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Short Form Order

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

COPY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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METROPCS NEW YORK, LLC and FIRST PRESBYTERIAN CHURCH OF SOUTHAMPTON,

Petitioners-Plaintiffs,

For an Order and Judgment under Articles 30 & 78 of the New York State Civil Practice Law and Rules,

-against-

THE INCORPORATED VILLAGE OF SOUTHAMPTON, THE INCORPORATED VILLAGE OF SOUTHAMPTON BOARD OF TRUSTEES, THE INCORPORATED VILLAGE OF SOUTHAMPTON CLERK/ADMINISTRATOR, THE INCORPORATED VILLAGE OF SOUTHAMPTON BUILDING DEPARTMENT AND THE INCORPORATED VILLAGE OF SOUTHAMPTON BOARD OF HISTORIC PRESERVATION & ARCHITECTURAL REVIEW,

Respondents-Defendants.

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INDEX NO.: 26595/12
MOTION DATE: 1/24/13
MOTION NO.: 001 Continued
002 MD 003 MOT D

PETITIONERS' ATTORNEY:
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Upon the following papers numbered 1 to 33 read on this motions to dismiss and for an order to annul based on conflict of interest and other relief : Notice of Motion/ Order to Show Cause and supporting papers 1-6; 12-27 ; ~~Notice of Cross Motion and supporting papers~~ ; Answering Affidavits and supporting papers 7-9; 28-31 ; Replying Affidavits and supporting papers 10-11; 32-33 ; ~~Other~~ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (motion sequence no. 002) of respondents/defendants for dismissal and the motion (motion sequence no. 003) of petitioners/plaintiffs for an order annulling the July 30, 2012 decision of the Incorporated Village of Southampton Board of Historic Preservation & Architectural Review are consolidated for the purposes of this determination; and it is further

ORDERED that the motion (motion sequence no. 002) of respondents/defendants for an order pursuant to CPLR R. 3211(a)(7) dismissing the petition/complaint in its entirety is denied; and it is further

ORDERED that the motion (motion sequence no. 003) of petitioners/plaintiffs for an order annulling the July 30, 2012 decision of the Incorporated Village of Southampton Board of Historic Preservation & Architectural Review based on the failure of certain members of said Board to recuse themselves from hearing and voting on their application, and to strike and add certain documents to the certified return, is determined herein.

In this hybrid CPLR Article 78 proceeding and plenary action for declaratory relief petitioners/plaintiffs seek, among other things, a judgment annulling the July 30, 2012 decision of respondent/defendant Incorporated Village of Southampton Board of Historic Preservation & Architectural Review (the "Board") denying their application for a certificate of appropriateness and directing that it issue a certificate of appropriateness and that respondent/defendant Incorporated Village of Southampton Building Department (the "Building Department") issue a building permit to permit petitioners/plaintiffs to construct, operate and maintain a public utility wireless communication facility on the property located at 2 South Main Street, Southampton, New York. Said property is owned by petitioner/plaintiff First Presbyterian Church of Southampton (the "Church") and is improved by, among other things, a sanctuary building that has an approximately 70-foot-high steeple. Petitioner/plaintiff MetroPCS New York, LLC ("MetroPCS"), a lessee of the property owner, is licensed by the Federal Communications Commission to construct, maintain and operate wireless telecommunications systems in the New York area and seeks to provide reliable wireless telephone service within the geographic boundaries of the Incorporated Village of Southampton (the "Village").

MetroPCS applied on July 26, 2011 to the Building Department for a building permit for the project. Prior thereto, on March 22, 2011, MetroPCS applied to the Board for a certificate of appropriateness pursuant to Village Code §65-4 describing the nature of the proposed work as reconstruction or alteration to install wireless antennas within the church's bell tower. Petitioners/plaintiffs claim that the project involves the removal of less than one percent of the exterior sheathing of the Church steeple in order to replace the same with radio frequency transparent fiberglass reinforced polymer ("RFP") identically matching the exterior sheathing based on size, thickness and texture to be painted white to match the current sheathing material.

After four hearings before the Board, MetroPCS submitted an alternate design to the New York State Office of Parks, Recreation and Historic Preservation (NYSHPO) on March 19, 2012 which reduced the number of antennas from eight to four and lowered the height of the antennas ten feet to minimize any potential impact to the Church building, the Village's historic district and its surroundings, which was purportedly found by NYSHPO to have no adverse effect. MetroPCS resubmitted its application to the Board on May 8, 2012 based on said alternate design. At the next hearing before the Board on June 27, 2012 MetroPCS submitted a sample of painted RFP material to enable the Board to compare it to the existing facade, members of the Church testified in support of the application, some neighbors testified against it, and Ken Wedholm of Stealth Concealment Solutions testified in support, providing photographs of other similar projects, such as the East Hampton Presbyterian Church, where historic structures were used to house a wireless communication facility and the same material was used to camouflage the wireless antenna. The hearing was adjourned to July 11, 2012 for a final hearing during which Ken Wedholm testified again and MetroPCS submitted its "Findings of Fact and Conclusions of Law." At the hearing, the Board voted to deny the application and subsequently rendered its decision, which was filed with the Village Clerk on July 30, 2012.

In its decision, the Board noted that due to the landmark status of the church building and steeple and their location within the Village's historic district, approval by the Board of a certificate of appropriateness was a condition precedent to the issuance of a building permit for

the installation of the proposed facilities. The Board indicated that the second application submitted on May 8, 2012 was dissimilar to the first inasmuch as it proposes to install the antennas in the area below the steeple roof next to the four clock faces. It explained that,

> The specific proposal of this application is to remove the exterior sheathing from the four sides of the steeple surrounding the respective clock faces and replace the wood and boards with the RFP material which will be milled to the specifications of the boards being replaced and paint the RFP material the same color as the rest of the steeple, white. In addition, the applicant proposes to remove the sheathing with a high degree of care to minimizing [sic] any damage during the removal process and store the boards in labeled crates within the church for restoration of the boards on the steeple in the same order as removed when the lease term expires.

The Board noted that the purpose or reason for the alteration was not restoration, rehabilitation or for general maintenance of the existing sheathing or structure but rather was for a voluntary or elective alteration to the church exterior. It distinguished this application from instances where historic material in need of maintenance, repair or replacement can no longer be obtained and a synthetic or non-historic material represents either a viable or the sole available replacement. Based on the purpose or reason for the alteration, "a voluntary elective alteration to the church exterior," the Board found that the proposal was not "appropriate" to the property as the term is contextually used in Village Code §65-5(C)(1). In addition, the Board disagreed that the area affected by the project represented a small percentage of the size of the building, finding that the appropriate basis for measuring the impact or scale of the application was limited to the steeple itself, the architectural centerpiece of the sanctuary, and that the central focus of the steeple was the clock. The Board in considering the scale of the proposed project under Village Code §65-5(C)(2) explained,

> From the perspective of an observer on the ground, the clock area is one-third of the architectural presence of the steeple. Defining the area of the project in terms of square feet of sheathing to be replaced, as the applicant advocates, does not provide a realistic comparison of the scale of the project based upon the visual impact the clock area makes in relation to the steeple itself and the Board determines the scale of the proposal is large and characteristically significant in relation to the section of the church in which it is located.

Next, the Board expressed significant reservations concerning the ability of MetroPCS or the Church to assure that at the end of the lease, the original sheathing would be properly restored, particularly because MetroPCS declined to provide relevant sections of the text of the lease and it was disclosed that the lease could potentially be renewed for 25 or 30 years, approximately one-fifth of the time that the steeple has existed. The Board determined that an approval of the application for an indefinite period of time cannot reasonably be temporary as MetroPCS asserted and that the approval would, instead, be more in the nature of a permanent grant.

The Board expressed its concern that MetroPCS had not shown how the restoration of the church building as close as possible to its present condition at the end of the lease thereby

preserving the historic material and character of the building would be monitored and accomplished over a period of 20 or 30 or more years of successive administrations of the Church, changes in the corporate structure of MetroPCS, and administrative changes of the Village. It determined that it was unrealistic to consider that the removal, care, storage and restoration of the existing sheathing could be "successfully monitored, enforced or achieved over such a long period of time." The Board added that MetroPCS had submitted no legal authority that it was within the jurisdiction of the Board pursuant to the Village Code "to accept such contingent procedures extending so far into the future as a condition for granting an approval." The Board found that "[a]bsent express jurisdiction to accept such a proposal and written and enforceable agreements with all responsible parties as to the satisfactory future performance of the contingencies, the Board deems it unreasonable to accept such a proposal as a basis for favorable consideration of the application."

The Board concluded that "... the practical reality is that the request is not for the temporary installation of non-historic material, but for substitution of the historic material with a synthetic material on a permanent basis. The RFP is a synthetic material, and in the opinion of the Board its substitution for the original sheathing, which in this context is irreplaceable as the original sheathing, does not comply with the principle of compatibility, or the spirit and intent of historic preservation under Village Code Section 65-5 C. (3)."

The Board also concluded the proposed project did not comply with the relevant sections of the Secretary of the Interior's "Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings," which the Board considered in its review pursuant to Village Code §65-5(C)(6).

Petitioners/plaintiffs commenced this hybrid CPLR Article 78 proceeding and action for declaratory relief on August 28, 2012. By their petition/complaint they argue that the denial of their application by the Board violates their rights under the Telecommunications Act of 1996, Federal and New York State case law, and CPLR Articles 30 and 78. They allege a first cause of action that the Board's determination was arbitrary and capricious; a second cause of action that the determination was not supported by substantial evidence contained in the record; and a third cause of action that respondents/defendants failed to recognize MetroPCS as a public utility under New York State Law and afford MetroPCS deferential treatment under the Village Code. They also allege a fourth cause of action that the determination constitutes an invalid prohibition against the provision of wireless services within the Village in violation of the Telecommunications Act of 1996; a fifth cause of action that in denying the application, the Board unconstitutionally usurped powers and acted in an *ultra vires* manner; or, in the alternative, a sixth cause of action that the Village Code is unduly vague, overly broad and unconstitutional.

Respondents/defendants served a certified return and a supplemental certified return containing the transcript of the July 11, 2012 public hearing.

Respondents/defendants now move to dismiss the petition/complaint for failure to state a cause of action.

On a motion to dismiss pursuant to CPLR R. 3211 and §7804 (f) in a hybrid proceeding and action, the petition-complaint alone must be considered, and all of its allegations are deemed

true and afforded the benefit of every favorable inference (*Matter of Bloodgood v Town of Huntington*, 58 AD3d 619, 621, 871 NYS2d 644 [2d Dept 2009]; *see Matter of 1300 Franklin Ave. Members, LLC v Board of Trustees of Inc. Vil. of Garden City*, 62 AD3d 1004, 880 NYS2d 133 [2d Dept 2009]). In addition, on a motion to dismiss a declaratory judgment action for legal insufficiency, "the test is not whether a party will succeed in getting a declaration of rights in accordance with a theory or contention advanced, but whether '[t]he allegations of the complaint * * * when considered as true, demonstrate the existence of a bona fide justiciable controversy which should be settled'" (*Matter of Schulz v New York State Legislature*, 230 AD2d 578, 582, 660 NYS2d 155 [3rd Dept 1997], *lv denied* 95 NY2d 769, 722 NYS2d 473 [2000], *quoting Sysco Corp. v Town of Hempstead*, 133 AD2d 751, 751, 520 NYS2d 40 [2d Dept 1987]). However, the rule that the facts alleged are presumed to be true and are to be accorded every favorable inference does not apply to allegations consisting of bare legal conclusions or factual claims that are either inherently incredible or flatly contradicted by documentary evidence (*see SRW Assoc. v Bellport Beach Prop. Owners*, 129 AD2d 328, 517 NYS2d 741 [2d Dept 1987]). The court must also accept as true all factual submissions made in opposition to the dismissal motion (*see Wohlgemuth v Lang Constr., LLC*, 18 AD3d 650, 795 NYS2d 634 [2d Dept 2005]).

Here, the first cause of action alleging that the Board's determination was arbitrary and capricious and the second cause of action claiming that the determination was not supported by substantial evidence contained in the record state viable causes of action (*see Matter of Campbell v Town of Mount Pleasant Zoning Bd. of Appeals*, 84 AD3d 1230, 923 NYS2d 699 [2d Dept 2011]). The third cause of action claiming that respondents/defendants failed to recognize MetroPCS as a public utility under New York State Law and afford MetroPCS deferential treatment under the Village Code states a cause of action (*see Crown Communication New York, Inc. v Department of Transp. of State*, 4 NY3d 159, 791 NYS2d 494 [2005], *cert. denied* 546 US 815, 126 SCt 340 [2005]; *see also National Fuel Gas Distrib. Corp. v Public Service Commn. of State*, 16 NY3d 360, 922 NYS2d 224 [2011]). The fourth cause of action alleging that the determination constitutes an invalid prohibition against the provision of wireless services within the Village in violation of the Telecommunications Act of 1996 is a viable cause of action (*see* 47 USC § 322 (c) (7) (B) (iii); *Matter of Khan v Zoning Bd. of Appeals of Village of Irvington*, 87 NY2d 344, 639 NYS2d 302 [1996]). Moreover, the fifth cause of action alleging that in denying the application, the Board unconstitutionally usurped powers and acted in an *ultra vires* manner states a cause of action (*see Matter of Wind Power Ethics Group (WPEG) v Zoning Bd. of Appeals of Town of Cape Vincent*, 60 AD3d 1282, 875 NYS2d 359 [4th Dept 2009]; *Matter of Hampshire Mgt. Co., No. 20, LLC v Feiner*, 52 AD3d 714, 860 NYS2d 204 [2d Dept 2008]). Finally, the sixth cause of action claiming that the Village Code is unduly vague, overly broad and unconstitutional is viable (*see Matter of Timber Point Homes, Inc. v County of Suffolk*, 155 AD2d 671, 548 NYS2d 250 [2d Dept 1989]; *Matter of City of Utica, Bd. of Water Supply v New York State Health Dept.*, 96 AD2d 719, 465 NYS2d 365 [4th Dept 1983]). In light of the foregoing, the motion by respondents/defendants to dismiss the petition/complaint for failure to state a cause of action is denied.

Petitioners/plaintiffs now move for an order annulling the July 30, 2012 decision of the Board based on the failure of two Board members, Arnold Paster and Brian Brady, to recuse themselves from hearing and voting on their application, and to strike certain documents and to add certain documents to the certified return. Keith P. Brown, attorney for petitioners/plaintiffs, asserts in his affirmation that the action of Arnold Paster in submitting a report vehemently

opposing the project into the record on November 21, 2011 prior to the July 11, 2012 hearing tainted the application and shows that he prejudged facts in advance of hearing them and participating in the determination of the application such that there was a conflict of interest and he should have been disqualified from hearing and voting on the matter. He notes the last sentence of Paster's report: "If our mandate as the Board of Architectural Review and Historic Preservation is to preserve the historic buildings within our community, then certainly this building should not be altered in the tower area, the most visible area." Mr. Brown also argues that Brian Brady should have recused himself because his firm was the design architect for the home remodeling project of Vyto and Patricia Kab, whose property is adjacent to the church and who are actively and adamantly opposed to the project, and that his failure to do so was a direct violation of the Village Code Standards of Conduct §7-3. Petitioners/plaintiffs submit a copy of the Building Department disclosure affidavit for the Kab project indicating that Brian Brady, the designer, had an interest, and a copy of chapter 7 of the Village's Code of Ethics, including §7-3, Standards of Conduct.

In opposition, respondents/defendants contend that the letter/report of Arnold Paster was merely a report of his site inspection detailing his observations and concerns regarding the use of "substitute material" on the church steeple, raising the same type of questions as expressed by other Board members at the public hearings, and that his last statement on which petitioners/plaintiffs rely so heavily is merely an expression of Paster's personal opinion about his duties as a Board member under the relevant chapter of the Village Code. In addition, they contend that nothing in the letter/report or in the record suggests that Paster had any financial interest in the Board's decision on the application or that the letter/report together with his seniority influenced the vote of the other Board members. With respect to Brian Brady, respondents/defendants argue that a situation in which a board member was formerly retained by a current objector to the project does not constitute a conflict of interest. They further contend that inasmuch as the entire Board voted in favor of denying the application, the application would have been denied even if Paster and Brady had recused themselves, thus rendering any conflict of interest argument moot. They submit the affidavit of Brian Brady in which he states that the design/architecture firm of which he is the principal, Brady Design, provided various design and architecture services to Vyto and Patricia Kab with respect to their home approximately between May 5, 2011 and September 26, 2011 and that the project was completed prior to the subject application. He adds that his decision to deny the subject application was not influenced in any way by the Kab project or by his relationship with the Kabs.

In reply, petitioners/plaintiffs argue that Arnold Paster's report/letter constitutes far more than opinion inasmuch as he urged his fellow Board members to deny the application and wrote that their failure to do so would be akin to failing to fulfill their Board obligations and that it shows that he was not an impartial decider. Regarding Brian Brady, they argue that his work on the Kab residence was performed while the instant application was pending thereby creating a conflict of interest that warrants setting aside the Board's decision.

Questions of conflict of interest require a case-by-case examination of the relevant facts and circumstances and the mere fact of employment or similar financial interest does not mandate disqualification of the public official involved in every instance (*see Matter of Parker v Town of Gardiner Planning Bd.*, 184 AD2d 937, 585 NYS2d 571 [3d Dept 1992], *lv denied* 80 NY2d 761, 592 NYS2d 670 [1992]; *Matter of Zagoreos v Conklin*, 109 AD2d 281, 491 NYS2d 358 [2d Dept

1985]). In determining whether a disqualifying conflict does exist, the extent of the interest at issue must be considered and where a substantial conflict is inevitable, the public official should not act (*see Matter of Parker v Town of Gardiner Planning Bd.*, 184 AD2d 937, 585 NYS2d 571).

Here, petitioners/plaintiffs did not establish that the votes of Arnold Paster and Brian Brady should be invalidated due to claimed conflicts of interest or related improprieties (*see Matter of Eadie v Town Bd. of Town of North Greenbush*, 47 AD3d 1021, 850 NYS2d 240 [3d Dept 2008]). Paster's statement of personal opinion without any evidence of financial interest in the rejection of the project does not constitute a basis for finding a conflict of interest (*see Matter of Byer v Town of Poestenkill*, 232 AD2d 851, 648 NYS2d 768 [3d Dept 1996]; *Matter of Segalla v Planning Bd. of Town of Amenia*, 204 AD2d 332, 611 NYS2d 287 [2d Dept 1994]; *Matter of Laird v Town of Montezuma*, 191 AD2d 986, 594 NYS2d 939 [4th Dept 1993]). Nor can he be characterized as having taken a dual role of "prosecutor," merely by having submitted said letter, then acting as "judge" on their application (*cf Matter of Beer Garden, Inc. v New York State Liquor Auth.*, 79 NY2d 266, 582 NYS2d 65 [1992]), or as having taken a public position about specific facts at issue in a pending proceeding given that the letter was solely for the Board's use (*cf. Matter of 1616 Second Ave. Rest., Inc. v New York State Liquor Auth.*, 75 NY2d 158, 551 NYS2d 461 [1990]). Moreover, any conflict of interest based on Brady's past or continuing employment with neighboring objectors to the project who are not parties to this matter is too attenuated and speculative (*see* General Municipal Law §809; *compare Matter of Schupak v Zoning Bd. of Appeals of Town of Marbletown*, 31 AD3d 1018, 819 NYS2d 335 [3d Dept 2006], *lv to appeal dismissed* 8 NY3d 842, 830 NYS2d 694 [2007]). Therefore, their recusal was not warranted (*see Matter of Eadie v Town Bd. of Town of North Greenbush*, 47 AD3d 1021, 850 NYS2d 240).

In addition, petitioners/plaintiffs object to the contents of the certified return arguing that respondents/defendants failed to disclose during the public hearings two reports dated October 9, 2011 and December 12, 2011 included in the certified return that were prepared by Zachary Studenroth, the Board's consultant, concerning the initial application, despite the written request of petitioners/plaintiffs on July 11, 2012 to see said reports. They assert that they were deprived of the opportunity to cross-examine the preparer of the reports and to offer evidence to rebut the conclusions of said reports and seek to strike them from the certified return. They also object based on the failure of petitioners/plaintiffs to include their written request dated July 11, 2012 for said reports in the certified return and seek to amend it to include said letter, and based on the failure of the Board to request the consultant to prepare a new report on the alternate design of placing the antennas inside the steeple that was the basis of the second application. They further object to the failure of respondents/defendants to include the following expert reports of petitioners/plaintiffs that were submitted into the record: the Inventory Map and Sites Description dated September 26, 2011 and resume of Nicholas Balzano, RF Engineer employed by MetroPCS, the Planning and Visual Impact Report prepared by Amber Courselle of EBI Consulting, and the Structural Analysis Report prepared by Robert Toms, P.E. of MTM Design Group, Inc. dated May 29, 2012. Petitioners/plaintiffs request that the certified return include said reports. In support of their requests, they submit their aforementioned letter and the above reports.

In opposition, respondents/defendants argue that the July 11, 2012 letter was never received by the Board or by the Board's in-house counsel, Elbert Robinson, Jr., and submit his

affirmation, that the Inventory Map and Sites Description dated September 26, 2011 and resume of Nicholas Balzano, RF Engineer employed by MetroPCS and the Structural Analysis Report prepared by Robert Toms, P.E. of MTM Design Group, Inc. dated May 29, 2012 were also never received by the Board, but that the Planning and Visual Impact Report prepared by Amber Courselle of EBI Consulting is contained in the certified return. Based on their failure to receive the alleged omitted items, respondents/defendants argue that said items not be included in the certified return. They also argue that with respect to the two reports prepared by the Board's consultant, Zachary Studenroth, the Board's files are maintained at the Building Department and are available for inspection at any time during regular business hours subject to receipt of a Freedom of Information Law request, and that the Board and the other Village officers have no affirmative obligation to provide copies of documents received in an ongoing application. They note that Zachary Studenroth testified at the public hearings and that petitioners/plaintiffs were provided with the opportunity to respond to the evidence presented at the hearings and by written comments thereafter.

In reply, petitioners/plaintiffs contend that the Board improperly accepted the two reports dated October 9, 2011 and December 12, 2011 prepared by Zachary Studenroth, the Board's consultant, during the meetings of the Board on December 11, 2011 and January 9, 2012 even though petitioners/plaintiffs requested an adjournment of the public hearings on this matter on said dates and the adjournments were granted.

Here, the two reports of the Board's consultant were improperly considered by the Board without providing petitioners/plaintiffs with notice of their inclusion in the record and an opportunity to challenge their contents during the public hearings (*cf. Matter of W.W.W. Assoc., Inc. v Rettaliata*, 175 AD2d 133, 572 NYS2d 22 [2d Dept 1991]). Therefore, the two reports dated October 9, 2011 and December 12, 2011 prepared by Zachary Studenroth, the Board's consultant, currently exhibits 20 and 38 in the certified return, are to be stricken from the certified return. It follows that the request by petitioners/plaintiffs that their letter dated July 11, 2012 pertaining to said reports be included in the certified return is denied as moot. Inasmuch as the certified return does not contain a copy of the public hearing transcript for the June 27, 2012 hearing, it cannot be determined whether or not, as petitioners/plaintiffs assert, the hearing was adjourned to enable Zachary Studenroth to prepare a report on the alternate design of the second application and whether the respondents/defendants failed to follow through on such request prior to the closing of the record at the next hearing. Therefore, the Court directs the respondents/defendants to amend the certified return to add a copy of the public hearing transcript for the June 27, 2012 hearing on this matter. The Court notes that the certified return contains the Planning and Visual Impact Report prepared by Amber Courselle of EBI Consulting in exhibit 33. In addition, inasmuch as the Inventory Map and Sites Description dated September 26, 2011 and resume of Nicholas Balzano were referred to by counsel for petitioners/plaintiffs at the final hearing, the certified return is to be amended by the addition of said documents (*see* CPLR §7804 [e]).

Accordingly, the motion by respondents/defendants to dismiss is denied and the motion by petitioners/plaintiffs is granted solely to the extent of striking the two reports dated October 9, 2011 and December 12, 2011 prepared by Zachary Studenroth, the Board's consultant, from the certified return and directing respondents/defendants to amend the certified return by adding the Inventory Map and Sites Description dated September 26, 2011 and resume of Nicholas Balzano,

RF Engineer employed by MetroPCS. In addition, the Court directs the respondents/defendants to amend the certified return to include a complete copy of the public hearing transcript for the June 27, 2012 hearing on this matter.

Although respondents/defendants briefly mention an answer at the end of their affirmation in support of their motion to dismiss, no answer has been submitted herein. Therefore, in the event that they have not already done so, respondents/defendants are directed to serve and file their answer to the petition within 10 days of service of a copy of this order with notice of entry. Otherwise, any party may re-notice this matter for hearing upon appropriate notice pursuant to CPLR §7804 (f) and include a copy of the answer and this order.

Dated: April 25, 2013

PAUL J. BAISLEY. JR.
J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION