Horvath Communications, Inc. v Town of Lockport Zoning Bd. of Appeals
2018 NY Slip Op 33830(U)
October 26, 2018
Supreme Court, Niagara County
Docket Number: 165205/2018
Judge: Daniel J. Furlong
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PRESENT: HON. DANIEL J. FURLONG, J.S.C.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF NIAGARA

HORVATH COMMUNICATIONS, INC. HORVATH TOWERS V, LLC and ATLANTIC MOBILE SYSTEMS OF ALLENTOWN, INC d/b/a/ VERIZON WIRELESS,

Petitioners

v.

DECISION AND ORDER

Index No. **165205/2018**

TOWN OF LOCKPORT ZONING BOARD OF APPEALS, TOWN OF LOCKPORT PLANNING BOARD, and BRIEN BELSON, as TOWN OF LOCKPORT SENIOR BUILDING INSPECTOR

Respondents.

FURLONG, J.

On June 22, 2018, Petitioners brought a petition pursuant to CPLR Article 78, wherein they sought an order from this Court (1) declaring that Respondent Zoning Board of Appeals' (ZBA) denial of Petitioner's application for use and area variances to install a wireless telecommunications tower on property located in the Town of Lockport is arbitrary and capricious and unsupported by substantial evidence in violation of State and Federal law; (2) declaring that Respondent Planning Board's denial of Petitioner's application for site plan approval and a special use permit for the same is likewise arbitrary and capricious and unsupported by substantial evidence in violation of State and Federal law; (3) declaring that the

aforementioned denials effectively prohibit wireless telecommunications services in violation of federal law; and (4) requiring Respondents to issue all permits and approvals necessary to install the tower immediately.

Respondents filed an answer and arguments in opposition to the petition on July 24, 2018, along with a certified copy of the record of the relevant proceedings. Petitioner replied via an Affirmation by counsel on September 14, 2018. For the reasons stated below, Petitioner's application is hereby granted, to the extent that this Court finds the Respondent ZBA's denial, dated May 22, 2017, to be arbitrary and capricious and unsupported by substantial evidence, and accordingly the Petitioner's application for a use variance is hereby granted, and it is further ordered that this matter is hereby remanded to the Town of Lockport Planning Board for further proceedings.

The background details of this case are voluminous and largely not in dispute, therefore the will not be restated in this decision.

Because they are a "public utility" providing cellular telephone service, Petitioners had to satisfy the "public necessity" test as set forth in *Matter of Cellular Tel. Co. V. Rosenberg*, 82 NY2d 364 [1993], in order to be entitled to a use variance. Thus, they "need only establish that the proposed cellular telephone tower 'would enable [them] to remedy gaps in [their] service area that currently prevent [them] from providing adequate service to their customers," and that there are compelling reasons, economic or otherwise, [to approve the variance]. However, where the intrusion or burden on the community is minimal, the showing required by the utility should be correspondingly reduced." (*Id.* At 373-374; *Matter of Consolidated Edison Co. of NY v. Hoffman*, 43 NY2d 598 [1978]; *Matter of SBA, Inc. V. Schwarting*, 299 AD2d 940 [4th Dept 2002]).

There is no dispute that Petitioner established the first element; however, the ZBA concluded that the Petitioner failed the second. In the ZBA's decision, they state that allowing the cell tower on the site at issue would be a substantial (rather than minimal) intrusion because it would be "in view of many homes, and numerous members of the community have made their opposition known at the public hearing and through petition. Seemingly on this same point, the ZBA also said that the tower "would be sited within approximately 600 feet of occupied dwellings."

Despite their rationale, numerous prior court decisions have held that the mere existence of a "generalized objection of residents who oppose [a] cellular telephone tower in the vicinity of their property" is an insufficient basis, standing alone, to deny a variance (see *Schwarting, 299* AD2d at 941; see also *Matter of 450 Sunrise Highway, LLC v. Town of Oyster Bay*; 287 AD2d 714 [2nd Dept 2011]; *Matter of Twin County Recycling Corp. v. Yevoli*, 90 NY2d 1000 [1997]; *Cellular Tel. Co. v. Town Bd. of the Town of Oyster Bay*, 166 F.3d 490 [2nd Cir. 1999]; *Omnipoint Communications, Inc. v. Village of Tarrytown Planning Bd.*, 302 F.Supp2d 205 [SDNY 2004].

Furthermore, the record of the ZBA proceedings establishes that Petitioner had reduced the height of the cell tower to the minimum level required to remedy the gaps in cellular coverage, which was 154 feet—much lower than the initially proposed 195-foot tower. The technological need for this height was verified by the Respondent Town's own expert consultant. The record also contains the Planning Board's determination pursuant to the New York State Environmental Quality Review Act ("SEQRA") that the tower will not have any significant adverse visual or other environmental impacts. Additionally, photographic simulations contained in the record show that the view of the tower from residential areas *after* the leaves had fallen off the trees would potentially comprise *only* the uppermost portion of the tower.

The objections from "numerous members of the community," as the ZBA noted in it's decision, were contrasted evenly, if not overwhelmingly, by the numerous other members of the community (including from emergency services personnel) who either appeared or petitioned in support of the cell tower due to the coverage issues. In any event, many of the opposition statements were matters of opinion or speculation (i.e., without factual or scientific basis), which in-and-of-themselves do not meet the required "substantial evidence" standard. At an April 24, 2018 public meeting of the ZBA, the Respondent Town's own expert even corrected some of the incorrect assertions made by a member of the community who was opposed to the project. Finally, as pointed out by the Petitioner, due to the height of the tower at issue, the minimum allowable setback to a residential dwelling under Town Zoning Code section 200-114.B is 250 feet. Therefore, the fact that it is "600 feet from occupied dwellings" actually weighs in Petitioner's favor.

The second rationale given by the ZBA for their denial is that the Petitioner did not demonstrate "compelling reasons" for erecting the tower at the proposed location, rather than "in an open field that would not be near houses." The ZBA also stated that "in the immediate vicinity" of the site, there were "hundreds of acres of open fields." The record, however, does not support the ZBA's conclusion, which is based on a general speculation that does satisfy the applicable legal standards. The Petitioner investigated numerous alternative sites (at least 8), including one that the Respondent Planning Board requested the Petitioner to review, and after an objective technical analysis, each one failed to provide the coverage necessary to remedy the existing gaps. The Town's own expert confirmed these conclusions as well. Additionally, there are no lands in the vicinity of the proposed site that would not also require a variance, or simply be unavailable due to wetland protections or utility installations.

In sum, there is no objective factual basis to support the conclusion that there does, in fact, exist a better-suited parcel of land that Petitioner has either ignored or failed to show why the particular parcel at issue should be chosen over that (speculative) one. There is no legal requirement that the Petitioner analyze *each and every possible* parcel of land before obtaining a variance; such a requirement would be unworkable. Furthermore, according to the controlling case law, given the minimal impact the tower will have on the community, the "compelling reasons" showing that Petitioner must make "should be correspondingly reduced." Without any scientific or other factual basis to support the ZBA's conclusion, this Court finds the ZBA's denial to be arbitrary and capricious.

In light of the above, the Court need not entertain Petitioner's remaining arguments. The Petitioner's relief is hereby granted, to the extent that the Respondent ZBA's denial of the variance is reversed and vacated, and the ZBA is ordered to grant Petitioner said variance. The matter is remitted to the Town Planning Board for further proceedings to take place, specifically for consideration of the site plan approval and special use permit, which had been previously denied on the basis of the ZBA's variance denial. No further order is required.

DATED: October 26, 2018
Niagara Falls, New York

HON. DANIEL J. FURLONG
Justice of the Supreme Court