

**Matter of Crown Castle NG E. LLC v City of Rye**

2018 NY Slip Op 34422(U)

August 20, 2018

Supreme Court, Westchester County

Docket Number: Index No. 50310/18

Judge: Susan Cacace

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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In the Matter of the Application of  
CROWN CASTLE NG EAST LLC,

Petitioner/Plaintiff,

DECISION & ORDER

Index No. 50310/18

For a Judgment Pursuant to Article 78 of the CPLR

- against -

THE CITY OF RYE and THE CITY COUNCIL OF THE  
CITY OF RYE,

Respondents/Defendants.

-----X  
CACACE, J.

The following papers, numbered one (1) through seven (7) were read on this  
petition for relief pursuant to article 78 of the Civil Practice Law and Rules (CPLR):

Papers Numbered

Notice of Verified Petition/Complaint - Verified Petition/Complaint with Exhibits . . . . .	1
Affirmation in Support of Verified Petition . . . . .	2
Memorandum of Law in Support of Verified Petition . . . . .	3
Notice of Motion to Dismiss - Affirmation in Support of Motion to Dismiss with Exhibits . . . .	4
Notice of Cross Motion to Convert to Summary Judgment - Affirmation in Opposition to Motion to Dismiss and in Support of Cross Motion with Exhibits. . . . .	5
Memorandum of Law in Opposition to Motion to Dismiss and in Support of Cross Motion . . .	6
Reply Memorandum of Law in Further Support of Motion to Convert to Summary Judgment and to Grant Summary Judgment for Petitioner . . . . .	7

Upon the foregoing papers it is decided and ordered that this petition for relief is resolved  
as follows:

Factual Background/Procedural History

The record presented reflects that the events relevant to this proceeding began when the respondent City of Rye (the City) adopted a consent resolution on January 12, 2011, which led to its entry into a right of way use agreement (hereinafter, the RUA) with NextG Networks of NY, Inc. (hereinafter, NextG) on February 17, 2011. Pursuant to the RUA, NextG was authorized by the respondent City to operate a telecommunications business that designed, installed and operated distributed antennae systems (hereinafter, DAS) to expand existing wireless telephone services and coverage for providers of such services by installing its equipment, in most instances upon pre-existing utility poles owned by Consolidated Edison, Inc., within the public right-of-way (ROW) of the respondent City. In exchange for its contractual rights thereunder to install and maintain its equipment in the ROW, the RUA obligated NextG to annually remit a set level of financial compensation to the respondent City pursuant to the specific terms of the RUA. Furthermore, the RUA specifically precluded NextG from assigning or otherwise transferring its rights and obligations thereunder without the express written consent of the respondent City. Notwithstanding this contractual consent condition, the RUA permitted NextG to avoid the necessity of obtaining the consent of the City for such an assignment to any “parent, subsidiary, or other affiliate of NextG or to any successor in interest” so long as NextG was able to demonstrate, to the respondent City’s satisfaction, that the assignee/transferee has financial strength equivalent to NextG, that the assignee/transferee accepts all of NextG’s obligations under the RUA, and that the assignee/transferee possesses the experience and qualifications required to operate the NextG network (hereinafter, the Exempted Transfer Criteria

or ETC). However, although the RUA enabled NextG to avoid the obligation of obtaining the respondent City's consent for an assignment or transfer of its rights and obligations under the RUA by successfully demonstrating its satisfaction of the ETC to the respondent City, NextG was required to provide the respondent City with written notice of its intent to make such a transfer pursuant to an ETC at least 30 days prior thereto.<sup>1</sup>

Specifically, the RUA provisions outlining the authorized procedure to be followed by both NextG and the respondent City, should NextG seek to assign or transfer its rights and obligations under the RUA, is set forth in the RUA as follows:

[T]he transfer of the rights and obligations of NextG to a parent, subsidiary, or other affiliate of NextG or to any successor in interest or entity acquiring fifty-one percent (51%) or more of NextG's stock or assets (collectively "Exempted Transfers") shall not be deemed an assignment for the purposes of this Agreement and therefore shall not require the consent of the City, provided that NextG reasonably demonstrates to the City's lawfully empowered designee the following criteria (collectively the "Exempted Transfer Criteria"):

- (i) such transferee will have a financial strength after the proposed transfer at least equal to that of NextG immediately prior to the transfer;
- (ii) any such transferee assumes all of NextG's obligations hereunder; and
- (iii) the experience and technical qualifications of the proposed transfers, either alone or together with NextG's management team, in the provision of telecommunications or similar services, evidences an ability to operate the NextG Network.

NextG shall give at least thirty (30) days' prior written notice (the "Exempted Transfer Notice") to the City of any such proposed Exempted Transfer and shall set forth with specificity in such Exempted Transfer Notice the reasons why NextG believes the Exempted Transfer Criteria have been satisfied.

With regard to these terms of the RUA, the record reveals that the only notice provided by NextG

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<sup>1</sup>Although not relevant to the Court's analysis of the issues raised, the RUA continues with an outlined procedure through which NextG must demonstrate to the respondent City that it has satisfied the ETC, and through which the respondent City must address and determine the sufficiency of NextG's showing in that regard.

to the City in connection with its desire to effectuate an assignment or transfer of its rights under the RUA occurred on May 25, 2012, when NextG sent a letter to the City which related, in pertinent part, “effective April 10, 2012, NextG Networks of NY, Inc., (‘NextG’) became a wholly owned indirect subsidiary of Crown Castle International Corp.”, accompanied by a Certificate of Merger and an Authentication Certification from the Secretary of State of Delaware which collectively reflected the merger of “Crown Castle NG Acquisitions Corp.” with and into “NextG Networks, Inc.,” and leaving the sole surviving corporation under the registered name of “NextG Networks, Inc.”. Furthermore, this letter of May 25, 2012 was accompanied by another document, dated May 7, 2012 and entitled “Crown Castle International Corp. Consolidated Subsidiaries”, which lists NextG Networks of NY, Inc. under a heading thereupon of “Inactive Entities”, bearing an effective date of April 10, 2012.

Ostensibly pursuant to the authority of the RUA, NextG expanded its existing wireless telephone services and coverage within the respondent City by installing nine (9) so-called nodes therein upon existing utility poles located within the public ROW of the respondent City between 2011 and 2015. In advance thereof, the respondent City approved the petitioner’s application for permits authorizing these installations following its review of NextG’s permit application pursuant to the terms of Chapter 167 of the Rye City Code (hereinafter, the Code). In December of 2015, in some unspecified manner, the petitioner advised the respondent City of its desire to install additional equipment/nodes within the City of Rye pursuant to the RUA, essentially providing for the installation of so-called equipment cabinets which are dimensionally larger than the pre-existing equipment cabinets (hereinafter, the larger cabinets), as well as its desire for an interpretation of the RUA provisions relating to the definition of “equipment” insofar as the

larger equipment cabinets would be concerned. Following a meeting conducted between representatives of the petitioner and the respondent City on March 15, 2016, the petitioner submitted a letter to the respondent City Council on April 8, 2016, formally relating its desire to install the larger cabinets within the City of Rye pursuant to the RUA, and formally requesting an interpretation of the RUA provisions in such a manner as to permit the installation of the larger cabinets under the existing terms of the RUA, or to otherwise require an amendment of the RUA to allow for the use of the larger cabinets (hereinafter, the proposed installation project).

The respondent City Council addressed the petitioner's applications during its meeting on June 8, 2016, when several representatives of the petitioner and two members of the community were heard, after which the public hearing was adjourned until July 13, 2016. On June 17, 2016, the petitioner wrote to the respondent City Council and presented argument that the existing RUA permitted its proposed installation of the larger cabinets without being "subject to the respondent City's zoning or other land use chapters in the City Code", and that the special permit requirements provided under Chapter 167 of the respondent City's Code were inapplicable under the terms of the RUA. Thereafter, on June 24, 2016, the petitioner again wrote to the respondent City Council and presented argument that its proposed installation project involved an exempt Type II action which would make any review under the New York State Environmental Quality Review Act (SEQRA) or a resulting positive declaration thereunder wholly inappropriate, thereupon requesting that the respondent City Council adopt a resolution confirming the status of the proposed installation project as a Type II action under SEQRA, or adopt a negative declaration thereunder, at its upcoming meeting on July 13, 2016.

Although no vote upon the proposed installation project was undertaken by the

respondent City Council during the continued public hearings it conducted upon the proposed installation project in both July and August of 2016, the respondent City Council announced its initiation of SEQRA review and its intention to serve as lead agency thereunder with regard to the proposed installation project during the continued public hearing it conducted on October 5, 2016. Although the petitioner continued to undertake various efforts to persuade the respondent City Council that the proposed installation project constituted an exempt Type II action under SEQRA, the petitioner provided the respondent City Council with a Full Environmental Assessment Form (EAF), updated engineering drawings, several amended plans and other additional information over the course of the ensuing several months. Thereafter, during the continued public hearing conducted before it on April 22, 2017, the respondent City Council issued a “positive declaration” for the proposed development project under SEQRA.

In response thereto, the petitioner commenced a legal proceeding in the United States District Court, Southern District of New York, alleging that the respondents had violated the RUA, several provisions of the federal Telecommunications Act of 1996 (hereinafter, the “TCA”), 47 U.S.C. 151 *et seq.*, and also brought claims under article 78 of the CPLR, and the New York State Transportation Corporations Law (TCL). By Opinion and Order, filed and entered on December 8, 2017, the United States District Court, Southern District of New York (Briccetti, J.) granted the respondents’ motion to dismiss pursuant to Rule 12(b)(6), upon determining that the petitioner’s TCA claims constituted contract claims sounding in State Law; and further dismissed, without prejudice, the article 78 claims which sought to reverse the respondent City Council’s issuance of a “positive declaration” for the proposed development project under SEQRA, to reverse the alleged denial by the respondent City Council of the

petitioner's application to proceed with the proposed development project, and for an order directing the respondents to issue all necessary permits and authorizations with regard to same upon federal jurisdictional grounds pursuant to 28 U.S.C. § 1367(c)(3) (*Crown Castle NG East LLC v City of Rye*, US Dist Ct, SD NY, 17 CV 3535, Briccetti, J., 2017).

The instant litigation ensued, as the petitioner now seeks, in substance, an order reversing the respondent City Council's issuance of a "positive declaration" for the proposed development project under SEQRA, and further seeks an order directing the respondents to issue all necessary permits and authorizations which are required to allow the petitioner to proceed with the proposed development project. More specifically, through this hybrid article 78 proceeding/declaratory judgment action, the petitioner seeks an order of this Court: (1) declaring that the petitioner's proposed development project involves a Type II action which is exempt from SEQRA, (2) directing the respondents to grant the petitioner's request for, and deem granted, all City permits required for the proposed development project pursuant to the terms of the RUA, (3) overturning the respondent City Council's SEQRA Resolution, Interpretation/Denial Resolution and final scoping document purportedly issued pursuant to SEQRA, and (4) declaring that the petitioner has at all relevant times been in full compliance with the RUA, that the RUA does not restrict petitioner from incorporating customer owned units as part of its DAS network expansion in the Rye ROW, and that the RUA remains in full force and effect, and (5) awarding damages in an amount to be determined at trial.

The respondents oppose the instant petition for relief through the filing of a pre-answer motion to dismiss, seeking the dismissal of the verified petition pursuant to §§ 3211(a)(3), 3211(a)(7), and 7804(f) of the CPLR, alleging that (1) the petitioner's claims arising under article

78 of the CPLR fail to state a claim upon which relief can be granted because the RUA is void as a matter of law, and because the remaining causes of action are moot, (2) the petitioner lacks the requisite standing to maintain any of the claims raised in this proceeding, and (3) the petitioner's claims pertaining to the respondents' SEQRA determination which are raised pursuant to article 78 of the CPLR lack ripeness for review through this proceeding.

By notice of cross-motion, the petitioner moves this Court for an order converting the motion to dismiss for one seeking summary judgment pursuant to CPLR 3211(c), and thereupon granting summary judgment to the petitioner on all causes of action.

#### Discussion/Legal Analysis

Upon consideration of a motion to dismiss brought pursuant to CPLR 3211, it is well-settled that the pleadings are to be liberally construed by the reviewing court, that the alleged facts are to be accepted as true and every favorable inference possible must be afforded to the petitioner (*see Nonnon v City of New York*, 9 NY3d 825). Furthermore, in connection with the reviewing court's examination of the pleadings upon such a motion, the factual allegations raised therein must be accepted as true and must be viewed in the light most favorable to the petitioner (*see Lawrence v Miller*, 11 NY3d 588; *see also Leon v Martinez*, 84 NY2d 83, 87), as the court's sole inquiry shall concern whether the facts alleged fit within any cognizable legal theory, irrespective of the level of evidentiary support proffered (*see People v Coventry First LLC*, 13

NY3d 758).

Turning initially to consider the respondents' challenge to the standing of the petitioner to bring this proceeding, the respondents argue that the failure of NextG to adhere to the explicit terms of the RUA governing the assignment and/or transfer of its rights and obligations under the RUA when it ostensibly attempted to transfer and assign those rights to the petitioner prior to the commencement of this proceeding, leaves the petitioner without standing to maintain this proceeding. As a threshold matter, it is a fundamental prerequisite in a proceeding brought pursuant to article 78 of the CPLR that the petitioner must establish standing to challenge the administrative action under review (*see Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769). In order for a petitioner alleging an adverse impact from an administrative determination relating to SEQRA and other zoning issues to establish standing, such petitioner must show (1) that the proposed action will have a harmful effect upon it which is different from that suffered by the public-at-large, and (2) that the alleged injury falls within the zone of interest sought to be promoted or protected by SEQRA (*see Society of Plastics Indus. v County of Suffolk*, 77 NY2d at 772-774; *see also Matter of Mobil Oil Corp. v Syracuse Indus. Dev. Agency*, 76 NY2d 428; *Matter of Long Island Pine Barrens Society, Inc. v Town of Islip*, 261 AD2d 474, 475; *Matter of Parisella v Town of Fishkill*, 209 AD2d 850, 851; *Schiavoni v Village of Sag Harbor*, 201 AD2d 716). In this regard, the Court of Appeals has instructed that this standing test is applicable "whether the challenge to governmental action is based on a SEQRA violation . . . or other grounds" (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d at 774).

In the first instance, it is significant to note that all of the petitioner's causes of action raised through this hybrid proceeding for a judgment and declaratory relief are either directly or

tangentially based upon allegations that the respondents have undertaken actions, or refrained from undertaking actions, pursuant to SEQRA in violation of several of the various rights which the petitioner submits are accorded to it under the terms of the RUA. The respondents have based their standing challenge upon their claim that the petitioner is neither a party to the RUA, nor a valid assignee or transferee of the rights that accrued to NextG under the explicit terms of the RUA, and consequently, the respondents argue that the petitioner may not be heard to seek the enforcement of any of the terms of the RUA, including those provisions which govern environmental review, SEQRA classification, and permit issuance. In this regard, the Court notes that since the record makes clear that the original parties to the RUA are NextG and the respondent City, the petitioner's authority to seek the enforcement of the rights which it claims to have derived from the RUA is contingent upon an examination of the legitimacy of any purported assignment or transfer of NextG's rights under the RUA to the petitioner. In this regard, the RUA sets forth the exclusive means by which NextG would be permitted to validly assign and/or transfer its rights under the RUA in great detail, initially precluding such a proposed assignment or transfer by NextG without first obtaining the consent of the respondent City.

However, as the record reflects that NextG had neither sought, nor had obtained the consent of the respondent City for any proposed assignment and/or transfer of its rights under the RUA to the petitioner, the Court's examination must focus upon those provisions of the RUA which permit NextG to avoid the necessity of obtaining the respondent City's consent for its proposed transfer of its rights under the RUA. Specifically, the RUA provides that so long as NextG was able to demonstrate to the respondent City's satisfaction that the proposed transfer of

its rights under the RUA satisfied the criteria of an “exempted transfer” or ETC, NextG could make such a transfer without needing to first obtain the respondent City’s consent.

Notwithstanding its contractual ability to avoid the necessity for seeking the respondent City’s consent, the RUA required NextG to provide the respondent City with written notice of its proposed transfer of its rights under the RUA pursuant to a proposed exempted transfer upon application of the ETC (hereinafter, an ETC Notice) at least 30 days prior thereto, which was further required to set forth NextG’s basis for belief that it had satisfied the consent exemption criteria of the ETC with specificity. Thereafter, the RUA provides that within 30 days from its receipt of an ETC Notice from NextG, the respondent City was permitted to interpose written objections to the evidentiary sufficiency of the ETC Notice, and thereby compel NextG to provide it with additional evidence until the ETC Notice reasonably satisfied the ETC criteria. Consequently, drawing from the plain language of the RUA, the Court finds that where, as here, NextG had not first obtained the consent of the respondent City, no transfer of NextG’s rights under the RUA would be valid unless NextG had provided the respondent City with an adequately supported ETC Notice at least 30 days in advance of its proposed transfer of its rights under the RUA, in compliance with the explicit terms and requirements thereof.

Here, the respondents first argue that NextG never effectively transferred its rights and obligations under the RUA to the petitioner or any other entity, as evidenced by the failure of NextG, at any time, to provide the respondent City with an ETC Notice evincing its proposed transfer of its rights under the RUA. In response, although the petitioner does not claim that NextG had provided an ETC Notice to the respondent City, the petitioner submits that NextG was not required to do so since it had never sought to transfer and/or assign its rights under the

RUA to the petitioner. In this regard, the petitioner argues that NextG was not required to serve an ETC Notice upon the respondents to evince its proposed transfer of its rights under the RUA to the petitioner because it is not “an assignee, parent, subsidiary, affiliate or successor of NextG”, rather it claims to be the same entity, albeit under the new name of Crown Castle NG East LLC. In support of this claim, the petitioner relies exclusively upon a letter NextG sent to the New York State Public Service Commission (PSC) on December 17, 2012 (hereinafter, the PSC letter), which indicates, in pertinent part, that NextG was notifying the PSC that it was seeking to change its name to Crown Castle NG East Inc., and was requesting that the PSC update its records to reflect the name change to Crown Castle NG East Inc., effective December 19, 2012.<sup>2</sup> Whatever the petitioner may suggest has been established through its reference to the PSC letter, the Court discerns that same merely reflects NextG’s notice to the PSC of its anticipated name change to be made effective two days hence, but does not otherwise address whether or not the petitioner had consequently become “an assignee, parent, subsidiary, affiliate or successor of NextG”, and therefore obligated NextG, under the terms of the RUA, to serve a timely and sufficient ETC Notice upon the respondent City before its rights thereunder could be assigned and/or transferred to a third party such as the petitioner.

In this regard, the record further reflects that prior to sending the PSC letter, NextG sent a letter to the respondent City seven months earlier on May 25, 2012, which reflected that its purpose was to serve as notice to the City that NextG had become “a wholly owned indirect

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<sup>2</sup>Although of no consequence to the issues before the Court, the petitioner also referenced an additional Certificate of Conversion of the corporate structure of Crown Castle NG East Inc. to Crown Castle NG East LLC, that being the petitioner’s corporate name, with an effective date of December 31, 2013, as evidenced by a Certificate recognizing this change issued by the Secretary of State of the State of Delaware on December 30, 2013.

subsidiary of Crown Castle International Corp.” as of April 10, 2012, and related that all future interaction sought to be had with NextG would be managed through Crown Castle, that NextG and Crown Castle would be seeking to integrate their respective systems and operations, and that they looked forward to provide services to the respondent City “as the newly expanded Crown Castle” (hereinafter, the subsidiary notice letter).<sup>3</sup> Consequently, despite the petitioner’s claim that NextG need not have followed the ETC Notice requirements and related provisions of the RUA which govern the proposed assignment and/or transfer of its rights under the RUA because it is not “an assignee, parent, subsidiary, affiliate or successor of NextG”, the Court finds that the several representations made by NextG in its subsidiary notice letter conclusively undermine the petitioner’s argument. Specifically, the Court notes with significance that by its subsidiary notice letter, NextG clearly represented and communicated to the respondent City that it had become “a wholly owned indirect subsidiary of Crown Castle International Corp.” as of April 10, 2012. Furthermore, the additional content of the subsidiary notice letter supports that representation insofar as NextG further relates therein that all future interaction which the respondent City might seek to have with NextG would be managed through Crown Castle, that it would be integrating its operations and systems with Crown Castle, and that it would continue to provide services to the respondent City as the newly expanded Crown Castle. Notably, NextG’s argument to this Court in its memorandum of law in opposition to the respondents’ motion to

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<sup>3</sup> Although enclosed therewith was a Certificate of Merger filed with the State of Delaware on April 10, 2012, reflecting the corporate merger of Crown Castle NG Acquisitions Corp. with and into NextG Networks, Inc., and the existence of NextG Networks, Inc, as the sole surviving corporation resulting from that merger, same is irrelevant to the issues before the Court since this submission to the respondent City appears plainly to reference merger activity between two corporate entities which are neither original parties to the RUA, nor the petitioner in the case at bar.

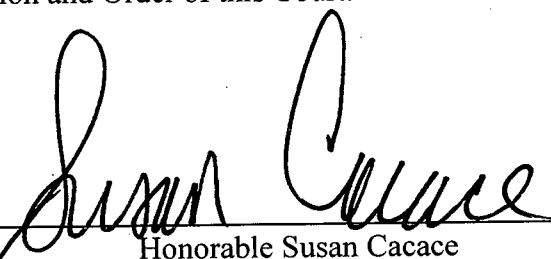
dismiss that it is not “an assignee, parent, subsidiary, affiliate, or successor of NextG”, either intentionally or otherwise, completely overlooks and/or ignores the contrary representation made by NextG in the subsidiary notice letter. In fact, intentionally or otherwise, the petitioner never addresses the content, meaning and effect of the representations made to the respondent City by NextG in the subsidiary notice letter in any fashion.

Upon the record presented, most notably the subsidiary notice letter, this Court finds that NextG, as of April 10, 2012, had become a subsidiary of a parent corporate entity known as Crown Castle International Corp., and that in so doing, NextG had neglected to comply with those terms of the RUA which govern the manner by which NextG could have sought to assign and/or transfer its rights under the RUA to Crown Castle International Corp., the petitioner, or any other entity. Specifically, the Court finds that, in contravention of the pertinent terms of the RUA, NextG neglected to timely, or otherwise, provide the respondent City with a required ETC Notice which evinced its proposed transfer of its rights under the RUA to the petitioner. Consequently, this Court is compelled to conclude that since the petitioner is neither a party to the RUA, nor a valid assignee or transferee of the rights that accrued to NextG under the explicit terms of the RUA, the petitioner lacks standing to maintain this proceeding and may not be heard now to seek the enforcement of any of the terms of the RUA, including those provisions which govern environmental review, SEQRA classification, and permit issuance (*see Tepper v Cablevision Systems Corporation*, 19 AD3d 585, 586 [non-party to an agreement does not have standing to seek redress for alleged violations of provisions of that agreement]; *see also Utica Mutual Ins. Co. v Johnston*, 62 AD3d 692, 693; *Fellows v CitiMortgage, Inc.*, 710 F Supp 2d 385, 405-406).

Based upon the foregoing, it is hereby decided and ordered that the respondents' motion to dismiss this hybrid proceeding for a judgment pursuant to CPLR article 78 and declaratory relief pursuant to CPLR 3001 is hereby granted pursuant to CPLR 3211(a)(3) and 7804(f) due to the failure of the petitioner to establish its standing to maintain this proceeding, and as a consequence thereof, the petitioner's cross-motion for an order converting the motion to dismiss for one seeking summary judgment pursuant to CPLR 3211(c) is denied as moot, and therefore, this proceeding is hereby dismissed.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
August 20, 2018



Honorable Susan Cacace  
Acting Justice of the Supreme Court

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