EMPIRE STATE REPORT

Cell Towers: Powers and Limitations for Municipalities

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One of the vexing land use issue facing New York municipalities in the last few years is the scope of municipal zoning authority (and municipal powers and opportunities more generally) as to cell towers. As cell phone usage continues to grow at an enormous pace, cellular companies seek permission from local governments to construct more and more telecommunications towers. Many Planning Board meetings are dominated by this issue at times.

Here is a summary of what the law provides, and how courts have been ruling in New York State. First, the federal Telecommunications Act of 1996 (the Act) has limited local control in this area in some respects, but most especially in a regulatory capacity. Municipalities retain significant power, however, over the siting of cell towers in their neighborhoods. Significantly, the Act places the burden of cell phone tower applications on the municipality, which must support its decision to grant or to deny permits by substantial evidence. This means that generalized objections related to property values, or environmental or health concerns, such as radio frequency emissions (RFE), will not be sufficient to deny a permit.

Local governments retain their authority under the State Environmental Quality Review Act (SEQRA). Type I actions, typically subject to an environmental

impact statement, include utility towers taller than 100 feet. A positive declaration, even though that lengthens the review process considerably, has not been held to violate the "reasonable period of time" restriction on local review; but, as noted, the environmental issue of RFEs may not be used to deny an application. On the other hand, negative declarations under SEQRA have been given for tall microwave towers, and sustained by the courts.

Municipalities (or similar entities, such as schools) retain the same rights as private land owners, that is, when they act in their proprietary capacities, for example, in deciding to not lease their land to communications companies for cell towers. But when municipalities decide to earn income from such leases, they also then have the corresponding duties to observe zoning regulations (that is, no municipal immunity from zoning requirements).

Furthermore, under New York law, cellular providers are considered public utilities and qualify for the "public necessity use test." This means that a cellular company applying for a use variance needs only to establish that the proposed cell tower would bridge gaps in currently inadequate service and would result in a minimal burden or intrusion on the community. On the other hand, neither the general goal of increasing competition nor of the "rapid deployment" of new technology necessarily "trump" local land use powers.

A few examples will illustrate some of these principles. In November of 2002, the New York Supreme Court, Appellate Division reversed a lower court's decision that had confirmed the Town of Elbridge Zoning Board of Appeals' (ZBA) denial of an application for a use variance to construct a cell tower. The Appellate Division (citing a 1993 New York Court of Appeals decision, *Matter of Cellular Telephone Co. v. Rosenberg*) held that the petitioner "presented evidence that the proposed cellular telephone tower would remedy a sizeable gap in cellular telephone service and that the tower would not interfere with electrical service or air traffic, diminish property

values or create health risks." The only contrary evidence was "generalized objection of residents who oppose[d] the cellular tower in the vicinity of their property." As noted, local governments may not make general prohibitions on cellular towers nor may they defend a denial with vague concerns of risk to human health and the environment or diminished property values. Instead, municipalities should be prepared to defend denials of permits to build cellular towers with specific and substantial evidence.

An example of a New York municipality that was successful in denying an application to build cell towers is the Town of Ontario near Syracuse. In 1996, a cellular company filed three separate applications to build three cellular sites. The applications were submitted on an "all or nothing" basis. The Town Planning Board denied all three permits, primarily because, although there was substantial evidence a single tower would adequately address the gaps in service, the cellular company was unwilling to build just one tower. In February 1998, the United States District Court for the Western District of New York held that the Ontario Town Board acted within its authority and complied with the Telecommunications Act, the New York Town Law, the Town of Ontario Zoning Ordinance and SEQRA in its denial of the cell tower application.

The court found the Board's decision in denying the applications and proposing a single tower was supported by "substantial evidence in the written record." Specifically, the Board based its decision on findings made during nine meetings, as well as additional information supplied by the cellular company, including simulated photos of the towers, computer generated maps, environmental impact statements and responses to public comments.

Also important to the court's decision was that the Town Board did not prohibit *all* cell towers, which clearly would have been in violation of the Act, but opposed the cellular company's insistence on three towers. The Town of Ontario

case is indicative of the control over cell tower placement municipalities have retained, in spite of the federal Telecommunications Act.

Federal and state courts in New York have been reluctant to annul decisions of zoning and planning boards to *grant* permits for the construction of cell towers. As long as the decision is "rational and is supported by substantial evidence, a reviewing court may not substitute its judgment for that of a [ZBA], even if an opposite conclusion might logically be drawn." For example, a court upheld the Town of Mendon's determination to grant approval for a cell tower disguised as a silo. The court reasoned that the ZBA's determination was rational and supported by substantial evidence, as the use of a silo to mask the sight of a cell tower mitigated a significant visual impact; the town acted rationally here because a silo's presence was in keeping with the rural nature of the area.

Another recent case involved the Town of Greece ZBAs' issuance of a negative declaration under SEQRA pertaining to a cell tower and subsequent area variance and special permit. The court found that in issuing a negative declaration under SEQRA, the ZBA took "the requisite hard look" to make a rational decision supported by substantial evidence. This entitlement to great deference is another way local governments hold significant control with regards to cell tower placement.

Another important and recent development pertaining to local authority and cell towers is the determination that the federal Act does not preempt a municipality's exercise of its right as a landowner to deny to a communications company, as any private landowner can, the right to lease the municipality's land. A recent decision by the federal Circuit Court covering New York held that a school district's requirement that a cell company install an antenna with emissions 13,000 times lower than the federal requirement, pursuant to a lease addendum, did not amount to a regulation and therefore, was not preempted by the federal law. Instead, the court said, the school district's actions were in its capacity as a property

owner. Therefore, the school district had the same right to attach conditions to the lease – or deny a lease completely – as would any private party; the school district was not attempting thereby to "regulate" the placement of cell towers, an action preempted by the Act.

But the other side of the coin is that municipalities cannot exempt themselves from their own land use restrictions when they act in their capacity as private property owners to lease municipal land to cell companies. Laudable though its intentions might be to raise money for basic municipal affairs, such leasing is government acting in its private property owning (i.e., proprietary) capacity. So, the municipality has to observe setback requirements and other zoning restrictions.

To sum up, cellular technology and the federal Telecommunications Act have had significant effects on local land use law, to be sure. However, municipalities play an important role in the determination of where cell companies place their towers. When making decisions to deny telecommunications towers, municipalities must meet the test of substantial evidence by making careful and detailed assessments. Local governments retain substantial authority in decisions to grant cell tower permits, as the courts give them great deference. Finally, the federal Act does not preempt actions by municipalities as landowners, just so long as municipalities do not, at the same time, claim municipal exemption from their own zoning and other land use restrictions.

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At press time, after just having overridden Governor Pataki's veto of the Legislature's budget bill, the Legislature was settling down to consider three very lengthy, competing and confusing brownfields bills, including funding for Superfund reauthorization. After years of deadlock on the issue, and despite the larger budget concerns, it is a welcome development that one of these bills is expected to emerge this year. The new law will have a tremendous impact on municipalities looking to

enhance their tax base by putting non-productive properties back on the tax rolls. If one is passed and signed into law, we will discuss it next issue.

James J. Periconi is a partner at the Manhattan law firm of Periconi, LLC, engaged exclusively in the practice of environmental law. He welcomes your comments, suggestions and queries (e.g., citations to any of the above cases) and can be reached at jpericoni@periconi.com or 212-213-5500.