of Resolution 2007-33. The VILLAGE BOARD relies upon the FCC licensing and regulatory process to ensure that the cumulative emissions will not exceed FCC guidelines.

The Court finds that the VILLAGE BOARD "identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for their determination." **Concerned Citizens of Valley Stream, Inc. v. Bond,** 282 AD2d 532. Accordingly, it has satisfied SEQRA and its determination shall not be disturbed. **Id.**

The Court has considered the remaining arguments of the parties and finds them to be without merit or rendered moot by the above determination.

Based upon the foregoing, it is

ORDERED, that the motions to dismiss the petition (Seq. 006, Seq. 007) are **granted**, and the Petition (Seq. 001) is **dismissed.**

ENTER:

Dated: 8/10/08

J.S.C.