

David Lothspeich

From: victor.filippini@hklaw.com
Sent: Tuesday, July 12, 2011 12:00 PM
To: David Lothspeich
Cc: Marlo.DelPercio@hklaw.com; Betsy.Gates@hklaw.com
Subject: T-Mobile PWS Application
Attachments: 10466449_1.docx

Hi Dave,

As we discussed, attached is a memorandum reviewing the T-Mobile application. As I mentioned to you, I did discuss the application with T-Mobile's attorney. During that conversation he expressly mentioned that litigation was an avenue available to T-Mobile if the application is denied. Accordingly, the Village Board is able to discuss this matter in executive session if it so desires.

Thanks,

Vic

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Memorandum

Date: 12 July 2011

To: Mr. David A. Lothspeich
Village Manager
Village of Long Grove

From: Victor P. Filippini, Jr.
Marlo M. Del Percio

Re: T-Mobile/Insite PWS SUP Application

CONFIDENTIAL/ATTORNEY-CLIENT PRIVILEGE

This memorandum expands upon the discussions we have had regarding the Insite/T-Mobile application for a special use permit to locate personal wireless antenna facilities upon the electrical transmission towers along the Commonwealth Edison right-of-way (the "**Application**").

Federal Limitations on Local Zoning Reviews

We have previously noted that the Federal Telecommunications Act of 1996 (the "**1996 Act**") preempted in part local zoning authority with respect to "personal wireless services" facilities (*i.e.*, cell phone facilities) ("**PWS Facilities**"). In addition, the Federal Communications Commission (which has rulemaking authority under the 1996 Act) has issued various orders relating to the implementation of the 1996 Act's preemptive provisions relating to PWS Facilities, including a Declaratory Ruling issued on November 18, 2009 (the "**FCC Order**"). The following summarizes our analysis of how the 1996 Act and the FCC Order impact the Village's consideration of the Application.

Under the 1996 Act, the Village generally still retains local authority over zoning and land use decisions relating to PWS Facilities, including cell towers. However, Section 332(c)(7) of the 1996 Act includes specific limitations on that authority. Those limitations provide that a state or local government: (i) may not unreasonably discriminate among providers of functionally equivalent services; (ii) may not regulate in a manner that prohibits or has the effect of prohibiting the provision of personal wireless services; (iii) must act on applications within a

reasonable period of time; and (iv) must make any denial of an application in writing supported by substantial evidence in a written record. The 1996 Act also preempts local decisions premised directly or indirectly on the environmental effects of RF emissions, assuming that the provider is in compliance with the FCC's RF rules. See 47 U.S.C. Sec. 332(c)(7)(iv). Certain cellular service providers were not happy with how the above-referenced provision was being interpreted (and to be fair the interpretations had not been consistent) and, therefore, sought a ruling from the FCC, which led to the issuance of the FCC Order.

Although fairly lengthy, the FCC Order primarily did three things. First, it generally requires that a municipality has 90 days to process a collocation application and 150 days to process zoning applications other than collocations. If an application is not processed in that time frame, a rebuttable presumption arises that the municipality failed to act in a reasonable time period as required under Section 332(c)(7)(B)(v). Second, the FCC Order bars municipalities from denying a cellular provider's zoning application based on the fact that another provider or providers already provide cellular service to an area in question. Thus, just because cellular service to an area is provided by, say, AT&T and Verizon, that does not allow a municipality to deny an application from T-Mobile to provide cellular service to that same area. Third, the cellular providers had requested that the FCC deem municipal codes requiring variances for any and all cellular tower as *per se* unreasonable. In the minds of the cellular providers, such code provisions violated Section 332(c)(7)(iv) because such code provisions allegedly amounted to an unreasonable barrier to market participation. The FCC Order failed to grant that request by the cellular providers; instead it just stated that it might review municipal codes on a case-by-case basis to see if the codes did, in fact, amount to an unreasonable barrier.

Village Zoning Regulations of PWS Facilities

After reviewing the Village Zoning Code, we do not find that the FCC Order or 1996 Act requires any changes to the code. The Village's cellular regulations do not allow the Village to deny an application just because another provider serves the same area. In fact, the applicable Village Code provisions (e.g. requiring new towers to have space for additional PWS service providers) run counter to that concern. The existence of other PWS Facilities within the Village demonstrates that the Zoning Code provisions do not have the effect of prohibiting PWS Facilities. Lastly, nothing in the Village Code provisions prevents the Village from meeting the 90 and 150 day time periods referenced in the FCC Order.¹ Thus, the Village regulations relating to PWS Facilities comply with the 1996 Act and the FCC Order.

The Insite/T-Mobile Request

Although the PCZBA and Village Board are empowered to make recommendations and decisions, respectively, regarding requests for PWS Facilities, we did want to offer some perspectives on the recommendation to deny the Application, in light of the 1996 Act, the FCC Order, the Zoning Code provisions, and various court decisions.

First, it is important to note that the 1996 Act requires that any denial be based on "substantial evidence." Although courts have stated that deference will be given to a decision-making body

¹ Although the Zoning Code does not need to be revised, the PC/ZBA and the Village Board should be aware of the applicable time limits so that they can schedule hearings and votes to meet those deadlines. Additionally, because the time limits run from submission of a complete application, the Village should maintain clear records of when an application is final and complete, and written notices should be provided to an applicant whenever requests to supplement an application are made.

regarding the substantiality of the evidence, see *Voice-Stream Minneapolis, Inc. v. St. Croix County*, 342 F. 3d 818, 830 (7th Cir. 2003), that deference would not allow a decision-making body like the Village Board to rely on supposition and generalities in the face of more concrete evidence. This is especially true where the basis for denial rests on aesthetic concerns. See *PrimeCo Personal Communications LP v. City of Mequon*, 352 F. 3d 1147, 1150 (7th Cir. 2003)(generalized aesthetic concerns insufficient to support denial of application).

Considering the testimony and application materials presented at the PCZBA meeting, we note that T-Mobile did present data and maps to show that the Application was designed to enhance cellular service in the area. There was no comparable evidence from neighbors, although some anecdotal information about the sufficiency of service and the availability of other service providers was offered by objecting neighbors. This latter point (availability of other service providers) is not a basis for denial under the 1996 Act (*i.e.*, a local zoning authority may not unreasonably discriminate among providers of functionally equivalent services).

The objecting neighbors' testimony and petition raised concerns about the Application causing "unnatural visual impact" and "high tension clutter." In our view, were a court to review the evidence presented, we do not think that the addition of the T-Mobile antennae on the existing Com Ed transmission towers would be viewed as "adversely affect[ing] the aesthetic harmony" of the area, *Helcher v. Dearborn County*, 595 F. 3d 710, 725 (7th Cir. 2010), especially given the predominance of the transmission towers and the modest visibility of the antenna at the height proposed.

Nor do we think that the Application could be reasonably viewed as impacting the uses on nearby properties. Zoning Code, Sec. 5-9-6(C)(3); see also *Helcher*, 595 F. 3d at 725. It is our understanding that the Com Ed transmission towers were erected before the development of the Tall Oaks/Hampton Drive residences; thus, those towers did not impede the development of those homes.

The Application also proposes to collocate the PWS Facilities on an existing structure, which is what the Zoning Code encourages. Zoning Code, Sec. 5-9-6(B)(3). We also understand that T-Mobile had investigated other locations, and they were found not suitable because of access limitations and less effective service benefits.

Two issues were presented that might provide a justification for denial in the abstract, but the particular context suggests that those grounds may not warrant a denial of the Application. First, the residents pointed out that the Application does not meet the requirement of Zoning Code Section 5-9-6(B)(1) requiring a 500-foot separation between PWS Facilities and the nearest outside wall of a residence "in existence prior to the commencement of such personal wireless service antennas, support structure, or personal wireless services facilities." There is some ambiguity here because, while there are residences in existence now and prior to the installation of the proposed PWS Facilities, the transmission towers on which the PWS Facilities will be installed were in existence prior to the construction of the nearby residences. A technical reading of the Zoning Code suggests that a variance from the 500-foot standard is necessary, but a court's practical application of the provision may not see the need for a variance. Second, even if the facilities on the transmission towers were not considered, there would be new ground level equipment for the PWS Facilities that would be less than 500 feet from existing residences. This is true, but the substantiality test could make this fact inconsequential.

Finally, we should also note that the attorney for Insite/T-Mobile has contacted us regarding the Village's review of the Application. It was clear from that communication that Insite/T-Mobile believe that their Application is very solid, and there is no doubt that they see litigation as one alternative in the event that the Application is denied. In considering the Application, the Village Board should be mindful of that possibility, as well as the fact that T-Mobile had previously approached the Village about a PWS Facility and that T-Mobile believes that it looked into collocating on the Com Ed transmission towers at the suggestion of the Village.

Recommendations for Action

The point of this memorandum is ***not*** to suggest that the PCZBA recommendation is not sustainable. It may very well be. Rather, our point is to note that the evidence relating to the negative impacts of the Insite/T-Mobile Application is not so overwhelming that the Village would have a certain case if a denial were issued and challenged. Further, because the Application needs to be considered in the context of the 1996 Act and the FCC Order as well as the Zoning Code provisions, the Village simply does not exercise the same degree of regulatory autonomy in the case of PWS Facilities as with other land uses.

If the Village Board determines that the recommendation of the PCZBA should be followed, we recommend that the Village direct that detailed findings be prepared for consideration at the next Village Board meeting. The detailed findings will then articulate the bases for denying the Application in order to present the Village with the best possible justification for the denial of the Application.

If the Village Board determines that the Application should be granted, then the Board should consider what conditions should be attached to such approval, if any. In this regard, we note that Insite/T-Mobile has offered alternative approaches for the driveway access, screening, and housing of the ground equipment associated with its PWS Facilities. The Village Board can evaluate these alternatives, or it could remand the Application for review by the PCZBA of such items. (If there were to be a remand for purposes of identifying the conditions of approval, we suggest that this point be made clear so that the PCZBA will not need to re-assess the threshold question of whether the SUP should be granted.) Ultimately, the Village Board will need to direct that an ordinance be prepared to grant a SUP if that is the decision reached.

If you have any questions or wish to discuss this matter further, please contact us.