

Board of Mgrs. of Westage Towers E. Condominium v Planning Bd. of the City of White Plains
2024 NY Slip Op 35251(U)
July 8, 2024
Supreme Court, Westchester County
Docket Number: Index No. 68062/23
Judge: Maurice Dean Williams
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
Application of the BOARD of MANAGERS of WESTAGE
TOWERS EAST CONDOMINIUM, JEFFREY I. KLEIN, as
PRESIDENT of the BOARD of MANAGERS of WESTAGE
TOWERS EAST CONDOMINIUM, JUDITH HARARI, and
ALBERT HARARI,

Petitioners,

DECISION & ORDER

For a Judgment Pursuant to Article 78 of the CPLR,

Index No. 68062/23

-against-

Motion Seq. 1

THE PLANNING BOARD of the CITY OF WHITE PLAINS,
The CITY OF WHITE PLAINS and DISH WIRELESS LLC,

Respondents,
-----X

Williams, A.J.S.C.

The following papers, numbered 1-53, were read on this Petition:

<u>Papers</u>	<u>NYSCEF Numbered</u>
Notice of Petition/Petition/Exhibits A-I	1-11, 14-16
Answers/Transcript/Exhibits 1-29/Memorandum of Law	18-50
Reply	52-53

In this Article 78 proceeding, Petitioners seek to annul and vacate Respondent's, Planning Board of the City of White Plains ("Planning Board"), resolution which approved Respondent, DISH Wireless LLC ("DISH"), application for a special permit to install three public utility wireless telecommunications antennas and related equipment on the rooftop of an existing building in a commercial business area of the City of White Plains (zoned Core Business-4). Petitioners allege the decision was arbitrary and capricious, and that the Planning Board, in approving the proposed plan by DISH, misinterpreted or misunderstood the relevant portion of the Telecommunications Act of 1996 which permits local municipalities to prohibit projects

planned by wireless providers where radiofrequency ("RF") emissions levels would exceed the FCC guidelines governing emissions standards. No procedural irregularities are alleged. Upon review of the foregoing papers, and consideration of the appropriate legal authority, the petition is denied.

Background

DISH, in accordance with an agreement with the Department of Justice and Federal Communications Commission ("FCC"), committed to build a 5G network system that would provide coverage to 70% of the U.S. population by June 2023. Their application to the Planning Board was in furtherance of this agreement. After canvassing three prospective properties, DISH submitted the application which is the subject of this proceeding. Under the White Plains zoning ordinances, the proposed telecommunications facility met all bulk requirements, no variances were needed, and as a public utility structure in a core business district, only approval by the Planning Board of a special use permit was required.

The proposed facility included three antennas being placed on the rooftop of 5 Barker Street, an existing structure. The antennas would be flush mounted to the rooftop bulkhead and painted to blend in with existing mechanical equipment or the building structure. An "Antenna Site FCC RF Compliance Assessment Report" ("Compliance Report"), that used a conservative calculation method to estimate the worst-case scenario RF levels, was submitted with the application. DISH alleged under this method, upon completion of the installation, the actual reading from the antennas would be lower than the levels stated in the report.

According to the Compliance Report, the results of the RF assessment yielded, "at street level around the site, the conservatively calculated maximum RF level from the proposed antenna operation would be 0.4416% of the FCC's maximum permissible exposure ("MPE")

limit for “uncontrolled” exposure of the general population”, well below the established FCC limit. In the vicinity of the antennas on the site rooftop, the RF levels yielded, “a worst-case result of 5.82% of the FCC’s general population MPE limit”, also sufficiently below the permissible limit. The only area where exposure would exceed the maximum calculated RF level was directly in front of the antennas, in the air, approximately 15 feet above the rooftop, an area where human exposure would not occur. At that height, the calculated RF level was estimated at 3,090.74%, which is considerably more than the FCC general population MPE limit. According to DISH, this level quickly dissipates as you move away from this aerial location.

Considering these aerial readings, the Compliance Report indicated that per “DISH guidelines and consistent with FCC guidance on rooftop compliance, caution signs are to be installed at each of the dish antennas. In addition, NOC information and guidelines signs are to be installed at the roof access points.” The conclusion reached in the Compliance Report was that in any area where human exposure would occur, the radiofrequency or emission level was well below and in full compliance with FCC guidelines.

The Planning Board forwarded the plan to the Department of Public Works (“DPW”), and Design Review Board, among other City departments, to review and submit any comments regarding the application. The Design Review Board issued an approval of the application as submitted. DPW requested DISH establish an escrow account in accordance with the City of White Plains guidelines for cellular antennas, requested documentation supporting the necessity of the site and concerning DISH’s consideration of other locations. DPW also requested a copy of DISH’s signage plan.

Petitioners are the managers and residents of Westage Towers East Condominium located at 25 Rockledge Avenue, in White Plains, New York. They oppose construction of the wireless

facility on the rooftop of an adjacent property. Petitioners raised their concerns about the potential adverse effect of the proposed plan on their health, property values, and desire not to reside next door to a “microwave” before the Planning Board prior to its’ approval of the permit (see June 20, 2023, July 18, 2023, and August 15, 2023 Planning Board Minutes).

Petitioners’ concerns ranged from whether there was a need for the antenna installation to the adequacy of the FCC guidelines to protect against potential adverse health risks, and from environmental justice to the impact upon future residents considering the expansive development occurring in the area. In addition, a large focus of their opposition was on the emission levels from the antenna at rooftop level. Petitioners reasoned based upon the reported excessive RF level in DISH’s Compliance Report, the Planning Board was obliged to reject the application and require DISH to either select another site or submit a new proposal.

Following the public hearing held on June 20, 2023, the Planning Board requested that DISH supplement the Compliance Report and provide RF emission levels from additional points, specifically from the adjacent properties located at 25 Rockledge Avenue and 3 Barker Avenue. Further, a request was made for DPW to have the Compliance Report reviewed by their outside independent consultant.

During the next meeting held on July 18, 2023, the DISH representative informed the Planning Board:

The public’s health concerns are taken very seriously, and I would like to take this time to discuss a few points in further detail.

First, the antennas are not proposed to be directly pointed at any building of similar height, including the Westage Towers Building. If they were, it would essentially defeat the purpose of providing coverage to the area as the building itself would block the signal. It’s my understanding from DISH RF engineer that the azimuth or the angle of the antennas are angled in such a fashion that the signal will be directed towards and clear over shorter buildings in the area.

Second, a particular concern was the RF report prepared by Pinnacle Telecom Group and previously provided by DISH with its original application. The report reflected calculated RF levels of 3,094% in front of the proposed antennas, which is a number that understandably causes some apprehension. However, I'd like to stress that this level is limited to exactly that location which is directly in front of the antennas.

As shown on the plans, the top of the roof is measured at 146 1/2 feet above ground level, and the base of the antenna will be located at approximately 160 feet of ground level. To be in that area noted in the report, one would need to be hovering about 15 feet above the roof.

Moreover, the RF levels decrease with distance as evidenced by the modeling shown on pages 19 and 20 of the report.

(Petitioners' Exhibit C, 7/18/23 *hearing transcript*, p. 2, line 15 – p. 3 line 7)

In response to DPW's requests, DISH submitted a "RF Justification Report" for the site, plan sheets, and a Structural Analysis Report. The RF Justification Report demonstrated that the proposed facility would address dead spots in the area and improve poor quality areas in DISH's service. A coverage/signal propagation map was included with the report.

DPW's independent consultant performed a "RF Hazard Conformance Assessment" and found the "application *DOES* conform to all elements" of the City of White Plains Guidelines for Cellular Antenna Applications. Upon consideration of these and other items, DPW recommended approval of DISH's special use permit application, subject to an actual reading of the RF levels post installation and periodic evaluations to ensure continued compliance with FCC limits. An escrow account was being funded to cover any costs associated with these evaluations.

At the final Planning Board meeting held on August 15, 2023, in addition to the approval received from DPW, the Planning Board was in receipt of the Supplemental Compliance Report furnished by DISH. This report found that at 3 Barker Avenue, the closest building, the RF level

worst-case scenario would be 0.0006% of the permissible FCC limit, and at 25 Rockledge (where Petitioners managed and resided), the RF level would be 0.02% of the FCC limit. In other words, at both locations the radiofrequency levels would be less than 1% of the FCC guidelines. During the public hearing session, Petitioners reiterated their concerns about the safety of the planned project and urged the Planning Board to reject the application expressing concerns about the sufficiency of the independent consultant's report.

Upon considering the concerns voiced by the community during the review process, statements made by DISH representatives, a review of the application, supplemental materials, and the report from DPW's independent consultant, the Planning Board arrived at its' decision that the RF emissions from the antennas would not exceed the threshold level set by the FCC regulations "related to the potential for human exposure to hazardous radiofrequency emissions" at any location where human contact would occur. The Planning Board also found that the application conformed to the zoning ordinance requirements of the City of White Plains and was consistent with their comprehensive plan for the City of White Plains. The Planning Board then adopted a resolution approving DISH's application for a special use permit and site plan subject to certain post construction conditions. This was based on a determination that the plan promulgated by DISH would not result in any adverse impact to the environment and was in compliance with their guidelines for wireless antennas application. Thereafter, Petitioners commenced this Article 78 proceeding.

Standard of Review

The role of the Court in this Article 78 proceeding, which is not the result of a hearing, is to consider whether the determination by the Planning Board was "made in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious, or an abuse of

discretion” (*Matter of Sam v. Annucci*, 192 A.D.3d 1485, 144 N.Y.S.3d 495 [2021]). “A determination is arbitrary and capricious when it is without sound basis and reason and generally taken without regard to the facts” (*Matter of Jefferson v. New York City Bd. of Educ.*, 146 A.D.3d 779, 44 N.Y.S.3d 535 [2017]). If the rationale offered by the local planning board appears pretextual or contrary to law, the determination will not be confirmed. However, if the planning board did not act arbitrary and capricious or abuse its’ discretion, the determination must be sustained even if the court concludes that it would have reached a different outcome (*Matter of Peckham v. Calogero*, 12 N.Y.3d 424, 883 N.Y.S.2d 751 [2009]). In sum, judicial review is not to determine whether a fair outcome was reached, but rather is to ensure there is a sound basis for the determination and the agency acted lawfully.

Petitioners’ Contentions

Petitioners argue that the Planning Board’s resolution is unlawful, arbitrary and capricious and contrary to the evidence. Petitioners are concerned that although this application only requests three antennas, the facility is designed to accommodate up to nine antennas. Once the special permit is granted, under the *Middle-Class Tax Relief and Job Creation Act of 2012*, the City would be powerless to deny any future permit applications.

Petitioners’ contention can be summarized into three main objections, i) there are health and safety concerns surrounding the impact of RF levels to their homes, ii) the absence of data demonstrating a gap in service exists which DISH seeks to address with the installation of the antennas and iii) that as a local municipality, the City of White Plains has the authority to regulate the placement, construction and modification of wireless service facilities that fail to comply with FCC emissions standards.

Respondents' Contentions

DISH's objections to the petition can be summarized as both procedurally and on the merits. In its' answer, DISH asserts the affirmative defense that the proceedings are barred by the statute of limitations. This defense however is not expounded upon in their memorandum of law. On the merits, DISH argues that the antennas will operate safely and are in compliance with federal regulations governing RF levels in areas where there is the possibility of human exposure. Further, DISH asserts that their application satisfied the local ordinances for issuance of a special permit and the proposed plan is consistent with the planning design established by the legislative body of White Plains through its zoning districts and ordinances.

The Planning Board (the municipal Respondents) states the decision under review is supported by substantial evidence and is not contrary to law. The Planning Board details the steps that were taken to review DISH's application, asserts the Petitioners do not allege any violation of lawful procedures and concludes that community opposition is not a justifiable basis to reject an otherwise appropriate application. With respect to the concern over future applications, prospective claims are not addressed by the Planning Board as they decide applications when they are presented, on a case-by-case bases.

Findings of Fact and Conclusions of Law

Addressing first DISH's contention that the petition should be dismissed as untimely, that application is denied. "In this regard, Town Law § 282, which provides for review of a decision made by a planning board by way of a proceeding pursuant to CPLR article 78, expressly sets forth a 30-day Statute of Limitations" (*Matter of Powell v. Town of Coeymans*, 238 A.D.2d 788, 789, 656 N.Y.S.2d 460, 462 [3rd Dept. 1997]). The 30-day period begins to run once the planning board has filed its decision with the town clerk (*see* Town Law § 282; *see generally*

Matter of Green Harbour Homeowners' Assn. v. Town of Lake George Planning Bd., 1 A.D.3d 744, 766 N.Y.S.2d 739 [3rd Dept. 2003]). Here, while the Planning Board voted to approve the application on August 15, 2023, the uncontroverted evidence demonstrates that the resolution was not filed until August 30, 2023. This action was commenced on September 29, 2023, within the statutory time frame. Accordingly, the proceedings are not time barred.

Turning to the merits of the petition, the Court finds that Petitioners have failed to meet their burden of establishing that the Planning Board's resolution was arbitrary and capricious, or made without a sound basis and reason.

"Congress enacted the Telecommunications Act of 1996 to encourage development and reduce regulation of telecommunications technologies (47 USC § 151). Section 332 of the TCA furthers this purpose by making it unlawful to prohibit wireless services: The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof ... shall not prohibit or have the effect of prohibiting the provision of personal wireless services" (*Chambers v. Old Stone Hill Rd. Assoc.*, 1 N.Y.3d 424, 431, 774 N.Y.S.2d 866 [2004]; *citing* 47 U.S.C.A. § 332[c][7][B][i][II]).

Concerning the regulatory treatment permitted by local municipalities of this technology, per the Telecommunications Act, "[n]o 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.A. § 332 [c][7][B][iv]). Thus, where there has been compliance with the FCC regulations regarding the emissions emanating from the facilities, the local municipality is prohibited from denying a permit where this would be the underlying basis. The vigorous opposition by the community to

the project is something the board should be aware of, however, where the concerns are generalized or unsubstantiated, they cannot form the basis of a determination (*see Matter of White Plains Rural Cemetery Assn. v. City of White Plains*, 168 A.D.3d 1068, 93 N.Y.S.3d 103 [2nd Dept. 2019]; *Matter of Ramapo Pinnacle Props., LLC v. Village of Airmont Planning Bd.*, 145 A.D.3d 729, 45 N.Y.S.3d 105 [2nd Dept. 2016]).

It is interesting to note that this Act does not preempt the local municipalities' authority to exercise its' powers to ensure compliance with local zoning ordinances and comprehensive plan design regarding land use within its' borders. The Telecommunications Act does however set the stage that with regards to the emissions level, the FCC shall regulate what qualifies as a permissible level.

In these proceedings, the Planning Board held several meetings, heard concerns from the community and reviewed the documentation submitted in support of the application to ensure compliance with their local ordinances and federal guidelines. The record reveals the Planning Board required DISH to supplement their report to include not merely the radiofrequency levels at an amorphous point on the street, but from the neighboring buildings as well. Both the initial and supplemental RF Compliance Reports utilized the worst-case scenario to calculate the potential radiofrequency emitting from the antennas. Under those calculations, the RF levels at the neighboring properties were less than 1% of the permissible federal guidelines. Indeed, even on the roof where the antennas would be installed, the RF emissions level was predicted to read below the FCC permissible guidelines. The only location with a high reading was in an area "inaccessible to the public and suspended in the air over 160 feet above grade directly in front of the antenna", which would not be in an area possible for human exposure.

Petitioners quarrel includes that the FCC standards are insufficient to protect them, and as a local authority it is the municipalities' responsibility to advocate on its' citizens behalf. The Court is sensitive to the concerns raised by Petitioners. Without a doubt, the prospect of having a wireless facility so close to one's home raises safety and aesthetics concerns. However, where an applicant has met the prerequisite established by the local municipality, and the proposed project is in harmony with the planning design for the district, the Planning Board's determination is not arbitrary. The local municipality is in the best position to determine the design and plans for its' various communities. This vision is established by the localities' zoning ordinances and other legislative actions.

The application which is the subject of these proceedings did not require DISH to seek a variance of any type from the City of White Plains. DISH is a business engaged in providing wireless services to the public. As such, it is classified as a public utility under the White Plains zoning ordinances. The proposed project is situated in a zoning district (business district) which required only a special use permit be sought. The zoning ordinance relied upon by Petitioners, Section 6.7.12.1, applies to wireless facility being installed within a residential area.

With respect to the issuance of a special permit, per White Plains zoning ordinances, a wireless facility is considered a "public utility building or structure" and applicants seeking a special use permit must obtain approval from the Planning Board. That procedure was followed in this case. Zoning Ordinance Section 6.1 states:

Special permit "uses" for which conformance to additional requirements is mandated by this Ordinance (see Sections 5.1 and 5.2) shall be deemed to be permitted "uses" in their respective districts, subject to the satisfaction of the conditions and standards set forth in this Section in addition to all other requirements of this Ordinance. All such "uses" are declared to possess characteristics of such unique and special form that each specific "use" must be considered as an individual case.

DISH's application was a permitted use in the zoning district, and as such Section 6.5 of the zoning code applied. Under Section 6.5 an applicant must comply with the following:

6.5 All special permit "uses" shall comply with the following standards in addition to the "site plan" standards of Section 7.5. The approving agency shall attach such additional conditions and safeguards to any special permit as are, in its opinion, necessary to insure initial and continual conformance to all applicable standards and requirements.

6.5.1 The location and size of the special permit "use," the nature and intensity of the operations involved in it or conducted in connection with it, the size of the site in relation to it, and the location of the site with respect to "streets" giving access to it are such that it will be in harmony with the appropriate and orderly development of the area in which it is located.

6.5.2 The location, nature and "height" of "buildings," walls and fences and the nature and extent of existing or proposed plantings on the site are such that the special permit 6-6 "use" will not hinder or discourage the appropriate development and "use" of adjacent land and "buildings."

6.5.3 Operations in connection with any special permit "use" will not be more objectionable to nearby properties by reason of noise, traffic, fumes, vibration or other characteristics than would be the operations of permitted "uses" not requiring a special permit.

The Planning Board found that DISH's application satisfied all the above requirements.

In contrast, Section 6.7.12, sets forth the "public necessity" standard which governs where an applicant seeks to install a wireless facility in a residential district. Where, as here, a wireless facility would be installed in a business district, DISH was not required to apply for a variance, satisfy the public necessity standards or show undue hardship. "[O]nce it is shown that the contemplated use is in conformance with the conditions imposed, the special use permit must be granted unless there are reasonable grounds for its denial, supported by substantial evidence"

(*Matter of George Eastman House, Inc. v. Morgan Mgt., LLC*, 130 A.D.3d 1552, 1554, 14 N.Y.S.3d 264, 266 [4th Dept. 2015]).

In approving a special permit, a municipality determines whether the proposed project complies with the standards and conditions contained in the zoning ordinance and their comprehensive plan governing land use [community planning use] (*see Chambers v. Old Stone Hill Road*, 1 N.Y.3d 424, 432, 806 N.E.2d 979, 982, 774 N.Y.S.2d 866, 869 [2004]).

The Planning Board's determination followed the approval of DISH's plan from the Design Review Board, and DPW. They also reviewed the "RF Hazard Conformance Assessment" performed by DPW's independent consultant which similarly found the application conformed with the White Plains Municipal Code and FCC's regulation. Based upon all the information before it, the Planning Board found that DISH's application complied with Section 6.5 in all material aspects and approved the special permit.

The community was extremely concerned by the prospect of the antennas emitting harmful rays. However, in accordance with the Telecommunications Act of 1996, if the Planning Board is presented with an application that complies with the FCC permissible emissions levels, they are not permitted to reject an application based upon health concerns. Here, the Planning Board was presented with evidence that the potential RF emissions level from the antennas would not exceed the FCC general population standard in any area where human exposure could occur.

Finally, although not required to be shown, concerning the placement of the antennas, DISH's justification report "contained an engineering explanation of all the graphical data, which explained that the Facility was needed to provide new coverage in residential and commercial areas, offer contiguous coverage with existing transmitting facilities outside of the downtown

area, and offload traffic from those nearby facilities to alleviate network congestion and enhance the overall network performance to provide reliable DISH services to the community.”

Accordingly, a review of the entire record reveals that the Planning Board’s determination in granting the special permit was not violative of any lawful procedure or affected by an error of law, or arbitrary and capricious, or an abuse of discretion. The courts define arbitrary and capricious as being “without sound basis in reason and . . . without regard to the facts” (*Pell v. Board of Education*, 34 N.Y.2d 222, 356 N.Y.S.2d 833 [1974]) (“a court cannot interfere unless there is no rational basis for the exercise of discretion, or the action complained of is arbitrary and capricious”).

The petition is hereby denied and dismissed.

This constitutes the decision and order of this Court.

Dated: July 8, 2024
White Plains, New York



Hon. Maurice Dean Williams
Acting Supreme Court Justice